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## RELIGION CLAUSE ANTI-THEORIES

*Thomas C. Berg\**

It is sometimes remarked that when a community's intellectual consensus disintegrates about an important practice or form of life, what first breaks out is theorizing.<sup>1</sup> So it has been recently with discussion of the Religion Clauses of the First Amendment.<sup>2</sup> That the Supreme Court has made a mess of this area is agreed to by most everyone, including many of the justices themselves. But there is fundamental disagreement over what the errors are: has the Court allowed too much involvement between government and religion, or too little? As a result, in recent years Religion Clause theory has sprouted up all over the place. Several justices and scores of commentators have proposed "rethinking" the Religion Clauses all the way down to their historical and theoretical roots.

All of those contributions, however, shared the premise that there is a satisfactory constitutional theory of religious freedom that the Court could identify if it were smart or conscientious enough. By contrast, one of the most notable recent trends in Religion Clause discussion is to reject that premise. Perhaps disheartened by the Court's repeated failures, a number of writers have concluded that at least at present, there is no single viable principle or approach available for courts to use to decide cases under the Religion Clauses. In

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1 GERALD GRAFF, *BEYOND THE CULTURE WARS: HOW TEACHING THE CONFLICTS CAN REVITALIZE AMERICAN EDUCATION* 52-53 (1992) ("'Theory' . . . is what erupts when what was once silently agreed to in a community becomes disputed, forcing its members to formulate and defend assumptions that they previously did not even have to be aware of.").

2 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

their weakest form, such views suggest merely that courts for now should look case by case at a wide variety of factors, rather than try to set forth a comprehensive constitutional doctrine of religious freedom. In stronger forms, however, such views suggest that no coherent account of religious freedom is possible or even desirable under the conditions of American religious and political life; and that courts ought to step aside and let church-state issues be resolved through the mechanisms of political decisionmaking.

I call these skeptical views Religion Clause anti-theories. Just as the antimatter in a cheesy science fiction story blows up whatever matter it touches,<sup>3</sup> the anti-theories, at least in their strong form, claim to blow up whatever theories of religious freedom they examine.<sup>4</sup> I address these issues by reviewing two recent concurring opinions of Justice Sandra Day O'Connor, articles by literary theorist Stanley Fish and theologian Stanley Hauerwas, and new books by law professors Steven Smith and Frederick Gedicks.

My claim, against the anti-theories, is that in the area of church and state, there are good reasons to try to discipline results by theory as much as possible, and acceptable theories are available. The claims of the anti-theorists are largely driven, and justifiably so, by skepticism about prevalent theories that equate religious freedom with a highly secularized government and thus seek to privatize and marginalize religion. But the anti-theorists wrongly jump to the conclusion that no viable theoretical approach is available. Their concerns are answered satisfactorily by a theory of voluntarism in matters of religion, sometimes referred to as "substantive neutrality"—minimizing government's impact on the religious lives of the people, and recognizing that a pervasive government may need to take affirmative steps to ensure its impact on religion is minimized. By preserving religious vol-

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3 "Antimatter," a theoretical concept, is a material made up of antiparticles. An antiparticle is "a subatomic particle that has the same mass as another particle and equal but opposite values of some other property or properties," such as a positive versus a negative electric charge:

When a particle and its corresponding antiparticle collide, annihilation takes place. . . . In principle there seems no reason why matter should not have this form, but, so far, no antimatter has been detected in the universe.

CONCISE SCIENCE DICTIONARY 43 (1984).

4 One of the writers I discuss, Steven Smith, notes that a colleague suggested he should title his book "Honey, I Blew Up the First Amendment." STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* at v (1995) [hereinafter SMITH, *FOREORDAINED FAILURE*]; see also Christopher L. Eisgruber & Lawrence G. Sager, *Review Essay: Unthinking Religious Freedom*, 74 *TEX. L. REV.* 577, 578 (1996) (reviewing Smith's book and referring to it as an "anti-theory").

untarism in the face of an activist state, this approach also best translates the original understanding of the Religion Clauses into current circumstances. I close with some final warnings against abandoning judicial review in this area; the best remedy for defective theory is, in large part, better theory.

## I

The most modest form of Religion Clause anti-theory simply emphasizes that no single principle or value can capture the constitutional commitment to religious freedom. Rather, there are a number of principles and values that judges must respect, and none of which they can ignore. If these values conflict in particular cases, judges should not look to a grand theory to dictate results; they must simply mediate between the various values in the light of the facts of the particular case.

This view has appeared explicitly in the opinions of Justice O'Connor in the Supreme Court's last two terms. For a decade before that, O'Connor decided Establishment Clause cases by a single principle: government action was invalid if it expressed endorsement or disapproval of religion.<sup>5</sup> Although the "no endorsement" approach in O'Connor's hands was highly fact-sensitive, she used it as an overarching Religion Clause standard, like the three-part test of *Lemon v. Kurtzman*<sup>6</sup> that it was explicitly designed to improve upon and replace.<sup>7</sup> The test also rested on an underlying theory about the proper roles of religion and the state: that government should not, by endorsing a religion, "send[ ] a message to nonadherents that they are outsiders, not full members of the political community."<sup>8</sup>

Recently, however, O'Connor has proposed a different way out of the Establishment Clause mess. In *Board of Education of Kiryas Joel*

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5 See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring in the judgment); *Lynch v. Donnelly*, 465 U.S. 668, 689-90 (1984) (O'Connor, J., concurring).

6 403 U.S. 602, 612-13 (1971).

7 In a series of opinions, O'Connor applied the test to most all Establishment Clause issues, including issues with a close relation to questions arising under the Free Exercise Clause. See, e.g., *Jaffree*, 472 U.S. at 69 (school-sponsored moment of silence); *id.* at 82-83 (exemption of religious conduct from general law); *Board of Educ. v. Mergens*, 496 U.S. 226, 248-49 (1990) (plurality opinion) (voluntary student prayer meetings in public schools); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 348-49 (1987) (Brennan, J., concurring) (exemption of religious conduct from general law); *Witters v. Washington Dept. of Servs.*, 474 U.S. 481, 493 (1986) (conurrence) (aid to religiously affiliated education).

8 *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

*School Dist. v. Grumet*,<sup>9</sup> she suggested replacing the still-lingering *Lemon* test with a "less unitary" analysis, using different tests for different categories of cases: for example, one test for government sponsored religious symbols or rituals, another for resolution of internal church disputes, and so forth.<sup>10</sup> She argued that trying to "shoehorn" all establishment cases into the language of a single test ends up distorting that test, and that specific tests for narrow topics might be more precise and also produce more consensus among the justices than had the broad tests for the whole area.<sup>11</sup> She advocated following the example of free speech doctrine, which employs different tests for different contexts according to how "different interests relevant to a Free Speech Clause inquiry—personal liberty, an informed citizenry, government efficiency, public order, and so on—are present in different degrees in each context."<sup>12</sup>

It is true that the Court, in order to reach various results, has pushed and pulled the words of the *Lemon* test until they have lost much of their shape.<sup>13</sup> But even before Justice O'Connor's proposal, there were distinctive tests for various corners of Establishment Clause jurisprudence, including internal church disputes,<sup>14</sup> and the Court treated other categories in distinctive ways even while claiming to follow *Lemon* overall.<sup>15</sup> O'Connor's proposal in *Kiryas Joel* would therefore produce greater candor but no more coherence, as Justice Scalia remarked in response.<sup>16</sup> Underlying any specific tests must be a deeper set of principles or values. These are necessary to determine what the content of different tests will be, and even to decide what the

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9 114 S. Ct. 2481, 2500 (1994) (O'Connor, J., concurring).

10 *Id.* at 2499 (O'Connor, J., concurring). For further analysis of Justice O'Connor's position, see Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 325-26, 378 (1996).

11 *Kiryas Joel*, 114 S. Ct. at 2499-2500.

12 *Id.*

13 See, e.g., *Lynch*, 465 U.S. at 668 (enforcing the *Lemon* test half-heartedly to uphold government-sponsored crèche).

14 See, e.g., *Jones v. Wolf*, 443 U.S. 595 (1979) (allowing courts to use "neutral principles of law" in resolving church property disputes); *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976) (requiring deference to tribunals of a hierarchical church in matters of doctrine and clergy selection).

15 For example, the 1980s Court, applying the second part of *Lemon*, found that direct aid to religious schools had the "primary effect" of advancing religion and was thus invalid, but that aid channeled to individuals who could choose to use it at religious schools did not. Compare *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (striking down direct aid), with *Witters v. Washington Dept. of Servs.*, 474 U.S. 481 (1986) (approving indirect aid). There may be reasons to distinguish the two situations, but "primary effect" is a label rather than a line of analysis.

16 See *Kiryas Joel*, 114 S. Ct. at 2515 (Scalia, J., dissenting).

categories are that call for different tests. As O'Connor conceded, even under a "more carefully tailored" framework, the "hard questions" still remain:<sup>17</sup> the real issue is what the deeper purposes or principles are that should shape all of these tests.

Justice O'Connor confronted this crucial issue in a concurrence in the latest religion case, *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>18</sup> and suggested that, as with the Free Speech Clause, there may be a host of principles and interests that should play a role in Religion Clause decisions. In *Rosenberger*, the University paid the expenses of a wide range of student-initiated publications, but it refused to do so for a student magazine that printed evangelistic sermons and Christian analyses of cultural issues. O'Connor joined the Court's opinion holding that the University's denial discriminated against the students' religious viewpoint in violation of the Free Speech Clause and was not justified by the Establishment Clause. But in her separate opinion, she renewed her attack on any "single test" or "Grand Unified Theory" for Establishment Clause cases.<sup>19</sup> The Christian students' claim, she said, raised an "unavoidable conflict" between "two bedrock principles" of "equal historical and jurisprudential pedigree": the requirement of nondiscrimination against religion, and the "prohibition on state funding of religious activities."<sup>20</sup> When two such principles conflict, she added,

neither can provide the definitive answer. Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case.<sup>21</sup>

O'Connor pointed to several particular facts that she said legitimated the funding in this case: the University would not pay the Christian students directly but would simply cover their printing bills, and other students could opt out of the fee that was charged to support such publications. This case-specific analysis, O'Connor claimed, preserved both "bedrock principles" of non-discrimination and no-funding, while at the same time refraining from adopting any "unified theory."<sup>22</sup>

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17 *Id.* at 2500.

18 115 S. Ct. 2510 (1995).

19 *Id.* at 2528 (O'Connor, J., concurring).

20 *Id.* at 2525-26.

21 *Id.*

22 *Id.* at 2528.

Justice O'Connor is certainly correct that there are a number of principles and values that are of prima facie importance in church-state cases. Free exercise of religion, separation of church and state, no compelled funding of religious teaching, equal treatment between religions and between religion and non-religion: all are valuable rules that can help resolve many cases.<sup>23</sup>

But these first-order principles frequently will conflict, as they did in *Rosenberger*, at least if each is pursued to its logical conclusion.<sup>24</sup> The problem in O'Connor's approach is in the way she proposes to resolve conflicts. She relies on simply looking at "the particular facts of each case"; but the facts, obviously, can only be interpreted or evaluated in the light of some principle or theory. Just as obviously, it does not at all help resolve the conflict to proclaim that the deciding issue is "whether the challenged program offends the Establishment Clause." Ultimately, O'Connor concluded that the facts she cited showed that providing the assistance "would not be endorsing the magazine's religious perspective."<sup>25</sup> In other words, she ended up using "no endorsement" as a second-order principle to mediate between the apparently less bedrock rules of no discrimination and no funding. Despite her protestations, O'Connor still tends (perhaps reflexively) to use "no endorsement" as a principle for every case, if not as a Grand Unified Theory.<sup>26</sup>

Justice O'Connor's method in *Rosenberger* typifies her approach to constitutional decisionmaking in general: avoid broad pronouncements, pay close attention to the unique combination of facts in each case. It is an approach that some scholars have associated with assertedly feminine virtues of openness to compromise and sensitivity to context,<sup>27</sup> and that others have associated with the general temper of

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23 In a similar vein, John Witte has argued that the Religion Clauses rest on a variety of "interlocking and interdependent" principles, none of which can be regarded as secondary or ancillary. John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 376, 394-402 (1996).

24 Cf. R.M. HARE, *MORAL THINKING: ITS LEVELS, METHOD, AND POINT* 25-43 (1981) (describing task of "moral thinking" as resolving inevitable conflicts between different everyday rules of moral conduct).

25 *Rosenberger*, 115 S. Ct. at 2526-28.

26 *But cf.* Greenawalt, *supra* note 10, at 327 (arguing that O'Connor sees the absence of endorsement "as significant, but she does not present 'endorsement' as an overarching test"). Also last term, O'Connor followed the no-endorsement test in a concurring opinion in *Capitol Square Review & Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2452-54 (1995).

27 See, e.g., Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 604-05 (1986).

legal and philosophical pragmatism.<sup>28</sup> A related approach is Cass Sunstein's recent argument for the value of "incompletely theorized agreements" in legal reasoning.<sup>29</sup> "The distinctly legal solution to the problem of pluralism," Sunstein says, "is to produce agreement on particular[ ]" results rather than general theory; "often people who are puzzled by general principles, or who disagree on them, can agree on individual cases."<sup>30</sup> He argues that this process, which characterizes the common law tradition, offers many advantages: it enables people with fundamental disagreements to reach common results and develop mutual respect, it allows the losers to think their views still may prevail in the future, and it leaves room for moral evolution.<sup>31</sup>

These are substantial advantages. But as Sunstein concedes, there are also problems with an approach that prefers narrow, localized rules. The *Rosenberger* concurrence reveals one potential problem: while Justice O'Connor said she was not elevating any single Religion Clause principle, she in fact had to appeal to one such principle (the "no endorsement" test) as a tie-breaker when two prima facie valid principles ("no funding" and "no discrimination") conflicted. She used no-endorsement in this way, however, without admitting to it or defending it; she hid the application of a theoretical principle in the guise of a simple balancing process based on "the particular facts of [the] case." If O'Connor's approach in *Rosenberger* is any indication, the case by case approach may conceal the implicit adoption of an overarching theory that it would be better to bring into the open and defend.

There are other difficulties with the case by case approach that are familiar to constitutional theorists. A widespread view of constitutional interpretation holds that only when judges formulate and adhere to principles can they be said to be following the Constitution as

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28 See, e.g., Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990); Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409 (1990).

29 CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996) [hereinafter SUNSTEIN, *LEGAL REASONING*]; Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

30 SUNSTEIN, *LEGAL REASONING*, *supra* note 29, at 47.

31 *Id.* at 38-43. The focus of my discussion is primarily on the preference for narrow "localized" results—not on the common law method as a whole, which historically has also made a place for broad, general rules. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 & n.76 (1996).



law.<sup>32</sup> In this view, to balance factors or proceed solely case by case—including, as Justice O'Connor suggested, to use such case by case techniques to choose between first-order principles—places no constraints on judges' decisions and therefore is inconsistent with the rule of law.

I do not mean to analyze these questions generally here. My argument is simply for continuing the pursuit of theory and overarching principles in the Religion Clause area. Even Sunstein allows that in many cases "fuller theorization—in the form of wider and deeper inquiry into the grounds for judgment—may be valuable or even necessary."<sup>33</sup> For several reasons, it is particularly appropriate to try to articulate an overarching theory or principle for the Religion Clauses.

First, Sunstein's brief for modest, "low-level" or specific judicial principles relies heavily on taking precedents as "fixed points" and reasoning by analogy from them.<sup>34</sup> In many areas of law, the set of precedents is serviceable for this job. But in the area of religious freedom, the set of Supreme Court precedents is, by near-unanimous consent, inconsistent. On almost any serious issue, one can find statements in the case law supporting analogies in either direction, and the Court has given us little help in choosing between them.<sup>35</sup> It is precisely because the case law has been so inconsistent and unconvincing, and because the Court has appeared eager to change, that judges and scholars have turned to theorizing in order to evaluate in which direction change should go.

Moreover, a major reason why the case law is incoherent is that the Court has failed to think broadly and treat the Religion Clauses as a unified pair: it has labeled and decided certain cases as "Establishment Clause" matters without giving attention to their implications for free exercise, and vice versa.<sup>36</sup> It is this fragmented approach that

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32 See, e.g., Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

33 SUNSTEIN, *LEGAL REASONING*, *supra* note 29, at 44.

34 *Id.* at 52, 70.

35 See Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 365 (1992) ("[Y]ou can demand consistency in the treatment of new cases only if the existing stock of rules (and precedents) is consistent. . . . Given two inconsistent propositions (in the text or the cases), you can show or refute any proposition at all.").

36 I will give just two examples. The Court's Establishment Clause decisions forbidding aid to schools that provide a secular education but integrate it with religious teaching took no account of the free exercise claim that to fund only public and secular private schools discriminates against religion and places an unconstitutional condition on the receipt of government educational benefits. The Court did not explicitly face up to this conflict until its free speech decision in the 1995 *Rosenberger*

is largely responsible for the so-called tension between establishment and free exercise.<sup>37</sup> A highly localized, case-bound method might simply perpetuate the Court's near-sightedness, its failure to recognize the relationships among Religion Clause principles.

In addition, balancing and case by case decisionmaking hold particular dangers in the area of religious freedom. Religion is a matter on which people, judges included, tend to have gut feelings that often are inarticulate but nevertheless can powerfully affect their outlooks. Case by case, intuitive judgments about such matters are likely to be unacceptably subjective.<sup>38</sup> They are also likely to give too little attention to the position of religious minorities.<sup>39</sup> Justice O'Connor's initial application of her "no endorsement" standard, approving a city-erected nativity scene,<sup>40</sup> did not inspire widespread confidence in her gut reactions.<sup>41</sup> Of course, theories can be unacceptably subjective as well; but the process of thinking carefully through an issue, with attention to as many of its ramifications as possible, creates the opportunity to confront and reduce biases.

My argument is not against case by case decisionmaking as such. It will sometimes be appropriate: the text of a provision, or the best principle interpreting it, may call on judges to use practical wisdom to apply a broad standard (perhaps, for example, "no endorsement") that will produce different results according to the particular facts of each case. But to say that applying the proper standard may call for case by case judgment is one thing. It is far different to suggest that

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case. And in ruling in *Sherbert v. Verner*, 374 U.S. 398 (1963), that the Free Exercise Clause sometimes exempts religious conduct from laws governing other conduct, the Court virtually ignored language in its contemporaneous Establishment Clause cases broadly forbidding any sort of aid to religion. See *id.* at 414-17 (Stewart, J., concurring); *Thomas v. Review Bd.*, 450 U.S. 707, 723-25 (1981) (Rehnquist, J., dissenting).

37 *Thomas*, 450 U.S. at 720-23 (Rehnquist, J., dissenting) (noting the "tension" and also blaming it on the Court).

38 See SUNSTEIN, *LEGAL REASONING*, *supra* note 29, at 44 (theorizing may be necessary to prevent "inconsistency, bias, or self-interest").

39 For a similar argument warning about pragmatic approaches to free speech rights, see Michael Kent Curtis, "*Free Speech*" and *Its Discontents: The Rebellion Against General Propositions and the Danger of Discretion*, 31 WAKE FOREST L. REV. 419 (1996) (criticizing Sunstein's approach in this context).

40 *Lynch v. Donnelly*, 465 U.S. 668, 689-90 (1984) (O'Connor, J., concurring).

41 See, e.g., Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 379 (1992) [hereinafter Laycock, *Establishment Clause*] (arguing that O'Connor has "described th[e] harm [that government endorsements cause to minority faiths] in principle, although she can never recognize it when she sees it"); Mark Tushnet, *Religion and Theories of Constitutional Interpretation*, 33 LOY. L. REV. 221, 222-23 (1987) ("Her [*Lynch*] opinion is in the worst tradition of genteel anti-Semitism.").

we will determine the proper standard for a case in the first place by some sort of intuitive process, without thinking about the justifications for that standard and about what it would mean if applied to other factual situations involving the same general legal question.<sup>42</sup> The process of justifying a legal standard and considering its application to other cases is, of course, the process of legal theorizing. If the Religion Clause precedents were consistent, we might be able to proceed on autopilot with them and avoid larger-scale theory; but they aren't, so we cannot.

In addition, there is a fairly widespread view (adverted to above) that if judges cannot find a coherent single principle—or at least a rather small and manageable set of principles—on a subject, they should exit entirely and let the politically accountable branches decide such questions prudentially. Sunstein, indeed, thinks that his skepticism about broad principles entails a limited role for courts and a preference for legislative decisions.<sup>43</sup> And some of the anti-theorists I discuss come close to suggesting that the courts should simply withdraw from Religion Clause issues and trust legislatures and administrators to resolve them<sup>44</sup> (although Justice O'Connor obviously does not share this view). There are plenty of arguments to the contrary, arguments that judicial review can be pragmatic and still legitimate.<sup>45</sup> But if the legitimacy of the courts' role in protecting religious freedom depends on there being clear, historically or theoretically defensible principles to enforce, then we ought to try hard to formulate such principles; for as I will argue at the end of this Article,<sup>46</sup> the courts play an important (although not the only) role in guarding religious freedom.

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42 Cf. HARE, *supra* note 24, at 34-35 (arguing, in the analogous area of moral philosophy, that any proposal to resolve conflicts between moral duties by "weighing" them "in the particular case . . . is less a method than an evasion of the problem").

43 SUNSTEIN, *LEGAL REASONING*, *supra* note 29, at 175-78.

44 SMITH, *FOREORDAINED FAILURE*, *supra* note 4, at 125 ("We should take seriously, in other words, the possibility that judicial intervention under the Constitution into matters of religious freedom is illegitimate or unjustified.") (emphasis in original). In an article published after his book, Smith has explicitly stepped back from the suggestion that courts should never overturn political decisions on Religion Clause grounds, and he has tried to set some guidelines for a judicial role, albeit a rather modest one. See Steven D. Smith, *Unprincipled Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 497 (1996). But as I discuss in greater detail *infra* notes 229-31, I do not see how Smith can set any such guidelines without developing some theory of religious freedom, which his book seems to say is impossible.

45 See, e.g., the works by legal pragmatists cited *supra* note 28.

46 See *infra* Part VI.

Moreover, even if religious freedom issues were left up to the political branches, the need for general principles would still remain. If we have no agreed-upon understanding of religious liberty, then it is impossible to know whether our case by case, political decisions are serving religious liberty. As Chris Eisgruber and Lawrence Sager put it in their review of Steven Smith's book, such a program of "muddl[ing] through" politically will not work without a "defensible metric" by which to direct efforts and evaluate the results; and "[s]uch a metric, of course, is what we seek when we look for a theory of religious liberty."<sup>47</sup> I would add that overarching principles, whether interpreted by courts or legislators, are essential to the important task of moral education. If we are going to teach our children what religious liberty means, we will have to have something more to say than: Do what seems best to as many people as possible, given all the circumstances.

## II

For the reasons just given, it is important in religious freedom cases to strive for as much principle and theoretical consistency as we can achieve. But if there are no such clear principles, as several of the anti-theorists claim, then such striving is pointless. The next sections evaluate those claims. However, since I argue that there is a particular theory or principle of religious freedom that answers the anti-theorists' objections, it will be helpful first to sketch that principle.

The anti-theorists' objections are answered by a principle of voluntarism, or in the words of other scholars, a "pluralistic" approach<sup>48</sup> or one of "substantive neutrality" toward religion.<sup>49</sup> The details of this approach have already been well articulated by its two leading advocates, Professors Douglas Laycock and Michael McConnell.<sup>50</sup> To summarize briefly, government should, as much as possible, minimize the

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47 Eisgruber & Sager, *supra* note 4, at 592. For further development of this argument, see *infra* Part VI.

48 Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 168-69 (1992) [hereinafter McConnell, *Crossroads*].

49 Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001-06 (1990) [hereinafter Laycock, *Neutrality*].

50 See sources cited *supra* notes 48-49; Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 37-38 (1989) (arguing that government should minimize incentives it creates for or against practicing religion). They do not agree on every point, but their basic approach is the same. See also Thomas C. Berg, *Slouching Toward Secularism: A Comment on Kiryas Joel School Dist. v. Grumet*, 44 EMORY L.J. 433, 451-55 (1995) (summarizing a similar approach).

effect it has on the voluntary, independent religious decisions of the people as individuals and in voluntary groups. The baseline against which effects on religion should be compared is a situation in which religious beliefs and practices succeed or fail solely on their merits—as those merits are presented and judged by individuals and groups, not by government. As the Supreme Court has put it, each religious view should “flourish according to the zeal of its adherents and the appeal of its dogma.”<sup>51</sup> A good, evocative model is of a free, competitive market in religious beliefs and activities.<sup>52</sup> Government may take steps to protect all citizens from having to adopt a religion, or non-religion, because of the physical force or threats of others; such protection ensures that citizens can make decisions about religion on its merits as they judge those merits. Beyond that point, government should, as much as possible, leave the religious views and decisions of citizens unaffected by its activities.<sup>53</sup>

In many cases, this approach calls for government simply to stay out of religious matters. Thus it is not only improper for government to go so far as to coerce citizens into expressing religious beliefs or engaging in religious practices; it is also improper for government explicitly to favor a particular faith in non-coercive ways, by trying to persuade citizens of its truth or by engaging in religious exercises celebrating that faith. The merits of any view for or against religion should be presented by citizens and voluntary groups, not by the government. Under this principle, the Court has been right to strike down government-sponsored public school prayers<sup>54</sup> and at least some

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

52 See McConnell & Posner, *supra* note 50, at 13-14; Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1092-93 & n.265 (1996) [hereinafter Laycock, *Continuity and Change*]. For an example of application of the “free market” approach to analyze American religious history, see ROGER FINKE & RODNEY STARK, *THE CHURCHING OF AMERICA, 1776-1990: WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY* (1992).

53 If the analogy to free-market, “libertarian” government policies is pursued, it would suggest also that government may act to protect people from fraud in matters of religion as well as from coercion. Government may do so, but only insofar as it is judging the truth or falsity of non-religious claims; to judge whether a religious claim is true or false puts government in the position of judging the religion’s merits. A religious leader may be prosecuted for saying contributions are going to his church that are in fact being used for his home, but not for saying that people will receive spiritual benefits from making such contributions.

54 See *Lee v. Weisman*, 505 U.S. 577 (1992); *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 208 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

kinds of government-sponsored religious symbols that convey a preferred status for a particular faith or range of faiths.<sup>55</sup>

Moreover, government should refrain from forcing people to act against the demands of religious conscience, even, in some cases, when the law in question applies to the whole population. To prohibit such conscientious conduct is to create a disincentive to engage in the conduct: that is, of course, the very purpose of applying the prohibition. Under this approach, then, the Court was wrong to do away with virtually all constitutionally required free exercise exemptions,<sup>56</sup> and Congress was right (as a matter of church-state theory) to pass a statute restoring them in many cases.<sup>57</sup> Such exemptions, however, are not always proper. Some confer protection for conduct that is so strongly linked to self-interest that the exemption may encourage people to adopt (or pretend to adopt) religion. If this effect of exemption is clearly greater than the impact of regulation would be on religious conscience—as, for example, may be the case with exemptions from the purely financial burdens of some taxes or administrative regulations—then the exemption would, overall, distort choice in favor of religion and so violate the Establishment Clause.<sup>58</sup>

In interpreting the voluntarism or free market principle, however, it is crucial to remember that we do not live in a laissez-faire world. Government now affects the non-governmental sector pervasively by imposing regulations, offering subsidies, and running its own agencies such as schools and welfare agencies. These actions affect areas in which religions also operate—especially education and social services—and the consequences of these government actions must be taken into account if we are going to minimize government's effect on religious choice. In particular, a highly active and wide-reaching government cannot be kept entirely secular, or free from religious influence and contact, without interfering with the ability of religious views to contend with secular views on their merits. This is one of the fundamental problems of modern-day Religion Clause jurisprudence.

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55 See *County of Allegheny v. ACLU, Greater Pittsburgh Chap.*, 492 U.S. 573 (1989). But see *Lynch v. Donnelly*, 465 U.S. 668 (1984).

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

57 Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994); see also Laycock, *Neutrality*, *supra* note 49, at 1013-17 (defending exemptions on this ground). I leave aside the complex question whether Congress had the power under the Fourteenth Amendment to mandate exemptions when the Court had refused to do so. See *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 293 (1996).

58 See Laycock, *Neutrality*, *supra* note 49, at 1017-18; Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 45-51 (1994).

Thus, when government subsidizes private schools in addition to public schools, it may not (and certainly need not) exclude otherwise-qualified private schools simply because they have a religious affiliation or viewpoint. Such exclusion, though still a part of the Establishment Clause case law, is an unconstitutional condition on school funding.<sup>59</sup> True voluntarism under the conditions of active government should not mean that government disfavors religiously related agencies, even though they contribute to the social goods government seeks, by leaving them to their own resources while funding all of their competitors. Excluding religious agencies from public programs in this way produces a regime that favors the secular rather than one that leaves choices up to citizens. The pervasive presence of the regulatory state also makes it even more important to exempt conduct motivated by religious conscience from the demands of general laws.

Other principles are also necessary to keep the active state from being an engine of secularization. While we should hold fast to the notion that government must not explicitly advocate religious doctrines or engage in religious rituals, it would be impossible for government to speak to citizens in legitimate ways about our culture without exposing them to religiously inspired materials. Our history, our art, and our music are replete with religious influences; and to teach about such influences is in some sense to acknowledge their value. Such acknowledgement is consistent with a posture of voluntarism and pluralism, since to ignore religious contributions to our culture is not only inaccurate and pedagogically unwise, but also a kind of government suppression of religion. What government is forbidden from doing is celebrating or advocating religion, or a particular faith, over and against other ideas. Moreover, that government may not explicitly advocate religious beliefs or doctrines does not mean that government may not rely on religious beliefs and values in legislating on secular matters such as economic policy, civil rights, criminal justice, and so forth.<sup>60</sup> Again, in those areas in which government is authorized to pursue social good, voluntarism and pluralism suggest that religion must be treated as a legitimate contributor to debating and defining that social good.

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59 Michael W. McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255 (1989).

60 For examples of arguments that government may not so rely, see BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFFAIRS 259, 274-96 (1989); Eisgruber & Sager, *supra* note 4, at 601; Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963 (1993); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 222 (1992).

As this summary indicates, often voluntarism requires equal treatment between religious views and their alternatives—what Professor Laycock calls formal neutrality.<sup>61</sup> But sometimes religion must be treated differently: government can try to persuade the people of a particular political ideological position, but not of a particular religious one. It is permitted to regulate conduct motivated by various beliefs, but is limited in regulating conduct motivated by religious demands. These differences are necessary to preserve a substantive neutrality, or a regime with a minimum of distortion of religious choice.

Voluntarism of this sort is the best principle available for interpreting the Religion Clauses. It does the best job of translating the original understanding of the Religion Clauses into today's very different circumstances; and it avoids the most telling objections raised against other theories. The next section discusses the original understanding, concentrating on Steven Smith's argument that it provides no substantive principle of religious freedom to guide us today. The section after that considers other objections to Religion Clause theories raised by Smith and other anti-theorists.

### III

Steven Smith argues that the original understanding of the Religion Clauses offers no principle to apply today. He does not think the original meaning is ambiguous or too remote from us (the most common objections to originalism in constitutional interpretation). To Smith, the record is clear; it shows that the enactors of the Religion Clauses adopted no substantive principle of religious freedom, no general conclusion about "the proper relationship between government and religion."<sup>62</sup> Instead, they decided, as a matter of federalism, to consign that question to the states by denying Congress any jurisdiction or power over the subject of religion (including any power to act against the state religious establishments remaining in 1789). Thus, there is no original theory of religious liberty to apply today. Moreover, the incorporation of the Religion Clauses to bind state governments was logically flawed, Smith says, since it "effectively . . . repealed" their original purpose of preserving states' control over religion and preventing the federal government from making policy on the subject.<sup>63</sup>

Smith joins other scholars in his stress on the original federalist nature of the Religion Clauses, but he presses further than others. As

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61 Laycock, *Neutrality*, *supra* note 49, at 999-1001.

62 SMITH, *FOREORDAINED FAILURE*, *supra* note 4, at 19.

63 *Id.* at 49.



he recognizes,<sup>64</sup> the dominant approach among scholars and judges has been to acknowledge a federalism component of the Religion Clauses—and the rest of the first eight amendments since none of them applied to the states—but to insist that the clauses also had a substantive meaning that, after incorporation, can logically restrict states as well.<sup>65</sup> Several scholars say that the Establishment Clause was purely a federalist provision that cannot be incorporated, but most of them think that the Free Exercise Clause represents a substantive liberty that can restrict states as well.<sup>66</sup> Smith, however, says that both clauses were purely jurisdictional in nature.<sup>67</sup>

The gist of Smith's argument is that the enactors could not have agreed on a general theory of church-state relations. In 1789 there was still an unresolved conflict between (1) the "traditional" position on government and religion, which "saw governmental support for religion [such as financial aid for churches, religious tests for office, and laws against blasphemy] as permissible and even essential," and (2) the newer theory of voluntarism, which also saw religion as essential to society but "strenuously objected" to government support for it.<sup>68</sup> While voluntarism won in Virginia and other states, the traditional position also had many supporters in 1789, as shown by the continuing existence in various states of established churches, government support for a preferred faith, and disabilities against religious minorities. Neither the traditional nor the voluntary position could have prevailed in Congress, at least not without an extended debate. But in fact, "discussions of the religion clauses," both in Congress and the state legislatures, were "desultory and superficial."<sup>69</sup> The only plausible explanation, Smith says, is that "the enactors believed that they were not answering the difficult questions at all but were merely deferring those questions to someone else—the states."<sup>70</sup>

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64 *Id.* at 18.

65 *See, e.g.*, *Lamont v. Woods*, 948 F.2d 825, 836 n.8 (2d Cir. 1991); *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 254-55 (1963) (Brennan, J., concurring); Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 413-16 (1986).

66 *See, e.g.*, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1158-59 (1991); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1485 & n.384 (1990) [hereinafter McConnell, *Origins*]; Joseph T. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 388-89; Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1717-18 (1992).

67 SMITH, *FOREORDAINED FAILURE*, *supra* note 4, at 25, 35-43.

68 *Id.* at 19-21, 26.

69 *Id.* at 26.

70 *Id.* at 27.

Smith presents this thesis in an engaging and clear-headed fashion (qualities that characterize the rest of his book as well). His argument, like those of other federalism theorists, draws attention to important complications with the use of the 1789 understanding to decide current church-state disputes. The notion that the original First Amendment simply confirmed the lack of any federal power over religion, and confirmed the continuation of that power in the states, helps answer a number of enduring historical puzzles that other approaches have had difficulty addressing. If the Religion Clauses represent a dramatic theoretical statement on the relationship between religion and government, then why indeed were the debates over the provisions so short and non-substantive? And why would the founding generation embrace, as a substantive ideal, a model of national government having so little involvement with religion, when at the same time religion continued to be an important matter of concern and policy for many state governments?<sup>71</sup> Of all the federalism theorists, Smith most fully pursues these questions to their logical conclusions, raising difficult questions for those who seek to extract substantive principles from the original understanding.

But while Smith shows that the original understanding is of limited use in generating substantive principles for Religion Clause decisions today, in my judgment he fails to show that it is of no use whatever. I will suggest that a principle of voluntarism along the lines outlined above<sup>72</sup> is the most faithful use of the original purposes that we can make in today's very different circumstances.

Initially, one can at least raise questions about Smith's conclusion that the 1789 First Amendment reflected no substantive views about religious freedom but only a federalism rule of "no federal power or policy concerning religion." It is true that the Religion Clauses would not have passed had they sought to dictate a principle of religious freedom in the states;<sup>73</sup> and they surely would not have passed with so

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71 The recent book by ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* (1996), simplistically reads the lack of religious references in the Constitution to mean the framers endorsed the idea of highly secular government in general. But as Scott Idleman has pointed out, the federalist interpretation of the First Amendment shows that much of the silence about religion is attributable to the fact that the new federal government was one of limited purposes. Scott C. Idleman, *Liberty in the Balance: Religion, Politics, and American Constitutionalism*, 71 NOTRE DAME L. REV. 991, 997-98 (1996).

72 See *supra* notes 48-62 and accompanying text.

73 Madison's original proposal contained a section forbidding any state to "violate the equal rights of conscience," but it was rejected by the Senate. See HELEN E. VEIT ET AL., *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 41 (1991) (noting the Senate's rejection on Sept. 7, 1789). Interest-

little debate. But it also seems likely that the clauses would never have been proposed or passed were it not for the agitation of groups with a substantive commitment. Prominent among these groups, for example, were Baptists and other Protestant dissenters who feared for their religious liberty under the new government. These sects, which one observer described to Madison as “very formi[da]ble” voting blocs,<sup>74</sup> opposed ratification of the original Constitution in several states because of the lack of a religious liberty guarantee.<sup>75</sup> As a major constituency in Madison’s congressional district in Virginia, they extracted from him the promise to introduce a proposal for such an amendment in Congress.<sup>76</sup>

The Baptists and Presbyterians did not fight to preserve the power of states to make decisions about religion. They fought to maintain a substantive right of full religious liberty—a right they had just won in states like Virginia and were struggling to secure in other states like Massachusetts. They were not about to give up ground on a new front, to surrender their embryonic rights to a new government.<sup>77</sup> They spoke in terms of rights and liberties of conscience more than limits on the federal government. Had the state of Virginia consented to a ministerial tax within its borders to be administered by federal officials, it might not have violated a federalism understanding of the First Amendment; but the evangelicals still would have opposed it as a violation of individual rights. They believed that the demands of God stood above those of government at any level, and thus they wanted strong free exercise protections. They also “opposed establishment on the ground that it injured religion and subjected it to the control of civil authorities.”<sup>78</sup> In short, they adhered on religious grounds to a variation of the principle of church-state voluntarism.

These views were not the only substantive ones that played a role in the push for religious liberty in the founding generation. The evangelical views coincided in important ways with those of James Madison. Both believed that religious duties were prior to those owed to society, and both believed that true religious faith could not be dictated or affected by force. Madison, like other Enlightenment-in-

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ingly though, the proposal was first approved in the House, with no more discussion of it than there was of the eventual Religion Clauses. *See id.* at 181.

74 Letter from Joseph Spencer to James Madison (Feb. 28, 1788), in 2 *DEBATE ON THE CONSTITUTION* 267 (1993).

75 ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791*, at 131, 170-71 (1969).

76 *See* McConnell, *Origins*, *supra* note 66, at 1476-77.

77 RUTLAND, *supra* note 75, at 171.

78 McConnell, *Origins*, *supra* note 66, at 1438; *see id.* at 1438-40, 1442.

fluenced thinkers, thought that real belief could be arrived at only by reason; the evangelicals thought it was possible only through the working of God's Spirit.<sup>79</sup>

These views were important to the passage of the Religion Clauses, particularly the Free Exercise Clause. A significant portion of the public in 1789 would have viewed the Free Exercise Clause, at least, as a statement of substantive religious freedom, and not purely as a matter of state's rights or an endorsement or affirmation of a state's power to regulate religion should it wish to do so. And indeed, contrary to Smith's arguments, there are good reasons to treat the Free Exercise Clause as reflecting a substantive rule of freedom at the federal level—one that can logically transfer over to bind states—even if the Establishment Clause reflected merely a decision to leave state establishments alone.<sup>80</sup>

Let us suppose, however, that both Religion Clauses originally reflected no substantive view about the best relationship between church and state. It still does not follow that the clauses can give no guidance in generating such a substantive principle today.

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79 See, e.g., James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in *CHURCH AND STATE IN AMERICAN HISTORY* 68, 68-69 (John F. Wilson & Donald L. Drakeman eds., 1987) (arguing that the "duty [to the Creator] is precedent, in order of time and in degree of obligation, to the claims of civil society," and "can be directed only by reason and conviction, not by force and violence"). On the overlap (and the differences) between Madison and evangelicals, see McConnell, *Origins*, *supra* note 66, at 1452-55.

80 The reasons for distinguishing the two clauses in this way have been set forth by other writers. Textually, the Free Exercise Clause speaks in terms of guaranteeing a substantive right of freedom; it is only the Establishment Clause that uses the peculiar "respecting" language that suggests largely federalistic concerns. Amar, *supra* note 66, at 1159. While the Establishment Clause's language had no precedents in state constitutions, the Free Exercise Clause tracks the language of some state provisions; since those provisions concededly were "substantive" in nature, it makes sense to read the Free Exercise Clause the same way. McConnell, *Origins*, *supra* note 66, at 1484-85 & n.384.

Smith argues that treating the Free Exercise Clause as "substantive," and the Establishment Clause as "jurisdictional," would make a difference between the clauses that the framers did not make. SMITH, *FOREORDAINED FAILURE*, *supra* note 4, at 36-37. But the distinction between the two clauses rests not so much on the framers' subjective conception as on the fact that, logically, the Free Exercise Clause is a rule about how government should treat citizens and thus can be transferred to other levels of government. Smith also argues, again, that there was no consensus among states about how much free exercise of religion to permit, and thus the Free Exercise Clause could not reflect any substantive commitment. *Id.* at 37-41. I do not think this inference is very strong; like many other legislative bodies, the framers enacted broad principles while disagreeing on their application in particular cases.

We should recognize first that the logical difficulties that Smith raises concerning the original understanding have to do mostly with incorporating the federalist Religion Clauses to restrict state action. Of course, the clauses in their primary form govern federal actions, and with respect to federal actions (which make up a good portion of the Supreme Court's church-state docket<sup>81</sup>) there is no question that courts must try to make sense of the provisions and enforce them. Scholars generally agree that the founding generation contemplated that whatever meaning the Religion Clauses and other parts of the Bill of Rights had would be enforced by courts.<sup>82</sup> Even under the "no federal power" account, there would have been questions from the very start in 1789 about just what actions Congress had power to take that might affect religion (as Smith and other proponents of this account acknowledge).<sup>83</sup> Thus, even under the federalism view it is a mistake to conclude, as Smith invites us to consider concluding, "that judicial intervention under the Constitution into matters of religious freedom is illegitimate or unjustified."<sup>84</sup> It is clearly not illegitimate for courts to review federal actions.

What suggestions can be drawn from the original purposes of the Religion Clauses with respect to federal actions? At a general level, there can be little dispute that all of the supporters of the Religion Clauses wanted to keep the new federal government from having any significant effect on the issue of religion. This is true not only of the evangelicals and of those like Madison, but also of those who sought to preserve state control over religion: the evangelicals and voluntarists sought to fend off a new threat to their hard-fought religious liberty, the pure federalists sought to preserve states' powers over religion from federal interference.<sup>85</sup> That same goal of minimizing effects on religion is precisely what is sought by the rule of voluntarism or substantive neutrality. As I argued in the previous section,

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81 For example, in the ten terms from 1985-86 through 1994-95, by my count, just a little less than 40 percent of the Court's Religion Clause decisions on the merits (8 out of 21) involved federal actions.

82 See, e.g., VEIT ET AL., *supra* note 73, at 83 (remarks of Rep. Madison) (contemplating that "independent tribunals of justice" will serve as "guardians of" the Bill of Rights).

83 See SMITH, FOREORDAINED FAILURE, *supra* note 4, at 33; Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1096 (1995) ("Of course, just what constituted 'power over the subject of religion' was a matter of considerable debate.").

84 SMITH, FOREORDAINED FAILURE, *supra* note 4, at 125 (emphasis omitted).

85 See McConnell, *Crossroads*, *supra* note 48, at 136 ("The overriding objective of the Religion Clauses was to render the new federal government irrelevant to the religious lives of the people.").

that principle must be construed in ways that will preserve religious freedom in the face of the pressures of the activist state. But the federalist and voluntarist rules share a similar goal with respect to federal actions.

The foregoing argument interprets the original understanding, and aims to implement it, at a reasonably high level of generality. Obviously, it does not investigate the historical background of the Religion Clauses in detail; rather it seeks to identify their primary purpose and, where necessary, “translate” the provision to preserve that purpose in the light of a changed legal or social background.<sup>86</sup> Reading the history at a general level can be misused to make it say whatever one wants it to say,<sup>87</sup> but that is not the case here. It is justified to adapt a federalist rule of “no power over religion” into a rule of voluntarism or substantive neutrality. To interpret the Religion Clauses in a way that responds to new circumstances is not to make up new rights out of whole cloth; it is to take a concern of the Founders, on which they specifically took action in the First Amendment, and try to preserve the essence of their response today. They wrote the First Amendment with a sufficient level of generality to allow for such adaptation.<sup>88</sup>

Perhaps most importantly, there is no way today to approach the federalist rule of “no federal power over religion” other than to try to translate it into an analogous rule that preserves the original rule’s purpose in new circumstances. The simple notion that the federal government should have “no power over religion” significantly reflects the premise that the federal government would be one of limited powers, most of which—foreign affairs and national defense, interstate trade in a fairly narrow sense, and so on—would not touch directly on the moral lives of the people in the states. It is true that the very passage of the First Amendment reflected fear that even then, the fed-

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86 See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1173 (1993) [hereinafter Lessig, *Fidelity*] (arguing that a flexible approach of “translation,” can be consistent with faithfulness to a text). The adaptation of the federalist rule here should not even be nearly as controversial as Lessig’s method of “translation” since he asserts that a translation can be legitimate even if it conflicts with the express language of the relevant text. See also Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 130 (1996) (arguing that the *Lopez* decision was faithful to the Constitution, even though it offered “artificial and incomplete readings of Congress’s [commerce] power” because it was “rendered in the name of restoring a [federal-state] balance envisioned in the framing generation”).

87 Lessig, *Fidelity*, *supra* note 86, at 1251.

88 See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 149 (1989) (arguing that the original understanding should be characterized at the level of generality that the text warrants).

eral government's enumerated powers could be used to affect religion.<sup>89</sup> But once the founders made explicit the denial of such a power, they would not have to delve into much detail about the precise contours of that rule. For the most part, a government generally engaged in only limited activity could leave religion alone simply by not making any laws on the subject.

By contrast, today the federal government exercises broad powers to regulate and support private activities, including areas such as education and social welfare that touch closely on matters with which religions are concerned. Today, in order to keep from affecting religious life, the federal government may have to take religion into account: that is, it may have to have a policy on religion in order to preserve religious freedom.<sup>90</sup> The "no power" rule cannot explicitly address these vastly changed circumstances; the only course is to try to translate it in a way that preserves its essential meaning and purposes in the welfare state.

This last point helps analyze and criticize some competitors to voluntarism as a translation of the original understanding. For example, Kurt Lash, who accepts the federalism reading of the 1789 clauses, argues that the federalist rule of "no power over religion" meant simply that government should not "legislate directly on religion qua religion," that is, it should not "directly target[ ] religion."<sup>91</sup> Lash concludes that free exercise exemptions from general laws would have been inconsistent with this federalist scheme, and with assumptions by the founding generation (particularly Jefferson and Madison) that religion and government could stay in separate spheres.<sup>92</sup> In effect, Lash argues that the federalist understanding translates into a rule of equal treatment, or formal neutrality, between religion and non-religion; the federal government simply may not take account of religion or make policy concerning it, and exemptions are such a policy.<sup>93</sup>

This translation of the federalist understanding, however, is not the best one. For one thing, it runs into some strong, specific contrary evidence: as Michael McConnell has shown, it is quite clear that

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89 See SMITH, *FOREORDAINED FAILURE*, *supra* note 4, at 31.

90 For similar arguments, see Berg, *supra* note 50, at 441-42; McConnell, *Crossroads*, *supra* note 48, at 137.

91 Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1117, 1113-14 (1994).

92 *Id.* at 1111-18.

93 Professor Lash ultimately supports free exercise exemptions, but only on the basis of a different understanding of church-state relations enacted in the Fourteenth Amendment. *Id.* at 1152-56.

the founders knew of and approved legislative actions that specifically exempted religion from general laws—including some exemptions that had been given by the central government.<sup>94</sup> McConnell also

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94 McConnell, *Origins*, *supra* note 66, at 1466-73, 1500-03. Professor Lash's article only deals specifically with constitutionally mandated exemptions, but his general proposal that the First Amendment forbade Congress "to legislate directly on religion qua religion" (Lash, *supra* note 91, at 1117) would also prevent religion-specific legislative exemptions. This point has been confirmed to me in recent exchanges with Professor Lash over the "Religionlaw" electronic discussion group.

Without going into great detail, here is an expanded argument against Lash's position on legislative exemptions. Professor McConnell based much of his argument on the presence of legislative exemptions in state laws circa 1789; to this, Lash would respond that state practices provide no indication of how the framers thought the federal government could or should act. But legislative exemptions were also well known to the central government in 1789. The Continental Congress, for example, in 1775 exempted conscientious objectors from military service, stating that "[a]s there are some people, who, from religious principles, cannot bear arms in any case, this Congress intends no violence to their consciences." Resolution of July 18, 1775, reprinted in 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 187, 189.

The permissibility of congressionally granted exemptions is, of course, consistent with the notion that the Free Exercise Clause conferred a substantive right to religious freedom. See *supra* note 80. But even if the Free Exercise Clause should be read as only a "jurisdictional" rule, it is implausible to conclude, as Lash does, that the adoption of the First Amendment took away the new federal government's ability to make such accommodations to mitigate the effects of its own programs on religion. To read the provision that way is to say that at the very same time that the framers substantially strengthened the power of the central government—mostly through giving it many new enumerated powers not directly related to religion—they also disabled that government from limiting the effect that its new enumerated powers could have on religious conscience (when in fact predecessor Congresses had taken such self-limiting steps). This reading is implausible because it was precisely the exercise of the new enumerated powers (together with the Necessary and Proper Clause) that excited the fears of those who demanded a Bill of Rights.

Exemptions from federal laws are perfectly consistent with the federalist account of the Religion Clauses. It is not immediately clear how a decision by the federal government to refrain from interfering with religious conscience through one of its own laws would trespass on the states' power to regulate religion through their laws. Such an exemption in a federal law would not tell any state how it should treat religion, but would merely refrain from adding federal regulation to the duties that a sect or sects faced. And to the extent that action by the new government could be said to be interfering with the states' power, it might cut the other way: giving new powers to the central government without the possibility of religious exemptions might do away with the freedom that some sects had enjoyed in many states. For example, as Professor McConnell points out, during the ratification debates on the original Constitution, anti-Federalist pamphlets argued that without a freedom of religion amendment, the transfer of military power to the federal government would endanger the exemption from service that Quakers had enjoyed under state laws. See McConnell, *Origins*, *supra* note 66, at 1476 (discussing Pennsylvania pamphleteer "Philadelphensis" and others).



presents evidence, although he admits it is less conclusive, that the founders would have viewed some exemptions as constitutionally mandated.<sup>95</sup> But more important for my purposes, the specific situation in 1789 does not mean that the Free Exercise Clause should be interpreted not to require any exemptions from general laws. The sparse discussion of exemptions more likely reflects the fact that even though the founding generation occasionally faced the problem, they did not face it often enough for it to become a major issue. In a time when central government (and indeed every level of government) was far less active than now, those activities in which it did engage would be more likely to be seen as crucial enough to override religious freedom. Thus, Thomas Jefferson could say that no person has any "natural right in opposition to his social duties," as Professor Lash notes;<sup>96</sup> but Jefferson's conclusion rested at least in part on his assumption that government's powers were limited in the first place.<sup>97</sup>

The ultimate question, as Professor Laycock has argued, is whether a general law that burdens religion, though not intentionally, presents the same evils that the founding generation sought to prevent. If so, then the fact that the founding generation did not specifically endorse a principle of exemptions should not matter. As Laycock sums up, "[t]he evil of the Reformation-era conflict [that drove the framers to protect religious liberty] was that the State with its coercive power made human beings suffer for their religious belief and practice. . . . The evil is the same, whatever the State's motive."<sup>98</sup>

A different challenge to the voluntarist view is that the founders and immediately subsequent Congresses took some actions to support religion: they appointed congressional and military chaplains, authorized presidential proclamations of fasting and thanksgiving, and appropriated money to support missionaries to educate and proselytize Indian tribes. There is an extensive literature on this subject, and I have little to add.<sup>99</sup> In only one case, the appointment of military

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95 McConnell, *Origins*, *supra* note 66, at 1512 (summarizing the evidence).

96 Thomas Jefferson, Letter to the Danbury Baptists (Jan. 1, 1802), *reprinted in* THE REPUBLIC OF REASON: THE PERSONAL PHILOSOPHIES OF THE FOUNDING FATHERS 135 (Norman Cousins ed., 1958); *see* Lash, *supra* note 91, at 1115 n.37 (quoting Jefferson in support of no-exemptions position).

97 "The legitimate powers of government extend to such acts only as are injurious to others." Thomas Jefferson, *Notes on the State of Virginia*, *reprinted in* REPUBLIC OF REASON: THE PERSONAL PHILOSOPHIES OF THE FOUNDING FATHERS, *supra* note 96, at 123.

98 Laycock, *Continuity and Change*, *supra* note 52, at 1098-99.

99 *See, e.g.*, ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (2d. ed. 1994); Douglas Laycock, "Nonpreferential" Aid to

chaplains, did the early Congresses specifically discuss the Religion Clause implications of such aid. Significantly, in that case, as Professor Lash has shown, the chaplaincy appears to have been defended primarily on the ground that it promoted religious freedom and voluntarism because otherwise the access of servicemen to clergy and worship would be restricted.<sup>100</sup> Other cases are less probative because, as Professor Laycock has cogently argued, a principled understanding of the Religion Clauses cannot so easily be inferred from actions that no significant group complained of and that Congress never therefore examined.<sup>101</sup>

Steven Smith's explanations for such actions are less satisfactory. He uses some of them to support his argument that the First Amendment adopted no substantive principle of church and state. For example, the missionary subsidies would have operated only in the territories, as would anti-blasphemy laws that were found in some territories in 1789; Smith hypothesizes that these show that where Congress had general legislative power over an area, as with the territories,<sup>102</sup> it "did not seem to view itself as bound by any adopted constitutional principle controlling the relationship between religion and government."<sup>103</sup> But the notion that Congress would be entirely unconstrained in making laws in the territories—that it could with impunity establish a religion or prohibit religious belief—however accurate as an interpretation of the historical record, is simply too inconsistent with the text, which says "Congress shall make *no* law," to serve as a legal standard. Since it is the text that was enacted and that we are interpreting, no principle accounting for historical actions is acceptable as a legal standard if it is flatly inconsistent with the text. Not surprisingly, in the mid-nineteenth century it was simply assumed that the First Amendment bound Congress in legislating for territories.<sup>104</sup>

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*Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986) [hereinafter Laycock, *Nonpreferential Aid*]; Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986); Rodney K. Smith, *Getting off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions*, 20 WAKE FOREST L. REV. 569 (1984).

100 See Lash, *supra* note 83, at 1097 & n.45 (quoting sources arguing that failure to provide military chaplains would deny servicemen their free exercise of religion).

101 Laycock, *Nonpreferential Aid*, *supra* note 99, at 913-19.

102 U.S. CONST. art. IV, § 2 ("Congress shall have power to dispose of and make all needful rules and regulations respecting the territory [of] the United States.").

103 SMITH, *FOREORDAINED FAILURE*, *supra* note 4, at 29.

104 See *Reynolds v. United States*, 98 U.S. 145 (1879) (reviewing, although upholding, congressional prohibition of polygamy in the territories). The anti-blasphemy

Smith also suggests that some of the early congressional actions are consistent with the Religion Clauses acting as only a "partial renunciation of jurisdiction over religion": they might have merely assigned to states "the major, controversial issues of religion—issues regarding the 'establishment' and regulation of religion"—while leaving Congress free to act in "residual" matters.<sup>105</sup> But this distinction between "major" and "residual" issues merely returns us to the question of what kinds of actions toward religion are minor enough as to be consistent with a general posture of non-involvement. Moreover, in a time such as ours when the federal government is pervasive, a whole host of actions implicate the "major" issues of federal support or regulation of religion.

These explanations by Smith are hampered by his assumption that to be consistent with the original understanding, a principle must be consistent with everything that the early Congresses did. Much more realistic is Professor Laycock's argument that the founders could enact a provision but not follow its demands in all cases, whether from shortsightedness or from the pressure of other priorities.<sup>106</sup> Smith protests that such an argument is an insult to the founders,<sup>107</sup> but that charge is misplaced.<sup>108</sup>

So far, however, I have simply discussed the constitutionality of federal actions; while such actions are aplenty, the majority of Religion Clause issues, and the most controversial ones, have involved state actions such as policies in public schools. And Smith is correct that it is more complicated, under an originalist analysis, to apply the Religion Clauses to the states (through incorporation) than to the fed-

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laws may have been outside the text of the First Amendment because they were passed by territorial legislatures. See Lash, *supra* note 83, at 1098 & n.48.

105 SMITH, FOREORDAINED FAILURE, *supra* note 4, at 33-34.

106 See Laycock, *Nonpreferential Aid*, *supra* note 99, at 913-14.

107 See SMITH, FOREORDAINED FAILURE, *supra* note 4, at 8-10.

108 It is no insult to recognize that past unconstitutional practices might continue simply because "[m]omentum is a powerful force in human affairs, and the Framers were busy building a nation and creating a government. Their failure to spend time examining every possible Establishment Clause issue is hardly surprising." Laycock, *Nonpreferential Aid*, *supra* note 99, at 913-14. Smith argues that men such as Madison reflected carefully on the things they did, SMITH, FOREORDAINED FAILURE, *supra* note 4, at 10; but Madison himself concluded in later years that some of the actions he approved as congressman and president, including congressional chaplains and presidential thanksgiving proclamations, violated the Religion Clauses. See James Madison, *Detached Memoranda*, reprinted in JAMES MADISON ON RELIGIOUS LIBERTY 89 (Robert S. Alley ed., 1985). We may see inconsistencies that the founders overlooked, not because we are smarter than they are, but because experience is a good teacher. And of course we have probably forgotten many important truths that the founders knew.

eral government. It is more complicated, but not necessarily unwarranted. Smith argues that the current standard procedure, applying the 1789 understanding (as courts interpret it) to restrict states, is self-contradictory because the 1789 understanding was nothing but an assignment of power to the states. But the standard procedure makes sense if, as suggested above, substantive concerns were an important part of the enactment process along with federalist ones. If substantive concerns were important, then those substantive principles could indeed be transferred over to restrict states.

Even if the 1789 understanding was purely federalist, Kurt Lash has argued that by the mid-1800s both non-establishment and free exercise had developed a substantive meaning that could logically be incorporated to restrict states as well as Congress.<sup>109</sup> Smith does not adequately answer this challenge to his thesis.<sup>110</sup> He observes that switching attention from the Founding to Reconstruction would “not necessarily [shift religious freedom discourse] in a liberal or secular direction,” since government support of Christianity remained prevalent in the mid-1800s, the high point of America’s “de facto Protestant establishment.”<sup>111</sup> But even “conservative” or “non-secular” results would defeat Smith’s claim that no principles can be garnered from originalist analysis. Undercutting secularist theories of church and state is not the same as undercutting all theories. As I will discuss below, this is a crucial distinction that all of the anti-theorists, including Smith, tend to ignore.<sup>112</sup>

Even the mid-nineteenth century understanding, translated into today’s circumstances, may be consistent with large parts of the voluntarist approach to church and state. By that time the Religion Clauses were firmly understood as embodying the “voluntary principle,” which Robert Baird, a leading religious observer of the period, understood to “abolish altogether the support of any church by the state, and place all, of every name, on the same footing before the law.”<sup>113</sup> Like

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109 Lash, *supra* note 91, at 1149-56 (free exercise); Lash, *supra* note 83, at 1092-1100 (non-establishment). Like Lash, I leave aside the question of whether the Fourteenth Amendment was actually intended to incorporate the Religion Clauses, and concentrate only on whether the clauses had a substantive meaning that could be incorporated and what that meaning was.

110 In fairness, it should be noted that Smith did not see Lash’s work until his own book was nearly done. SMITH, FOREORDAINED FAILURE, *supra* note 4, at 50 (discussing Lash, *supra* note 90).

111 *Id.* at 53-54.

112 See *infra* Part IV.B.

113 ROBERT BAIRD, RELIGION IN AMERICA 129, 130 (Glasgow, Blackie & Son 1844); see *id.* at 129 (the churches “have been compelled to look, in dependence upon God’s blessing, to their own exertions, instead of relying upon the arm of the state”).

the founders, the generation of the mid-1800s eliminated only financial support for churches; their view of disestablishment coexisted with the notion that government could use means other than taxation to promote "religion in general"—by which they meant nondenominational Protestantism. Leading constitutional scholar Thomas Cooley, for example, wrote that "no principle of constitutional law is violated" by legislative prayers or presidential thanksgiving proclamations.<sup>114</sup>

But Cooley added that "in all these cases [in which support for religion is permitted], . . . care [must] be taken to avoid discrimination in favor of or against any one religious denomination or sect."<sup>115</sup> It would take a good deal more material to establish the point fully, but certainly a principle of "no preference between denominations" was a strong element in the mid-nineteenth-century understanding of proper church-state relations.<sup>116</sup> But even by that time, it was an unrealistic reading of American society to conclude that government could promote a non-denominational general religion by just promoting Protestantism. Such a view, ignoring the continuing increase in religious pluralism, led to whippings of Catholic children and burnings of Catholic churches when the children refused to read from the King James Bible in public schools.<sup>117</sup> And now, in the far more radical pluralism of American religious life in the late twentieth century, it is virtually impossible for government to speak religiously in an explicit way without violating the principle of no preference between religions. Almost any explicit religious statement government makes will now be consistent with the views of a smaller and smaller percentage of Americans, and cannot plausibly be seen as reflecting any general consensus. The voluntarist approach—which leaves religious expression up to citizens rather than government but vigorously pro-

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114 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION 159 (Boston, Little Brown & Co. 1878); see also BAIRD, *supra* note 113, at 148 (noting that a public school teacher "can easily give as much religious instruction as he chooses").

115 COOLEY, *supra* note 114, at 159.

116 For example, a Senate report of the time, discussing the appointment of congressional chaplains, stated that any law that

introduced, or should attempt to introduce, in favor of any church, or ecclesiastical association, or system of religious faith, "any" endowment at the public expense, peculiar privileges to its members, or disadvantages or penalties upon those who should reject its doctrines or belong to other communions—such a law would be a "law respecting an establishment of religion."

S. REP. NO. 32-376, at 1-2 (1853).

117 See, e.g., ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 230-35 (rev. ed. 1975).

pects their right to expression in the public square—may be the only approach consistent with a “no preference” rule today.

#### IV

For all these reasons, a principle of voluntarism is the best translation of the original understanding of the Religion Clauses into current circumstances. I have not engaged in a detailed examination of the original understanding, however; and it is difficult to say that the historical record unambiguously favors any single approach. When the original understanding is consistent with more than one principle, the case for any particular one can be bolstered by showing that it is preferable on other grounds besides historical ones.

However, the various anti-theorists I am discussing argue, in various degrees, that no coherent and acceptable theory can be developed—at least not under our current intellectual and social conditions. Law professor Frederick Gedicks argues that there are two diametrically opposed “discourses” on church and state, neither of them acceptable, and no happy median in sight.<sup>118</sup> Theologian Stanley Hauerwas and literary critic Stanley Fish argue that religious liberty is at war with true religious commitment.<sup>119</sup> And Steven Smith argues that any theory of religious freedom in a pluralistic society is ensnared in logical contradictions.<sup>120</sup> As I will argue, however, a theory of voluntarism answers the anti-theorists’ objections and serves as the most viable principle of religious freedom in modern America.

#### A

Each of the anti-theorists trains most of his criticisms on theories of church and state that posit a strongly secular government and therefore, given the pervasiveness of government, confine religion to a marginal role in public life. For example, law professor Frederick Gedicks, in a fine recent book,<sup>121</sup> argues that modern church-state decisions have been dominated by a discourse of “secular individualism.” Borrowing from postmodern theories about how language constructs social reality,<sup>122</sup> Gedicks argues that this dominant discourse defines the public and private spheres in a way that confines religion

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118 See *infra* Part IV.B.3.

119 See *infra* Part IV.B.2.

120 See *infra* Part IV.B.1.

121 FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* (1995) [hereinafter GEDICKS, *RHETORIC*].

122 *Id.* at 8-10.

to the private and forbids it to serve as a basis for public, or collective, decisionmaking.<sup>123</sup> The public sphere is limited to arguments based on the individual's critical reason and empirical observation; religious arguments, because they typically appeal to other sources of authority such as faith, tradition, or a community hierarchy, are deemed irrational and a threat to individual rights and social cohesion.<sup>124</sup> In good postmodern fashion, Gedicks emphasizes that while a conceptual framework such as secular individualism exercises tremendous power over thought—making certain questions appear senseless that are quite important under other frameworks—the framework is in fact “socially contingent” and does “not mark any natural or inevitable distinction between private and public life.”<sup>125</sup>

Nineteenth-century America, Gedicks says, was dominated by a discourse that is secular individualism's chief competitor: a “religious communitarianism” that saw mainstream Christianity as the essential foundation of civilized society and therefore worthy of encouragement and preferential treatment by government.<sup>126</sup> But secular individualism has taken over in the last fifty years. With considerable plausibility, Gedicks attributes to it a wide range of modern Religion Clause decisions: the prohibitions on prayers, creation science, and other religious influences in public schools;<sup>127</sup> the prohibitions on many, though not all, kinds of financial aid to religious schools;<sup>128</sup> and the notion that government may accommodate private religious activity through tax or regulatory exemptions (if at all) only as part of a broad class of exempted activities defined in wholly secular terms.<sup>129</sup> He also points out that even when the justices have reached a result more consistent with religious communitarianism than with secular individualism—for example, in approving a city's display of a nativity scene at Christmastime<sup>130</sup>—they are simply unable to present it in other than secular individualist terms, and thus they put forward unpersuasive arguments.<sup>131</sup>

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123 *Id.* at 31.

124 *Id.* at 12, 29-30.

125 *Id.* at 26, 32.

126 *Id.* at 11, 15-17 (tying this discourse to features of the nineteenth century “de facto Protestant establishment”).

127 *Id.* at 32-37.

128 *Id.* at 45-56, 81-91.

129 *Id.* at 91-116.

130 *Lynch v. Donnelly*, 465 U.S. 668 (1984).

131 *Lynch* suggested that the creche had had its religious meaning diluted by the accompanying secular holiday icons (reindeer, snowmen) and now served more to promote goodwill and encourage people to go Christmas shopping. *Lynch*, 465 U.S. at 668, 685. “Only if the religious can be made secular,” Gedicks accurately com-

Beyond trying to understand the cases, however, Gedicks criticizes secular individualism as intellectually unsatisfactory.<sup>132</sup> For example, secular individualism uses the rhetoric of neutrality between religion and non-religion to defend excluding religious schools from educational aid—as if somehow the government subsidies already given to the competing secular schools, public and private, were non-existent or irrelevant to whether government is being neutral.<sup>133</sup> As Gedicks points out, secular individualism also has produced a pair of cases holding that it is an unconstitutional burden when government requires students and their families to remain quiet during a forty-five-second platitudinous prayer at graduation ceremonies,<sup>134</sup> but that there is no such burden when government builds a logging road that destroys land used for centuries for sacred rituals by Native American tribes.<sup>135</sup> Secularism reaches these results and sees them as neutral because it views the public sphere as inherently and entirely secular. But it can do so only because it defines religion ahead of time as a wholly private matter.

Steven Smith also spends much of his time critiquing secularist theories of religious freedom, agreeing that these have dominated modern legal discourse on the subject.<sup>136</sup> His lengthy criticism of theories of neutrality also aims primarily at theories that assume that neutrality consists in excluding from the public sphere anything that is seriously religious.<sup>137</sup> He cogently criticizes the Court for holding that neutrality required the invalidation of laws against the teaching of evolution simply because they aided or reflected fundamentalist religious views.<sup>138</sup> As he points out, the requirement of neutrality could just as easily invalidate the teaching of evolution because it contradicts

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ments, "is a defense available within secular individualism." GEDICKS, RHETORIC, *supra* note 121, at 80; *id.* at 77 (adding that the Court tried to "empty [such displays] of their spiritual content and replace it with secular meaning"). Gedicks presents perhaps the most insightful explanation of why *Lynch* should give only limited comfort to those who support the result.

132 GEDICKS, RHETORIC, *supra* note 121, at 119-22.

133 *Id.* at 56-59.

134 *Lee v. Weisman*, 505 U.S. 577 (1992).

135 *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); see GEDICKS, RHETORIC, *supra* note 121, at 118 (noting that while coercion may exist in graduation prayers, it "pales beside that assumed and sanctioned by the Court in *Lyng*"). I think both actions were burdensome and should have been struck down.

136 SMITH, FOREORDAINED FAILURE, *supra* note 4, at 158 n.5; see *id.* at 99-117.

137 *Id.* at 82 (stating that the "equation of secularism and neutrality" is "deeply entrenched in modern discourse").

138 *Id.* at 82-83 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 103-04, 106-09 (1968)).



fundamentalist views.<sup>139</sup> Many subjects in the curriculum will implicate divergences among religions and between religious and non-religious views.<sup>140</sup> To insist that only the positions favored by non-religious views can be taught is neutral only if one assumes, again, a baseline under which religion is a wholly private matter.

Theories of the sort Gedicks and Smith criticize are indeed unconvincing. The premise that religion is a private matter is simply untenable in America. As Gedicks points out, it contradicts American history, because religion has consistently played a significant role in American public life.<sup>141</sup> It is also implausible intellectually, since most religions claim insight into moral truth and the nature of human beings and of reality, and it is hard to see how these matters can be separated from public affairs without active suppression. Moreover, the increase in government activity compounds the problem; a pervasive, yet wholly secular, government will not only discourage religion, as the school aid cases suggest, but will also on many occasions restrict even the "private" behavior of unpopular or powerless religious groups, as the case permitting the gratuitous destruction of Native American worship sites dramatizes.

The way in which secularism simply assumes a privatized religion is exemplified in the review of Steven Smith's book by Professors Eisgruber and Sager. They argue for reading the Religion Clauses in the light of a principle of equal regard, which "holds that the interests and concerns of every member of the political community should be treated equally, that no person or group should be treated as unworthy or otherwise subordinated to an inferior status."<sup>142</sup> This principle sounds attractive. Curiously, though, one of its entailments, accord-

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139 SMITH, *FOREORDAINED FAILURE*, *supra* note 4, at 83. For similar arguments, see STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 156-82 (1993).

140 I am speaking only of positions taught in secular subjects—math, science, history—that coincide with a religious view. The permissibility of teaching such positions should have been settled by *Harris v. McRae*, 448 U.S. 297 (1980) (holding that laws disfavoring abortion do not violate the Establishment Clause just because they coincide with, or even are prompted by, religious views). It is a different matter for government to teach a religious view directly. More recent laws requiring the teaching of "scientific creationism," see *Edwards v. Aguillard*, 482 U.S. 578 (1987) (invalidating such a law), present a harder case than the "no evolution" laws, because creationism in some forms can be a religious doctrine ("God created the species") rather than a religiously-inspired scientific account ("The species appeared suddenly as if from a creator").

141 GEDICKS, *RHETORIC*, *supra* note 121, at 119; for a readable summary, see A. JAMES REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* (1985).

142 Eisgruber & Sager, *supra* note 4, at 601.

ing to Eisgruber and Sager, is that government actions must be justified by "secular reasons, endorsable in principle by anyone committed to extending to the belief systems of others the same regard as they would like extended to their own belief systems."<sup>143</sup> The move here is the same as that of theorists who claim that secularism is neutral. No explanation is given as to how imposing a constitutional barrier preventing religious belief systems from influencing government policy gives equal regard to citizens who hold those beliefs. Only by assuming at the outset that religious beliefs are private, and that the secular public square is neutral, could one argue that such an arrangement is equal.<sup>144</sup>

Secularist theories, as Gedicks notes, are also "unacceptable and unpersuasive" to most Americans who are serious religious believers.<sup>145</sup> This criticism is the common theme of two anti-theorists who are not lawyers, Stanley Hauerwas and Stanley Fish.<sup>146</sup> Stanley Fish claims that a true religious believer cannot accept religious freedom because the believer cannot accept the system of liberalism in which it is embedded.<sup>147</sup> Liberalism, Fish says, "marginalize[s]" any person, such as a true religious believer, who offers a perspective in political debate that is not grounded solely in Enlightenment reason, one that is based on "beliefs not open to inquiry and correction."<sup>148</sup> This accurately describes the position of Eisgruber and Sager and other legal

143 *Id.* at 604.

144 Eisgruber and Sager may be suggesting that religious believers should find it easy simply to "bracket" their religious convictions about justice and social policy, and adhere to secular reasons. It is not so easy, however, to ignore one's deepest convictions; perhaps Eisgruber and Sager realize that fact, and that is why they suggest that a religious believer could endorse purely secular reasons "in principle." It is not clear, however, why a believer should be forced to do so, let alone why such a requirement accords her belief system "equal regard." Eisgruber and Sager do suggest a reason for treating religious beliefs differently in this way. In another part of their argument, they point out that, while government may not suppress racist views, it should not be "indifferent" to them and certainly should never reflect them. They advocate analogous treatment for religious views, even on secular matters of justice or social policy. *Id.* at 606. The equation of all religious views with racism speaks volumes about the premises of secularist theories of church and state.

145 GEDICKS, RHETORIC, *supra* note 121, at 120-21.

146 The two are strange intellectual compatriots. Fish is a skeptical, deconstructionist literary critic. Hauerwas is a Methodist theologian greatly influenced by the theology of Anabaptists, the family of Protestant groups (to which the Amish belong) that all tend, in varying degrees, to reject the modern secular world and concentrate on living in a closely-knit community of believers. But from their different premises, both conclude that a true believer cannot accept religious freedom as they define it.

147 Stanley Fish, *Why We Can't All Just Get Along*, *FIRST THINGS*, Feb. 1996, at 18, 21.

148 *Id.* at 22.

scholars who argue that laws may only be based on "publicly accessible" arguments, primarily reason and empirical inquiry without any religious suppositions.<sup>149</sup> And Fish is right to criticize this variant of liberalism.

Stanley Hauerwas, borrowing from Fish's earlier writings on freedom of speech,<sup>150</sup> claims, similarly, that "just as 'freedom of speech' has paved the way for an indifferentism about speech in America, likewise 'freedom of religion' has paved the way for 'religious indifferentism.'" <sup>151</sup> Arguing from within one tradition of Protestant Christianity, the Anabaptist tradition, Hauerwas emphasizes that Christians must care only about whether they are faithful to Jesus Christ and not at all about whether they or others are free from persecution.<sup>152</sup> He thinks that religious freedom is a flawed goal because it will never be provided to believers unless they agree to march in step with society or withdraw into a completely private role. Hauerwas quotes a column by George Will arguing that "by guaranteeing free exercise of religions, [the Framers sought to] make religions private and subordinate" to the secular order, to submerge the passions of religious faith in the pursuit of material goods in a capitalist economy.<sup>153</sup> Hauerwas rightly thinks that such a view severely constricts religious identity, which for most serious adherents is relevant to all areas of life. Indeed, this view is untenable for a nation whose population includes and has always included millions of active believers, who view their religion as having public implications for questions such as the purpose of education and the nature of a just society.

## B

The anti-theorists are rightly suspicious of theories that seek religious freedom by confining religion to a private role. But they proceed to give up on the viability of religious freedom altogether; and they are wrong to take that second step.

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149 See, e.g., works cited *supra* note 61.

150 See, e.g., STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 102-19 (1994).

151 Stanley Hauerwas & Michael Baxter, C.S.C., *The Kingship of Christ: Why Freedom of "Belief" Is Not Enough*, 42 DEPAUL L. REV. 107, 115 (1992).

152 *Id.* at 107; on Anabaptists, see *supra* note 146.

153 Hauerwas & Baxter, *supra* note 151, at 109 (quoting George F. Will, *Conduct, Coercion, Belief*, WASH. POST, Apr. 22, 1990, at B7).

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Although he mostly criticizes secularist theories of religious freedom, Steven Smith states that “[i]t would miss the point . . . to conclude that the Court erred by choosing the wrong principles of religious freedom.”<sup>154</sup> Rather, he says that no set of “consistent and explicit principles” of religious liberty is possible. His argument is that any theory of religious freedom in our highly pluralistic society faces a “fundamental conundrum”:

[T]heories of religious freedom seek to reconcile or to mediate among competing religious and secular positions within a society, but those competing positions disagree about the very background beliefs on which a theory of religious freedom must rest. One religion will maintain beliefs about theology, government, and human nature that may support a particular version of religious freedom. A different religion or a secular viewpoint will support different background beliefs that logically generate different views or theories of religious freedom. In adopting a theory of religious freedom that is consistent with some background beliefs but not with others, therefore, government (or the judge or the legal scholar) must adopt, or privilege, one of the competing secular or religious positions. Yet this adopting or preferring of one religious or secular position over its competitors is precisely what modern theories of religious freedom seek to avoid. Hence, theories of religious freedom can function only by implicitly betraying their own objective.<sup>155</sup>

Different principles of religious freedom, Smith sensibly points out, do not simply appear from nowhere; they “necessarily depend on—and hence will stand or fall along with” underlying notions about the nature and proper roles of religion and of the state.<sup>156</sup> For example, different citizens might propose principles of religious freedom based on secular Enlightenment theory, on Marxism, or on medieval Catholic theology. Smith objects that if government adopted any one of these competing principles, it would thereby adopt the background beliefs supporting it. In doing so, the government would no longer be mediating between the competing positions—which Smith argues is the function of a theory of religious freedom—but would have taken

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154 SMITH, *FOREORDAINED FAILURE*, *supra* note 4, at 117.

155 *Id.* at 68 (footnote omitted).

156 *Id.* at 63.

sides.<sup>157</sup> In short, the idea of religious freedom is “self-cancelling,” as Smith put it in an earlier work.<sup>158</sup>

Smith’s argument works as a syllogism: (i) a principle of religious freedom logically cannot rest on any disputed background belief, yet (ii) it also must rest on such a belief, therefore (iii) a principle of religious freedom is a logical impossibility. The question, however, is why we should accept (i) as a premise for an acceptable system of religious freedom. Smith is obviously correct that no system of religious freedom can be consistent with everyone’s beliefs.<sup>159</sup> Even principles that might be taken as bedrocks of our system of religious freedom will be inconsistent with some views. A principle that says “Do not put people in jail just because they are not Protestants” will be inconsistent with the views of those who believe that God requires that government protect the true faith by punishing non-Protestants. And a theory that allows religious groups to speak at all publicly on political matters will be inconsistent with the views of those who believe that religion is so destructive and dangerous a force that it must be kept entirely out of politics.

But why should a theory have to be acceptable to everyone? After all, many constitutional provisions have faced strong opposition before they have been enacted. The real task, the only one that makes any sense, is to argue for the best theory of religious freedom in a society—by whatever criteria “best” is defined. (In the last part of this essay, I suggest some criteria.) Smith sometimes talks as if such comparisons are impossible, as if he were a thoroughgoing relativist: for example, he emphasizes that there is “a host of different opinions and notions about” what religious freedom means, and he is willing to count Oliver Cromwell’s policy of suppressing Catholic worship serv-

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157 *Id.* at 70-71.

158 Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 151-52 (1991). His arguments apply as much to a theory that is inconsistent with some secular background view as to one that is inconsistent with some religious view. Professors Eisgruber and Sager are therefore wrong to suggest that Smith’s premise involves the “unimpaired flourishing” only of religious beliefs. Eisgruber & Sager, *supra* note 4, at 598-99.

159 Eisgruber and Sager are correct that “no recognizable form of liberal democracy can accommodate all religious [and other] beliefs in the way that Smith insists a satisfactory approach to religious liberty would have to do.” Eisgruber & Sager, *supra* note 4, at 598; *see also* Mark V. Tushnet, *Disaggregating “Church” and “Culture,”* 42 DEPAUL L. REV. 235, 239 (1992) (“In a religiously pluralist society, any particular pattern [of church-state interaction] will constitute an endorsement of the normative stance of some churches and a rejection of the stance of others.”).

ices as a brand of religious freedom.<sup>160</sup> But elsewhere he recognizes that “some opinions about the proper scope of religious freedom are more attractive, or more rationally defensible, than others,” and that “the normative question is which version of religious freedom is more attractive or sound, either generally or in a given context.”<sup>161</sup> This recognition undermines the conundrum he presents; if it is possible to argue rationally about the best theory of religious freedom in our context, why should we not turn to such arguments to give at least some guidance for the interpretation of the Religion Clauses?

Smith argues that if we adopt a theory based on a disputed background belief, we are not affording “religious freedom,” but instead are “privileging” the chosen background belief and giving at most “toleration” to other views.<sup>162</sup> He quotes familiar statements by James Madison and Thomas Paine that toleration is an unacceptable substitute for full religious freedom.<sup>163</sup> But it is strange that Smith should fasten on so narrow a definition of “religious freedom,” since, as noted above, he elsewhere emphasizes that there are many arrangements, even ones that restrict citizens’ choices a great deal, that could merit the label “religious freedom.” Now, on the other hand, he defines away as mere tolerance any theory that fails the impossibly strict standard of being consistent with all background beliefs in society. The truth is somewhere in between those two extremes. Some arrangements put so many restrictions on citizens’ decisions concerning religion that it is not sensible to call them religious freedom; but no arrangement, however liberal, can avoid being more consistent with some beliefs than with others.

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160 SMITH, *FOREORDAINED FAILURE*, *supra* note 4, at 11; *id.* at 8 (“As to freedom of conscience, I meddle with no man’s conscience; but if you mean by that, liberty to celebrate the mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted.” (quoting Oliver Cromwell) (footnote omitted)).

161 *Id.* at 11-12.

162 *Id.* at 73.

By determining the scope of religious freedom in accordance with the criteria or values of a preferred religious or secular position, this kind of theory effectively rejects on the most basic level—on the “constitutional” or “constitutive” level—the contrary secular and religious positions whose criteria or values were *not* selected as the foundation for constitutional theorizing, even though the theory may tolerate those unapproved practices and beliefs on a different level.

*Id.*

163 *Id.*; *see, e.g.*, THOMAS PAINE, *THE RIGHTS OF MAN* 65 (Secaucus, Citadel Press 1966) (1792) (“Toleration is not the *opposite* of Intoleration, but is the *counterfeit* of it. Both are despotisms.”).

Madison and Paine themselves based their arguments for religious freedom over toleration on disputable (and disputed) background beliefs, including religious ones. Madison's *Memorial and Remonstrance*, as noted earlier, rested heavily on religious arguments about the primacy of religious duties and the worthlessness of coerced belief.<sup>164</sup> And Paine argued that mere toleration "places itself . . . between God and man . . . and blasphemously sets itself up to tolerate the Almighty to receive [worship]."<sup>165</sup> What Madison found objectionable about "mere toleration" was not that it rested on a religious view, but two other things: it treated freedom to practice or not practice religion as a matter of legislative grace rather than natural right, and as actually carried out it involved continued preferential treatment for the favored faith, in the form of government funding, tests for public office, and so forth.<sup>166</sup>

Madison, in other words, sought equal religious liberty at what might be called the operational level: how government actually treats citizens of different religious and non-religious persuasions. He did not, and no one can, seek total equality or neutrality at the justificatory level. The operational rule adopted by government must inevitably rest on some view or combination of views about the role of the state and the nature of religion, and some views will be rejected at that level. Thus there is nothing incoherent if government makes a decision to stay out of religious matters based in whole or in part on a premise, itself influenced by religious views, that such involvement is wrong and counterproductive to true faith. Citizens who disagree—who want government to enforce religious conformity—have failed to have their own beliefs enacted, but they remain free to express and practice those beliefs. Religious freedom protects them too, even if it rests on a justification inconsistent with their beliefs.

Smith argues that at the least, his logical conundrum shows that no theory based on a disputed belief can be neutral between religion and non-religion, which he takes to be the sine qua non of modern theories of religious freedom.<sup>167</sup> Even if that were true, it would show only that government neutrality is impossible, not that all theories of religious freedom are impossible. For example, Smith's conundrum creates fewer problems for a non-coercion theory of the Establish-

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164 See *supra* note 79 and accompanying text.

165 PAINE, *supra* note 163, at 66.

166 See, e.g., DANIEL L. DREISBACH, *REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT* 136-39 (1987) (discussing Madison's views on "toleration").

167 SMITH, *FOREORDAINED FAILURE*, *supra* note 4, at 63, 75; *id.* at 77-97 (criticizing the "pursuit of neutrality").

ment Clause, under which government is free to rely on and endorse religious beliefs if it does not force anyone to confess or practice them. Indeed, those who argue for some version of the no-coercion standard commonly do so on the basis that government neutrality toward religion is impossible and (as Smith puts it) self-refuting—but that the no-coercion standard avoids such objections.<sup>168</sup>

A no-coercion standard largely avoids Smith's conundrum, but even it involves some choice among underlying views. Prohibiting government coercion toward religion restricts the ability of people to act on one particular religious view: the view that says that true reli-

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168 See, e.g., David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067, 1074-83, 1103 (1991) (book review); cf. McConnell, *Crossroads*, *supra* note 48, at 158, 188 (arguing that government coercion, defined "broadly and realistically," is the evil against which the Religion Clauses are directed, and that in some areas of church-state law "'neutrality' is an unattainable ideal").

In correspondence, Smith has clarified my understanding of his work by emphasizing the more limited thesis described in the paragraph in text: that what he objects to is not so much that religious freedom theories rely on controversial underlying positions, but rather that "modern religious freedom discussions" wrongly purport to *avoid* such reliance, that is, "to resolve issues of religious freedom *without* considering or presupposing the truth of the underlying positions." Letter from Steven D. Smith to the author (Jan. 9, 1997) (on file with author). If we agree that reliance on certain underlying views (religious or otherwise) can in fact lead to a regime that can meaningfully be called one of "religious freedom"—and not dismissed as a counterfeit—then our positions are much closer together.

At least two possible points of disagreement remain. First, even if Smith and I agree that "neutrality" is not a meaningful ideal at the justificatory level, we seem to disagree whether it can be a meaningful and coherent term to describe the operational level, that is, how government actually treats people. I argue that "neutrality," in a sense of minimizing government's impact for or against voluntary religious decisions, can be meaningful in this way. See *infra* notes 172-76, 212-20.

Second, a principle of religious freedom need not rest on one single underlying substantive vision of religion and humanity that prevails over all others. Various substantive views might, in John Rawls' terms, converge on an "overlapping consensus" sufficient to ground a principle of religious freedom. See John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEG. STUD. 1 (1987); Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TULANE L. REV. 87 (1992) (exploring the connection of religious freedom to civic virtue under several underlying views). A religious freedom principle also might be supported by prudential considerations, such as the impossibility of choosing which religion to support in a religiously pluralistic society. I do not think that a theory loses its status as "principled" simply because it is grounded partly in prudential judgments or in a "balancing" of competing concerns. See *infra* notes 218-20.

Finally, to adopt some account of religion and the state as the best for grounding a theory of religious freedom does not entail adopting that account for other questions of public policy. To find a Baptist, or a secularist, account of religious freedom the most plausible or workable does not mean we all become Baptists or secularists.



gion must be coercively enforced by government. This restriction, of course, is itself backed up ultimately by coercive measures: the contempt power of courts, the enforcement of injunctions by executive officers, and so forth. Thus the non-coercion standard entails the threat of coercion against at least one religious practice.

What this shows, however, is not that religious freedom is impossible, but that we should not wring our hands over such "paradoxes." Preserving the freedom of most citizens to engage in most kinds of behavior always entails restricting the few who want to engage in behavior inconsistent with the freedom of others. The state denies me the freedom to punch you or kill you because (among other reasons) such behavior interferes with your freedom of action. However the solution is defined, the paradox of restricting some actions by citizens in order to preserve freedom for other actions and other citizens is central to the activity of government. It should not suddenly be turned into a paralyzing "conundrum" when the matter for government is how to guarantee religious freedom.

Although this next point is more difficult, Smith's criticisms even fail to prove that government neutrality toward religion is impossible—as long as neutrality is properly defined in terms of voluntarism and pluralism rather than a total insulation from all things religious. Smith's primary argument, in his book, against the principle of substantive neutrality advocated by Professor Laycock is that the principle rests on disputable beliefs about the nature of religion and the state: that religious commitments are particularly important and valuable, but only if they are chosen without coercion or influence from government.<sup>169</sup> As a result, Smith rejects substantive neutrality because it "is not 'neutral' with respect to potential background beliefs that might inform one's views about religious freedom."<sup>170</sup>

But substantive neutrality need not claim to be—nor, as we have seen, can it be—consistent with all views about church and state. All it needs to claim is that, on balance and taken as a whole, it minimizes government's influence on the religious choices of citizens. To be sure, it entails rejecting certain religious views (and indeed some secular views) that assert that government should try to influence citizens' religious beliefs. But the rejection, the disfavoring, of that belief, one might assert, is justified by the payoff: government will refrain from inserting itself into religious doctrines and controversies in a host of other situations. Just as government generally restricts a few forms of behavior in order to protect a much larger range of freedom of behav-

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169 SMITH, *FOREORDAINED FAILURE*, *supra* note 4, at 81.

170 *Id.*

ior, so a government seeking to protect religious freedom might sensibly disfavor some ideas about religion in order to adopt a rule that on the whole minimizes governmental influence on ideas about religion. As I have argued elsewhere, such a rule can be justified as the most proximately neutral solution, even if it is not perfect or free from internal tensions.<sup>171</sup>

Smith, however, would likely counter that to the extent neutrality means that government should not express religious viewpoints, it still runs into a serious problem. In earlier work<sup>172</sup> Smith argued that such a theory of religious freedom was “self-cancelling” because the best justification for religious freedom itself rests on a religious view: the view, which has been discussed above,<sup>173</sup> that religious beliefs and duties are of prime value and importance but only if they are entered into voluntarily. If the system of religious freedom means that government may not espouse religious views, then the system prevents the giving of the best justification for its own existence.<sup>174</sup> At best that is an embarrassment; at worst it is likely to lead, as Smith then argued, to the negation of religious freedom as a theoretical and constitutional ideal.<sup>175</sup>

There are at least two reasons, though, why government neutrality, properly interpreted, does not cast a shadow on the religious views that helped inspire religious freedom in the first place. First, the question of what principle of religious freedom to adopt is like the question of what economic or foreign policy to adopt: it is a matter within the government’s jurisdiction, an issue of civil rights and social good that ranks among government’s basic concerns and responsibilities, and on which the government has to make a rule. It is not like the government composing a prayer or issuing a statement on the proper meaning of the Eucharist. Therefore, since government must act somehow on the matter of religious freedom, it may be influenced by religious views in deciding how to act.

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171 See Thomas C. Berg, *Church-State Relations and the Social Ethics of Reinhold Niebuhr*, 73 N.C. L. Rev. 1567, 1582, 1611 (1995).

172 See Smith, *supra* note 158.

173 See *supra* notes 78-79 and accompanying text.

174 For example, Smith argued, Thomas Jefferson’s Virginia Act for Religious Freedom, under this interpretation of religious freedom, would itself run afoul of religious freedom principles, since it is explicitly premised on assertions that “‘Almighty God hath created the mind free’” and that any interference with this freedom is “‘a departure from the plan of the Holy author of our religion.’” Smith, *supra* note 158, at 194 (quoting Virginia Act for Religious Freedom).

175 *Id.* at 182-96.

Second, the reliance on religious voluntarist beliefs to ground religious freedom is not the sort of reliance that amounts to real favoritism or preference for religion or a particular faith. Indeed, the purpose of the voluntarist principle is to give equal liberty to all beliefs. That government relies on one belief to ground that principle does not in itself create any favoritism in how government actually treats its citizens—and again, it is how government actually treats citizens, not the grounds on which it relies, that is most important to neutrality.

## 2

Smith's is the only real attempt among the anti-theorists to prove that it is impossible for us to have any coherent theory of religious freedom. The others essentially assume this impossibility, mostly because they assume that any account of religious freedom must be one that marginalizes and privatizes religion, and because they ignore the viability of a principle of voluntarism understood in a way that resists the secularizing pressure of the active state.

For example, only by assuming that religious freedom must marginalize religion can Fish and Hauerwas argue that religious believers should place little or no value on religious freedom altogether. If their assumption were true, the conclusion would follow, and that would indeed create a serious problem: Given the degree of serious religiosity remaining in America, there would be a legitimacy crisis in the very notion of religious freedom, not just certain versions of it. But the premise is not true. We can give an account of religious freedom that does not marginalize religion, and thus their objections are undercut.

First, both Hauerwas and Fish exaggerate the scope of what liberalism must inherently claim. Liberalism need not deny the existence of absolute truth or marginalize religion as Fish and George Will assert. As Michael McConnell has pointed out in response to Fish, liberalism in its proper, constitutional sense is not the ambitious form that insists that any "beliefs not open to inquiry and correction" must be marginalized. Rather, liberalism is a theory of government: it does not deny the possibility of truth, but simply restricts the use of force, including government power, "to resolve competing claims of truth."<sup>176</sup>

Hauerwas also exaggerates what liberalism must claim. For example, he rejects former Education Secretary William Bennett's defense of religious freedom as "the freedom to believe or not believe":

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176 Michael W. McConnell, *Correspondence: Getting Along*, FIRST THINGS, June-July 1996, at 2, 3 [hereinafter McConnell, *Correspondence*].

Does Bennett really believe that thousands of Jews have died at the hands of Christian and pagan persecutors in order to make it possible for subsequent generations to have the freedom to believe or not? Jews rightly do not want their children to make up their own minds whether they should or should not believe; they expect them to be faithful Jews.<sup>177</sup>

But this is an almost purposeful distortion of Bennett's argument; and Hauerwas immediately signals (unfortunately, only in a footnote) that he knows better. For in fact he identifies with a Christian tradition, Anabaptism, that renounces the use of force to compel religious profession (or indeed for any purpose). Support for a principle of freedom of religion, Hauerwas elsewhere concedes, can rest solidly on this "commitment to noncoercive belief."<sup>178</sup> The principle simply disables government from dictating or influencing belief; it leaves it open beyond that whether the people's religious beliefs (if any) will stem from tradition, communal influence, or autonomous individual choice.

Hauerwas recognizes the tradition of religious voluntarism although he does not make much use of it; but Stanley Fish simply ignores it altogether, and so offers up a caricature of what American religious believers actually think. To Fish, a believer "should not want to enter the marketplace of ideas but to shut it down." He should want a society "in which the pressure of first principles is felt and responded to twenty-four hours a day"—presumably through government compelling practice of the true faith.<sup>179</sup> But it was zealous religious believers who led the fight to prevent government from pressing a religion on citizens, in large part on the ground—shared with founders influenced by the Enlightenment—that a belief adopted under such pressure is not truly believed. Fish is wrong, therefore, to say that religious believers cannot accept religious freedom.

Fish is correct, however, that most religious believers in America cannot accept a theory under which their views are excluded from public debate or influence on general matters of government policy. The voluntarist tradition holds that government lacks competence or jurisdiction over religious belief and practice. But when government has jurisdiction—as it must over matters of "justice and the common good"—then it may constitutionally act, in Professor McConnell's

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177 STANLEY HAUERWAS, AFTER CHRISTENDOM 85 (1991).

178 *Id.* at 177 n.16.

179 Fish, *supra* note 147, at 21-23; *see id.* at 21 ("The religious person should not seek an accommodation with liberalism; he should seek to rout it from the field, to extirpate it, root and branch.").

terms, on the basis of "whatever positions and worldviews [citizens] find persuasive (religious or nonreligious)."<sup>180</sup> The difference, as Daniel Conkle has put it, is "between (1) spiritual matters and (2) worldly matters on which religion is brought to bear": between matters of belief, worship, and ritual,<sup>181</sup> and the wide range of other matters of social policy over which government has power. This distinction is supported by religious freedom, theories of constitutional democracy, and American constitutional history as well: from the sermons that helped fuel the American Revolution to those that inspired the civil rights movement, religion has always been a contributor to discussions about what course government in America ought to follow. Fish refers to such interactions between religious and other views in politics as a form of "conflict,"<sup>182</sup> and in a sense he is right: the resolution of political questions through majoritarian democracy does produce winners and losers. But it is, in relative terms, a peaceful form of conflict; both sides air their views, attempt to persuade their fellow citizens, and then abide by the decision (which of course can be revised politically too).

Stanley Hauerwas, on the other hand, correctly identifies some dangers to a religious community that becomes too focused on maintaining peace with the state. He warns that believers should not trust that any state will take religious freedom seriously<sup>183</sup>—and perhaps even more importantly, that believers should not support a state that gives them religious freedom if it does other, evil things.<sup>184</sup> To Hauerwas, the true relation between church and state is not non-involvement, but conflict. He raises legitimate concerns: freedom of religion has often been limited to those who pose no real challenge to the state,<sup>185</sup> and even the process of seeking such protection can lead one to compromise her beliefs. But these objections are greatly reduced if the believer's quest for freedom of religion is seen properly as a goal instrumental to, but not defining of, the religious life. The quest for freedom of religion can be a way of simply maintaining the community's ability to achieve its primary goal of expressing and carrying out its faith; it can be a way, in Frederick Gedicks's words, of

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180 McConnell, *Correspondence*, *supra* note 176, at 2.

181 Daniel O. Conkle, *God Loveth Adverbs*, 42 DEPAUL L. REV. 339, 345 (1992).

182 Fish, *supra* note 147, at 23.

183 Hauerwas, *supra* note 177, at 71 (freedom of religion lulls believers into thinking "we have been rendered safe by legal mechanisms").

184 *Id.*

185 See, e.g., Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 250-51 (1994) (summarizing the Supreme Court's repeated rejection of free exercise claims even before *Employment Div. v. Smith*, 494 U.S. 872 (1990)).

heading off the “terrible” choice “between faithfulness and survival.”<sup>186</sup> Preserving non-interference in religious matters can also serve precisely the goal that Hauerwas seeks: getting the state to acknowledge demands on its citizens higher and more important than those of the state itself.<sup>187</sup> Working to secure religious freedom is not the vocation of every religious believer; but for those whose vocation it is, it can be an honorable task.

## 3

Frederick Gedicks also ends up simply assuming that no viable theory of religious freedom is currently available. Having rejected the discourse of secularism, Gedicks also rejects what he sees as the only alternative: the “religious communitarian” discourse that gives privileged legal status to the majority religion in an effort to maintain social cohesion. Gedicks catalogs the “frightening” and “at the least, controversial” results that would likely follow from a religious communitarian theory—“direct financial grants to majoritarian religious organizations, public school instruction by ministers and priests, and [recalling the nineteenth century campaigns against Mormons and Catholics] repression of minority religions and others who threaten foundational social values.”<sup>188</sup> Gedicks’s critique of this model is very abbreviated. But he seems right to conclude that the rationale of religious communitarianism, and many of its results, are both inappropriate and impractical for a society that is pluralistic and that values freedom.

At that point, however, Gedicks throws up his hands—and seals his status as an anti-theorist—by saying that no alternative to the two unacceptable discourses is even “imaginable.”<sup>189</sup> Here I part company with him, and wish that he had added another chapter to his otherwise fine book. His two discourses work well as heuristic devices for diagnosing the problems in current law, and for the most part he claims no more for them than that purpose.<sup>190</sup> But when he says

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186 See Frederick Mark Gedicks, *The Integrity of Survival: A Mormon Response to Stanley Hauerwas*, 42 DEPAUL L. REV. 167, 173 (1992).

187 McConnell, *Origins*, *supra* note 66, at 1516.

188 GEDICKS, RHETORIC, *supra* note 121, at 122. As Gedicks describes religious communitarianism, the only limits on government promotion of the favored faith are that government may not directly forbid any religious worship and may not favor one Protestant denomination (perhaps today, one brand of Christianity) over others. *See id.* at 14-18.

189 *Id.* at 123-25.

190 *Id.* at 13, 19 (conceding that the discourses do not capture the complexity of actual historical views).

there is no acceptable Religion Clause theory available, he leaves behind heuristic frameworks and makes a more sweeping, and questionable, claim.

Gedicks explicitly analogizes his model of two polar discourses to the recent work by sociologist James Davison Hunter that analyzes the current culture wars between "traditionalists" and "progressives" on issues of education, religion, and the family.<sup>191</sup> With minor differences, Hunter's traditionalists are Gedicks's religious communitarians, and Hunter's progressives are Gedicks's secular individualists.<sup>192</sup> This bipolar model captures many of the most important cultural developments of the last thirty years,<sup>193</sup> but it also leaves out large portions of the population who do not sign on unqualifiedly to the programs of either the Christian Coalition or the People for the American Way. Hunter himself acknowledges that most Americans fall outside one of the warring camps,<sup>194</sup> but he does not examine any of the middle positions for solutions they might offer. Similarly, I think Gedicks overlooks the existence of other discourses on church and state. Like Hunter, he tends to treat middling positions as no more than unhappy and muddled compromises. For example, he dismisses as "rhetorically impossible and practically unlikely" Stephen Carter's proposal to see voluntary religious entities as sources of virtue and community independent of the state.<sup>195</sup>

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191 See JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991), cited and discussed in GEDICKS, *RHETORIC*, *supra* note 121, at 10-12.

192 See also Laycock, *Continuity and Change*, *supra* note 52, at 1070-77 (characterizing current church-state disputes similarly).

193 Especially the major decline in Protestant-Catholic tensions, the political mobilization of conservative Protestants in alliance with other cultural conservatives, and the mushrooming of a secular-oriented "knowledge class" that includes government bureaucrats. For more extensive discussion, see HUNTER, *supra* note 191, at 35-51; Laycock, *Continuity and Change*, *supra* note 52, at 1070-75.

194 HUNTER, *supra* note 191, at 159 ("Without doubt, public discourse [as reflected in the statements of activist groups] is more polarized than the American public itself."). He attributes the oversimplification and demonization mostly to the dynamics of television advertising and direct-mail fund-raising, which "simply do [ ] not allow for middling positions and the subtleties they imply." *Id.* at 170.

195 GEDICKS, *RHETORIC*, *supra* note 121, at 123 (discussing CARTER, *supra* note 137).

One interesting alternative, suggested by the parallel between Gedicks and Hunter, is a theory of church and state grounded in the experience of African Americans. Like Hunter's, Gedicks's map of the terrain pays little attention to blacks, who likely "would muddle up [any] neat categories." D.G. Hart, *Book Review*, 110 *THE CHRISTIAN CENTURY* 58, 59 (Jan. 20, 1993) (reviewing HUNTER, *supra* note 191) (noting that blacks tend to be "progressive" on some issues and "traditionalist" on others). Given the history of religiously-based liberation movements such as those for abolition and civil rights, a perspective grounded in African-American experience can hardly

Above all, Gedicks omits any examination of the long tradition of a voluntarist approach to church and state, based not on a desire to privatize and confine religion, but on the notion that religion flourishes far better in the hands of citizens themselves than in the hands of government. As I have already discussed, such a view played an essential role in the passage of the Religion Clauses, and today it remains consistent with widely held religious beliefs in America.<sup>196</sup>

Contrary to Gedicks's conclusion, such a discourse of religious voluntarism is available; indeed, it appears in several Supreme Court decisions that he chalks up solely to secular individualism. In the first school prayer case, the Court stated that prayers composed by the government not only coerce dissenters and harm society, but also "degrade religion," which is "too personal, too sacred, too holy, to permit

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seek to separate religion from politics or public policy. See, e.g., CARTER, *supra* note 139, at 227-29; Michael Eric Dyson, "God Almighty Has Spoken from Washington, D.C.": American Society and Christian Faith, 42 DEPAUL L. REV. 129 (1992). Yet the same experience would likely call for sensitivity to how the law affects the position and conscience of religious minorities, and a suspicion of any explicit enforcement of the majority religion. See, e.g., Martin Luther King Jr., *The Time for Freedom Has Come (1961)*, in TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 160, 164-65 (James M. Washington ed., 1986) (defending practice of a person disobeying a law that "conscience tells him is unjust"); Lash, *supra* note 91, at 1133-37 (noting history of suppression of slaves' religious practices through general as well as religion-specific laws); James M. Washington, *The Crisis in the Sanctity of Conscience in American Jurisprudence*, 42 DEPAUL L. REV. 11 (1992); see also LEO PFEFFER, CHURCH, STATE, AND FREEDOM 468-69 (rev. ed. 1967) (reporting Dr. King's support for the 1962 school prayer decision). But cf. STEPHEN L. CARTER, INTEGRITY 86 (1996) (noting that "support for classroom prayer is higher among African-Americans than in just about any other demographic group").

Given the general burgeoning of critical race theory, it is surprising that no law professor has yet written regularly and systematically on church and state from a self-consciously African-American perspective.

196 See *supra* notes 48-62 and accompanying text. A separate argument against even a properly-defined theory of "substantive neutrality" is that, to the extent it prohibits government from even expressing religious views non-coercively, it goes well beyond the "voluntarist" religious outlook that is supposed to be a prime support for the theory. If religious views are important, one might argue, the government should teach them and try to influence people even though it should not try to engage in (counterproductive) coercion. The broader prohibition on government expression can be supported, however, if one adds the argument that government is a particularly bad teacher of religious truths. Government always has other agendas in mind; and the entry of government into the realm of explicit religious speech, even without coercion, is likely to create both unnecessary conflicts over the content of the speech and an ultimate watering-down of the content. The foundational source for such arguments is in the writings of Roger Williams; for a recent statement, see Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 320-22, 351 (1996).



its 'unhallowed perversion' by a civil magistrate."<sup>197</sup> Both the Court and individual justices have opposed some kinds of aid to religious schools because it has come laden with regulations requiring secular teaching in the schools, raising the "specter of government 'secularization of a creed'"<sup>198</sup> and "tempt[ing the] religious schools to compromise their religious mission."<sup>199</sup> There is a colorable claim that by prohibiting certain forms of aid, the Court has saved religious schools from secularizing in order to receive government assistance.

But maintaining a voluntarist approach today, as I have argued, also requires recognizing how religious choice can be distorted when government gives aid solely to the secular competitors of religious schools—public schools, secular private schools. The justices who oppose parochial aid fail to confront that fact.<sup>200</sup> Preserving choice concerning religion points in favor of upholding aid to religious schools and social services when corresponding secular agencies receive aid, as long as the government does not make religious agencies more attractive than the alternatives and does not attach conditions that require them to secularize their teaching.

The Supreme Court has adopted this position in a now-lengthy line of decisions allowing aid channeled to individuals to be used at religious schools without secularizing conditions on the aid.<sup>201</sup> Gedicks says these rulings are "perfectly consonant" with secular individualism because they ensure that aid goes to religious schools only as part of a broad class and through the "undistorted private choices" of individuals.<sup>202</sup> But these decisions are more consistent with a voluntarism that does not favor religious agencies compared to others,

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197 *Engel v. Vitale*, 370 U.S. 421, 431-32 (1962). The opinion adds that the "purely religious function" of writing prayers is "no business of government" and should be left "to the people themselves and to those the people choose to look to for religious guidance." *Id.* at 435.

198 *Aguilar v. Felton*, 473 U.S. 402, 414 (1985) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 650 (1971)).

199 *Roemer v. Board of Pub. Works*, 426 U.S. 736, 775 (1976) (Stevens, J., dissenting).

200 In addition, one could reasonably question whether some justices who claim to oppose aid in order to protect the recipients from government interference really do care about religious freedom. Compare *Roemer*, 426 U.S. at 775 (Stevens, J.) (opposing aid to religious schools on that ground), with *United States v. Lee*, 455 U.S. 252, 261-64 (1982) (Stevens, J., concurring) (opposing any exemptions to protect religious conduct from general laws).

201 See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); cf. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510 (1995).

202 GEDICKS, RHETORIC, *supra* note 121, at 52.

but does treat them as fit participants in programs to achieve public purposes.<sup>203</sup> Elsewhere, Gedicks contradicts his statement above and says that secular individualism forbids the inclusion of religious agencies in public programs even as part of a broad class. In discussing decisions forbidding direct aid to religious elementary schools, he says that it is not enough for the secularist that government aid does not "affect[ ] the pattern of private choice"; here he says secularism forbids any aid unless the religious recipients are "recharacterized as secular."<sup>204</sup> In short, in his effort to characterize every modern decision as an example of secular individualist reasoning, Gedicks occasionally (not regularly) makes secular individualism say conflicting things. Some of the decisions Gedicks sees as secular individualist are more consistent with the voluntarist discourse whose existence he does not acknowledge.

This sort of voluntarism is free of the flaws that Gedicks and others rightly identify in secular individualism. By recognizing religious viewpoints as legitimate participants in public programs and legitimate influences on legislation, it avoids trying to constrict religion, with all its public aspects, into a private matter; and it avoids consigning the views of millions of Americans to a marginal place in American public life. Unlike secular individualism, it takes account of the effect of a pervasive state presence on religious freedom. And voluntarism does not imply individualism or overlook the communal shaping of identity. Its free exercise principles vigorously protect decisions made by religious communities, and its rules permitting aid and political involvement welcome religious communities to help in seeking the common good of society.

But voluntarism of this sort also avoids the flaws that Gedicks identifies in religious communitarianism. Unlike religious communitarianism, it recognizes the fact that America now is widely pluralistic in opinions about religion, far more pluralistic than in the founding generation or the nineteenth century. Voluntarism recognizes that it is almost impossible for government to teach or espouse religion itself without espousing some particular religious form adhered to by only a plurality of citizens. So it says that such promotion should be left to

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203 See McConnell, *Crossroads*, *supra* note 48, at 180 (endorsing *Witters* and *Mueller* on this basis).

204 GEDICKS, *RHETORIC*, *supra* note 121, at 91. The contradiction is shown by the fact that at the point that Gedicks argues that secular individualism requires recipients of aid to be secular, he has to insert a "but see" reference to his own previous discussion of how secular individualism can allow religious institutions to receive aid as part of a broad class. See *id.* at 174 n.43 (containing "but see" reference to *id.* at 55 & nn.66-67).

the citizens and the voluntary groups to which they belong; and that government should make room for their activities, avoid discouraging them, but also avoid favoring them.

## V

What are the criteria for the best principle or theory of religious freedom? We know, having thought through Steven Smith's arguments, that no theory can be consistent with every view in society. If that is his demand, he sets an unjustifiably high goal; and other anti-theorists give up on articulating an acceptable principle. But in their skepticism about theories, the anti-theorists do teach an important lesson. They remind us, in the words of Frederick Gedicks and the late Robert Cover, that different Religion Clause theories often stem from "deeply rooted normative differences"—from profound differences in each community's "nomos," or "'normative universe' that defines 'right and wrong,' 'lawful and unlawful,' 'valid and void.'"<sup>205</sup> The anti-theorists also remind us that it is difficult, if not impossible, to show that the presuppositions of one nomos are false or illegitimate under some universal standard; there is no "view from nowhere." All of us, however, judges included, are tempted to present as the products of universal reason arguments that are in fact parochial. One way of deciding between these arguments is majority rule; but judicial review cuts off that option. How then to make decisions that, we must acknowledge, are underdetermined by simple rationality?

One source for constraining such decisions is reliance on the original understanding of a provision. The chief appeal of originalism is a comparative one. It puts some limits on the scope of the relevant arguments; although it is far from perfectly determinate, it is more so than the profusion of competing theories that results when we simply engage in free-floating moral philosophy about concepts included in the Constitution.<sup>206</sup> I have already given arguments why voluntarism (substantive neutrality, pluralism) best comports with the original understanding—although I acknowledge that the arguments involve some translation of the original understanding into quite different circumstances.<sup>207</sup>

A theory should also be consistent with basic American traditions and self-understandings. It should not be unpersuasive, at a funda-

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205 GEDICKS, RHETORIC, *supra* note 121, at 26 (quoting Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983)).

206 See, e.g., BORK, *supra* note 88, at 251-59; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-63 (1989).

207 See *supra* Part III.

mental level, to a large portion of the population. That is not to say that a theory should always produce results that a majority favors, or has favored over time; that would undercut the very purpose of constitutionalism, which is to stand against the sentiments of simple majorities. But a constitutional theory should not be divorced from the most basic understandings that Americans have developed on a subject. Secular individualism is unacceptable to the millions of Americans who take their religious beliefs seriously and believe that they have public implications. Religious communitarianism is unacceptable to millions of Americans who do not adhere to the majority religion, and to many others in the majority who do not want their faith too closely aligned with government. Voluntarism of the sort advocated here offers a way of maintaining as much liberty as possible for all of these groups.

In addition to these ways of deciding between competing church-state theories or discourses, others are suggested by the work of philosopher Alasdair MacIntyre, who is well known for arguing that it is impossible to engage in moral reasoning without standing within some tradition.<sup>208</sup> Despite this emphasis, MacIntyre also argues that it is possible to identify features that make a tradition of reasoning more or less adequate in dealing with the world—a tradition that will thrive or one that must change radically in order to survive.<sup>209</sup> One of his suggestions is that an established tradition may be undermined if it is “confront[ed] by new situations, engendering new questions,” and it proves to lack “resources for offering or for justifying answers to these new questions.”<sup>210</sup> Voluntarism has resources to answer the pressing issues of church-state relations that other theories cannot answer. Secular individualism, as Frederick Gedicks and Steven Smith show, has proved inadequate to answer the challenge of the increasingly activist state, which makes a wholly secular government and public square more and more repressive of religion. Religious communitarianism cannot today, any more than it could thirty years ago, answer the challenge of increased religious pluralism, which makes it more and more

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208 See, e.g., ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPEDIA, GENEALOGY, AND TRADITION* (1990); ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988) [hereinafter MACINTYRE, *WHOSE JUSTICE*]; ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981).

209 MACINTYRE, *WHOSE JUSTICE*, *supra* note 208, at 354-56; see *id.* at 352 (arguing that without such an account, “no issue between contending traditions is rationally decidable”).

210 *Id.* at 355.

impossible to unite any American political community around any explicit religious message promulgated by government.<sup>211</sup>

A theory may also fail, MacIntyre says, if it is internally inconsistent, "enjoining perhaps alternative and incompatible courses of action."<sup>212</sup> The anti-theorists have pointed out a number of inconsistencies in secular individualism. But there are also charges that voluntarism of the sort I have set forth prescribes inconsistent results. As these are, in my view, the most serious charges against the theory I advocate, I will discuss them.

To take one example, critics have argued that it is inconsistent for a voluntarist to support free exercise exemptions because such exemptions distort individual choice in favor of religion and away from activities that are not exempted.<sup>213</sup> But this is not true of every such exemption, because the principle of voluntarism or substantive neutrality must also take into account the discouragement of religious choice if the religious activity is prohibited or regulated. As always, the question should be which course most permits the citizen to decide about religious beliefs and practices on their merits without government influence. This analysis is not, as some have charged,<sup>214</sup> a comparison of apples and oranges. In some cases, the burden on religion is serious, and the inducement to religion from an exemption is minimal. For example, a Jehovah's Witness suffers greatly from being forced to take a blood transfusion in violation of her faith, but few people, if any, are likely to join (or pretend to join) that sect in order to avoid receiving a transfusion. In other cases the burdens and benefits are more difficult to compare. Draft exemptions are a good example, because both the costs to true believers and the incentives to self-interested behavior are very high. The solution in such cases is to defer to a reasonable legislative judgment.

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211 I realize that identifying what "pressing questions" face us may itself be difficult without some agreement on a normative framework for interpreting social conditions. But it is likely to be easier to get some agreement about those questions at the outset than it is to get agreement about the solutions; then we can work from such agreement on the questions toward some agreement on the solutions. For example, it hardly seems disputable that constitutional theory must deal with the increased pressure that the activist state puts on First Amendment rights. A recognition of that pressure makes it more attractive (though perhaps not logically compelled) to recognize the rights of religious schools and service agencies to participate in public welfare programs.

212 MACINTYRE, *WHOSE JUSTICE*, *supra* note 208, at 355.

213 *See, e.g.*, Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 SUP. CT. REV. 123, 143.

214 *Id.*

Another possible inconsistency might be in the area of government symbols and speech. If a wholly secular government marginalizes religion so seriously, why should government not be able to engage in religious speech or expressly advocate a particular faith since it can advocate so many other things? For example, as Professor Gedicks suggests, if a system of subsidized secular public schools does, in fact, discourage religiously informed education, why can't government include religious teaching in the public school curriculum?<sup>215</sup> Such questions might be bolstered by the fact, noted earlier, that to teach many aspects of our culture satisfactorily, it may often be appropriate or necessary to include materials with religious content: Bach chorales, for example, in a high school choir or music class.

Nevertheless, there are good reasons to be leery of proposals to combat secularization by having government teach religion. The problem, from the voluntarist or pluralist standpoint, is that government can respect religious pluralism when it gives financial aid, by giving aid to any group (religious as well as non-religious) that provides the requisite services—but it is far more difficult for government to respect and promote religious pluralism when it engages in religious speech itself. Any statement the government makes is bound to favor one faith over another; even an ecumenical statement that seeks to be inclusive of all faiths favors ecumenical religion over the more sectarian kinds. It may be theoretically possible for government to speak in favor of a variety of faiths over time—for example, to give instruction in many faiths, or to conduct a variety of faiths, over the course of a school year. But the practical problems in working out such arrangements are likely to be great, and there are real dangers that such a series will end up favoring either the majority's faith or some watered down civil religion.

Moreover, the state can make efforts to accommodate religion in education in a more pluralistic fashion by creating opportunities for non-governmental religious expression and activities: church-sponsored baccalaureate services instead of graduation prayers, privately-sponsored religious displays in a publicly maintained forum<sup>216</sup> instead of government-erected crèches or menorahs, equal funding for religious schools instead of watered down religious instruction in public schools. Nevertheless, these alternatives are not perfect either, and any rule consistent with voluntarism should not seek to strip the public school curriculum of all religious elements. I do not offer a legal

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215 GEDICKS, RHETORIC, *supra* note 121, at 59-60.

216 As approved in *Capitol Square Second Advisory Review Bd. v. Pinette*, 115 S. Ct. 2440 (1995).

standard for such cases here, but only note that this question is difficult enough to divide Professors McConnell and Laycock, who otherwise agree on most Religion Clause matters.<sup>217</sup>

To take another example, it might be argued that it is inconsistent to permit government to rely on religious beliefs as the basis for lawmaking on "secular" matters such as economic policy or civil rights, but not to permit government to teach or promote those beliefs explicitly through prayers or rituals. Both categories of action, it might be argued, amount to government endorsement of whatever religious views are reflected in those actions. But there are solid reasons to distinguish between the two categories. It is not just that our history is replete with religious involvement in public policymaking—the history is also replete with official religious rituals. Rather, the point is that forbidding government reliance on religious beliefs in those "secular" areas where government has jurisdiction places a stringent limit on religion's ability to participate in American life, and thus is much harder to square with an overall policy of voluntarism. The direct teaching of religious doctrines or rituals can flow through many alternative channels—through the religious community itself and through its own expression in the public square. But it is often impossible, especially in an age of active government, to achieve the goals of justice, human rights, and human good that are part of many religious visions without working through the government in matters of social policy.

As shown by the topics just discussed (free exercise exemptions, government religious speech, and religious influences on secular laws), government action in any particular category of cases can have effects both for and against religion. The goal is to compare these effects and adopt a rule that achieves the minimal effect overall. In Professor Laycock's words, the analysis cannot be disaggregated;<sup>218</sup> it must look at both sides of the equation, or else it will simply ignore important effects that government has on religion. Typically, those who see inconsistency in the voluntarist approach are looking only at one side of the equation. When government is active, there are few things it does with no effect on religion; but the perfect cannot be the enemy of the good. The only possible goal is to reach proximate versions of voluntarism, pluralism, or substantive neutrality, not perfect

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217 Compare McConnell, *Crossroads*, *supra* note 48, at 188-94 (suggesting that such pluralistic programs of religious teaching are possible), with Laycock, *Nonpreferential Aid*, *supra* note 99, at 921 (doubting that they could be administered fairly).

218 Laycock, *Neutrality*, *supra* note 49, at 1007-08.

versions.<sup>219</sup> This sort of analysis involves balancing and comparing effects, but it is not the kind of case by case balancing that may best be left up to the political branches. That kind of balancing is unacceptably subjective. The approach I am describing is more like the “categorical balancing” that the Court has used in free speech cases:<sup>220</sup> developing appropriate rules for various categories of cases based on judgments about which course in each sort of case will, on the whole, minimize government’s impact on independent religious life. Those judgments may not be perfect or incontestable, but they can still be principled, and it is appropriate for courts to make and enforce them.

## VI

Behind the discussion of viable Religion Clause theories lurks the related question (which I touched on at the beginning of this Article) of what role the courts should play in protecting religious freedom. Some of the anti-theorists, at least, are highly skeptical about the contributions of courts to religious freedom; they suggest that the political branches may do just as well or better. Surely courts can play a negative role in this area, as in other areas. They can invalidate proper laws and in so doing harm religious liberty or needlessly block other valuable social efforts, and those constitutional errors are hard to correct. The courts can increase social division by trying to impose ambitious settlements on complicated issues; and even when they leave a particular case to the other branches, they can cause harm by affirmatively validating an unjust practice or denigrating the losing party’s position.<sup>221</sup>

The theory of voluntarism presented in this Article by no means consigns all church-state questions to the courts. For example, I have suggested that in a fair number of cases it should be left up to the

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219 Berg, *supra* note 171, at 1582, 1611.

220 In categorical balancing in speech cases, the Court “defines the precise circumstances in which [various] categor[ies] of . . . speech may be restricted.” Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987). “In attempting to strike an appropriate balance for each class of . . . speech, the Court considers a number of factors, including the relative value of the speech and the risk of inadvertently chilling ‘high value’ expression.” *Id.* at 47 n.4. Thus Justice O’Connor was right to analogize Religion Clause cases to free speech cases and call for different categorical tests according to how the relevant interests “are present in different degrees in each context.” Board of Educ. of Kiryas Joel Sch. Dist., 114 S. Ct. 2481, 2499 (1994) (O’Connor, J., concurring); see *supra* notes 9-12, 16-17 and accompanying text. What she failed to do was to identify what the Religion Clause interests are—a task that would involve deeper theorizing about the purposes of religious freedom.

221 See, e.g., Tushnet, *supra* note 159, at 241.



political branches to decide whether to exempt religion from general laws—to weigh the relative effects of subjecting religious practice to regulation versus exempting it from duties borne by others.<sup>222</sup> The extent to which laws in secular areas of policy rest on religious values should be left entirely up to the political process. And as I just argued, courts that prevent government from teaching or espousing religious doctrines should be equally careful not to prevent government from presenting elements of culture that have religious origins and messages.

In any event, it is important to put the drawbacks of judicial decisionmaking in perspective by remembering also the valuable things courts can do. They have saved some unpopular or unfamiliar religious minorities—the Santeria, the Amish, the Jehovah's Witnesses, the Hare Krishnas—from being destroyed by criminal laws or multi-million-dollar tort judgments.<sup>223</sup> Steven Smith points out that legislators and administrators sometimes take steps themselves to respect religious freedom.<sup>224</sup> But it seems likely that many such protections have been prompted by the spectre of judicial action lurking in the wings.<sup>225</sup> If courts withdrew from the stage entirely, it is unclear how legislators and bureaucrats would act. It may be relatively unusual for the political branches to single out an individual or group for persecution on the basis of religion. But when the government's activities are pervasive, the greater threat to religious freedom is from indifference, from a myriad of actions in which government simply does not take account of the effects of its actions on conscience. Courts are the better institution to address the problem of indifference. As Professor Laycock has pointed out, judges are institutionally obligated to pay attention to any claim that comes before them, while other officials can simply ignore such claims and plead lack of knowledge or time.<sup>226</sup>

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222 See *supra* note 58 and accompanying text.

223 See, e.g., *Church of The Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (protecting Santeria religion from laws against animal sacrifice that would have destroyed their central worship ritual); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (shielding Amish parents from criminal liability for withdrawing their teenage children from school in order to train them in the Amish way of life); *Murphy v. I.S.K.CON. of New England*, 571 N.E.2d 340 (Mass. 1991) (overturning multimillion-dollar judgment against Hare Krishnas for alleged "brainwashing" and infliction of emotional distress in religious recruiting and practices).

224 SMITH, *FOREORDAINED FAILURE*, *supra* note 4, at 126.

225 See *How to Restore Religious Freedom: A Debate*, FIRST THINGS, Apr. 1992, at 48, 51 (comments of W. Cole Durham et al.) (noting that officials are often motivated to respect free exercise by prospect of having to prove a "compelling interest" for their regulation in court).

226 Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 15.

To be sure, comparing the perspectives of judges and legislators is a complicated matter with many variables. One might argue that there is also a connection between being suspicious of secularism in church-state theories and being suspicious of federal judges. A critic especially concerned about secularist assumptions might warn that judges will always be drawn from the relatively secularized elite, while legislators and bureaucrats are forced institutionally to listen to—and are more likely to be drawn from—the more religious classes of society (at least the more numerous faiths). But to the extent that there was such a difference between judges and other decisionmakers, it probably has shrunk a considerable amount. Many of the most important decisionmakers on issues of religion and public life, especially those involving the public schools, are bureaucrats who have themselves been professionally socialized to be hostile to active, public religion. At the very least, they are so committed to their programs as to be unsympathetic about their effects on religious freedom. Separationism of the sort that sees religion as a mostly private matter has “penetrated the national . . . bureaucratic consciousness,”<sup>227</sup> and administrators now often go far beyond what the Supreme Court has required in keeping religious views out of public arenas. For example, it has taken a series of actions, mostly from the federal courts interpreting the First Amendment, to force public school officials to stop excluding voluntary religious expression from school campuses.<sup>228</sup> Not incidentally, these decisions have taught important lessons to the broader culture about the meaning of religious liberty and the difference between government endorsing a view and permitting it to be heard.<sup>229</sup>

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227 Lupu, *supra* note 185, at 243-44.

228 See e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995) (holding that state university could not exclude student religious magazine from benefits given to other student publications); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (concluding that school district could not exclude religious film on family issues from classrooms open to other groups to discuss community issues); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that state university could not exclude student religious group when other student groups could meet). The other protection came from Congress: the Equal Access Act, which requires high schools to allow student religious groups to meet when other groups are permitted. 20 U.S.C. § 4074 (1994). But it seems doubtful that Congress would have acted except against the backdrop of a theory that called attention to the unfairness of excluding groups just because their views are religious.

229 In an article published after his book, Steven Smith continues his argument for leaving religious freedom questions to be decided prudentially, case by case, by actors other than judges. Smith, *supra* note 44. He discusses a case where a junior high school principal ordered a teacher to stop reading his Bible silently in the classroom

This point about moral education returns us to a fact that needs to be reiterated. Even if courts largely get out of the business of enforcing the Religion Clauses, that will not do away with the need for overarching theories and principles. Legislators and voters will still need to know what the best decisions are, and American children (who come from more and more different faiths) will need to be instructed in what religious liberty means. Prudential compromises, "muddling through," and "strategic silences" will play a role in any successful arrangement of religious freedom. But they cannot substitute for thinking about and articulating, in an overarching way, the goals that we seek.<sup>230</sup>

### CONCLUSION

Professor Gedicks is correct that neither secular individualism nor religious communitarianism is a viable discourse in a nation that is highly religious, highly pluralistic, and also characterized by active government. Voluntarism, on the other hand, has a chance of doing the job. It takes religion seriously as a contributor to public life but insists that its direct, explicit advancement is best left "to the people themselves and to those the people look to for religious guidance."<sup>231</sup>

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during break time and also removed a Bible from the school library. Smith suggests that the decision again shows the dangers of "a misconceived commitment to 'principle,'" in this case the school principal's commitment to the thesis that religion had no place in the school. *Id.* at 515 (discussing *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990)). I draw a different lesson from the case. The school principal was socialized to suppress even the silent, non-coercive religious conduct of a teacher, and she was not interested in the kind of prudential compromise that Smith advocates and apparently believes will often occur. While courts cannot intervene in every school administrative matter, they need to enunciate principles of free speech and voluntary religious exercise, precisely so as to place restraints on administrators such as the principal in *Roberts*.

230 In his recent article, Steven Smith suggests that courts might intervene in some cases to protect religious freedom even under a "prudentialist" approach. Smith, *supra* note 45. But without at least some theorizing about the meaning of religious freedom, he cannot really offer any basis for such interventions. For example, he at least suggests that the Court in the *Lyng* case should have protected Native American religious sites from destruction by government road-builders, *id.* at 505-06, 515; but without some kind of standard (or principle) with which to weigh infringements on religious practice against government interests, there is no way to decide whether the Native Americans or the Forest Service road-builders should prevail. Likewise, while he says state support to religion should not itself be seen as a violation of religious freedom, it "may sometimes *cause* or *be accompanied by* harm to religious freedom," *id.* at 507; but it is not clear how he can say there are ever such harms without a notion, or a theory, of what religious freedom is.

231 *Engel v. Vitale*, 370 U.S. 421, 435 (1962).

Of course, it is more consistent with some views about religion than with others, and it sometimes involves making close judgments about which of two plausible courses, on balance, will best maintain voluntarism. But contrary to the suggestions of anti-theorists, those problems do not make the theory unacceptable. In the area of religious freedom, at least, it is preferable to have the best theory we can get, even if it is imperfect, than to leave the whole matter to the pure tug and pull of politics. Voluntarism has the best chance of maintaining and maximizing everyone's liberty in matters of religion. That is enough to ask from a theory.

