

# Fundamental Questions About the Religion Clauses: Reflections on Some Critiques†

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† Nathaniel Nathanson Memorial Lecture, University of San Diego School of Law, April 28, 2010.

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## I. INTRODUCTION: A RANGE OF STRONG CRITIQUES RAISING BASIC ISSUES

This essay responds to some major critiques of my work on the religion clauses. The effort has seemed worth undertaking because many issues the critics raise lie at the core of one's approach to free exercise and nonestablishment, and some of those issues matter greatly for constitutional adjudication more broadly. Like any author, perhaps, my reaction to reading some comments has been that I did not quite say that, but I shall not bore you with these quibbles about how well I explained myself in the past. Rather, I shall try to confront the genuinely basic questions that many of the comments raise. My aim is less to persuade the reader that my positions are right, or better than alternatives, than to explain what the positions are and why I hold them.

Most critics have thought that in exploring specific issues involving the religion clauses I do a reasonable job of explaining what is at stake and presenting competing arguments. The criticisms begin from there, and the most fundamental of these connect in various ways.

Rather than starting out with a grand theory, I undertake a "bottom-up" strategy of looking at various crucial issues. I believe that for both free exercise and establishment a number of central values need to be considered and accommodated. Although in some areas I move from these central values to fairly straightforward precepts that should govern decisions in particular cases, in other domains my suggestions involve substantial balancing and roughly approximate looking at the totality of circumstances. My approach does not rest on any particular religious or other comprehensive view, such as utilitarianism. Indeed, I claim that courts, and the government as a formal entity more generally, should not rely on any conclusion about religious truth.<sup>1</sup>

Here are some of the critiques. Although I present reasons for competing positions, I tend to settle for one conclusion rather than another without providing a reasonable basis for doing so. Steven Smith has written that

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1. A significant clarification to this sentence as it is written is that I believe it is appropriate for legislators to rely on their religious convictions in adopting legislation—say to aid the poor or extend health care—that does not itself promote a particular religious perspective. What I have in mind is the kind of influence described about the late Senator Edward Kennedy. My views on this topic are summarized in 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 497–524 (2008).

I am disconcertingly complacent, almost disdainful, about reason's requirements, that I make "bald," "highly conclusory pronouncements."<sup>2</sup>

Part of the problem involves the constraints of secular discourse under which I operate. Were theorists to engage central premises about religion, they would not suffer quite the disabilities of those who try to reason without relying on such premises. A closely related criticism is that one should not simply put aside the truth or value of religion when interpreting the religion clauses.

The origins of free exercise and nonestablishment are said to rest on religious convictions, and perhaps the soundest justifications still lie there. One needs to address this possibility directly. Moreover, one needs to consider if religion is distinctively valuable, whether or not the evaluation comes from a religious perspective. I fail on both fronts, the criticism alleges, despite having a chapter entitled "Justifications for the Religion Clauses."<sup>3</sup>

These questions about the place of religious premises connect to the status of original meaning. I reject originalism as a complete approach but without providing a systematic alternative or explaining in detail just how far original understanding matters for resolving issues about the religion clauses.<sup>4</sup>

Other critics, although not challenging the strategy of proceeding without reliance on any overarching religious or comprehensive view, other critics find my approaches to bases for judicial decisions unsatisfying for pragmatic reasons, mainly because they provide too little guidance for judges. Approaches that take into account multiple considerations without any clear direction about order and weight are simply unworkable; they leave courts with too much discretion to fill in a broad range of indeterminacy.<sup>5</sup> Related to this critique are claims that, given my own views, I cannot convincingly reject what I take as a more radical and

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2. See Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1872, 1893 (2009) (book review).

3. *Id.* at 1897. Paul Horwitz suggests in a forthcoming book, *Constitutional Agnosticism*, that that stance is the best approach, which he explains as differing from putting aside questions of religious truth. PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* (Oxford Univ. Press forthcoming 2011).

4. *Id.* at 1898–1903.

5. See Richard W. Garnett, *Judicial Enforcement of the Establishment Clause*, 25 CONST. COMMENT. 273 (2008); Paul Horwitz, *The Philosopher's Brief*, 25 CONST. COMMENT. 285 (2008).

thoroughgoing skepticism.<sup>6</sup> Further, I am mistaken in asserting that Supreme Court decisions about religion are less incoherent than is often claimed.<sup>7</sup>

The two obvious alternatives to my kind of contextualized approach are (1) judges making decisions according to a few basic rules, ones that do not require highly nuanced judgments and (2) judges extending very great deference to the political branches.<sup>8</sup> One way of conceiving the latter possibility is that the constitutional norms themselves would be understood as being broader than what is judicially enforceable.<sup>9</sup> Take *Employment Division v. Smith*, which held that when a law is neutral and generally applicable, religious claimants have no free exercise right to any exemption, no matter how severe the imposition on religious practice and no matter how modest the state's interest in curbing the practice.<sup>10</sup> In that case, the Supreme Court refused to consider an exemption for the Native American Church to use peyote as the very center of its worship services.<sup>11</sup> One way to conceive the decision, a way that does not accord with Justice Scalia's opinion, is that the Free Exercise Clause mandates an exemption, but not one that judges can enforce, because judges need manageable principles.

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6. See Steven D. Smith, *Kent Greenawalt's Elusive Constitution*, 25 CONST. COMMENT. 301, 305–06 (2008).

7. See Frederick Mark Gedicks, *Indeterminacy and the Establishment Clause*, 25 CONST. COMMENT. 279 (2008).

8. See Garnett, *supra* note 5, at 275. Anthony J. Bellia, Jr. and Nelson Tebbe discuss the advantages and disadvantages of more flexible interpretative approaches that allow relatively full consideration of factors at the expense of determinate guidance. See Anthony J. Bellia, Jr., *Establishment and Judicial Administrability*, 25 CONST. COMMENT. 259 (2008); Nelson Tebbe, *Eclecticism*, 25 CONST. COMMENT. 317 (2008). As Professor Bellia points out, I actually support a significant number of categorical rules in respect to nonestablishment. See Bellia, *supra*, at 259–60.

9. Garnett writes of following James B. Thayer's proposal that judges correct only "clear mistake[s]." See Garnett, *supra* note 5, at 275; see generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (describing Thayer's argument for the rule of clear mistake).

10. *Emp't Div. v. Smith*, 494 U.S. 872, 885, 890 (1990). Congress aimed to undo the practical effect of that case with the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488. The Supreme Court has held that law unconstitutional as applied to state restrictions, *City of Boerne v. Flores*, 521 U.S. 507 (1997), but has upheld its application to federal laws, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

11. *Id.* at 874–75, 890.

## II. BROAD QUESTIONS ABOUT APPROACHES TO THE RELIGION CLAUSES

I shall first address the broader, more abstract, questions about how judges and scholars should develop theories for the religion clauses and defend recommended resolutions of particular disputes. I then turn to what are desirable strategies for religion clause interpretation. Along the way, I say a few words about particular subject areas, but these are for illustrative purposes. I do not try to repeat or summarize the fuller accounts in my earlier work.

I want to begin with a remote, very tangential, story. Daisy and Dan fall in love during their judicial clerkships and marry. Daisy wants to teach, Dan to practice. Daisy has offers to teach at a law school near Washington, D.C., and a slightly more prestigious, more exciting, school in a small college town. Because Washington, D.C., is so much better for Dan's practice in terms of interest and income, Daisy chooses the school there. After she and Dan have two children, she is offered a position at a school in Colorado. With a modest sacrifice in salary and interesting practice, Dan could relocate to Denver. Both Daisy and Dan love skiing and believe Colorado is beautiful and a healthy environment for children. She accepts the offer. Five years later, she is asked to teach at a law school in Chicago with a faculty she greatly respects. Dan regards the possible move as slightly less desirable for his career, and Daisy and Dan agree that if they were thinking *only* of the children they would stay put, but they are confident that their still young children could adjust comfortably to Chicago and flourish there. She accepts the offer. Two years later, she receives an attractive offer from a law school where she would love to teach. Because it is located far from any city suitable for Dan's practice and because keeping the family as a unit is very important to them, she refuses. Three years later she receives an offer from another school where she would greatly like to teach. The city where that school is located would be fine for Dan's practice. But by now both children are teenagers and tightly connected to their friends and school. Daisy and Dan decide against disrupting the children. Two years go by and a man Daisy and Dan have known well in Chicago becomes President of the United States. Daisy is offered a Cabinet position. Recognizing that taking the position will create some family hardship—moving the children at a less than ideal stage and interfering with her ability to spend time with them—she and Dan nevertheless

conclude that she should not refuse, given her strong wish to help the new President, the extreme interest the position holds for her, and her sense that she may be able to provide valuable service for the national community.

Daisy and Dan have made a series of employment decisions, taking into account their professional aspirations, salaries, an attractive environment, a good location for children to grow, family unity, and avoidance of disruption. If someone asked Daisy why she and Dan made particular decisions, she might have said: "It's a school near a location that's good for Dan and our family income"; "We love Colorado and we believe it's a fine place for children to grow"; "It's a terrific school and I'm looking forward to teaching there"; "I didn't want to interfere with Dan's practice"; "We didn't want to uproot the kids at this stage of their lives"; and, "This was a unique opportunity I couldn't refuse."

The reasons Daisy gives at various stages as her explanations differ sharply, but at each stage she and Dan have taken into account a range of different kinds of considerations. If they are typical, they will have neither any clear ordering nor a precise weighing of factors. If the professional position is extremely attractive, as I am positing about the Cabinet position, they will make sacrifices in other respects that they would not make for a more modest professional advantage. This is how most people with opportunities go through life. Yet we do not suppose they are somehow incoherent or arbitrary in the way they make decisions, though they have no system that either they or we as outsiders could identify.<sup>12</sup>

It is, of course, a long way from this illustration to judges deciding major constitutional questions, even if we agree that Daisy and Dan may act coherently and sensibly while offering various explanations and lacking any system. Are decisions about public welfare radically different? A county must decide whether to allow a ski resort to be built on public land. The beauty and quiet of the mountains will be disturbed, yet the county will benefit economically and local skiers will welcome a place nearby to ski. There is no simple equation to determine what to do if one rejects, as I do, the possibility that some formula, such as wealth maximization or greatest happiness utilitarianism, should be the exclusive guide. Even those who accept such a possibility recognize that often the relevant future facts are so indeterminate that a decisionmaker is reduced to crude intuitions about what is likely to happen. Of course, with legislative decisions, one possible answer—the wrong one, I believe—

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12. I do not count listing pros and cons as itself a system.

is that legislators should do whatever the majority of citizens or constituents want.<sup>13</sup>

A President's decision whether to send many additional troops to Afghanistan raises more complex issues, ones about how to value great expense and lives sure to be lost against a possible increase in national security, not to mention the probable future of the Afghan people given various choices the United States might make. We are aware that President Obama and his advisors took a long time to make that decision in late 2009, but few have suggested any systematic formula by which the decision should have been made.

Legal decisions are different. They are much more constrained by authoritative sources. Further, the hope and expectation is that these sources are capable of leading the broad range of decisionmakers to the same results in the vast majority of instances. Unlike some skeptics, I believe this aspiration is realized within our legal system, and I believe it is realized even in respect to constitutional law. When their resolution is really simple, issues tend not to reach the courts, and relatively easy questions are almost always settled in lower courts. For the most part, the Supreme Court gets only hard issues,<sup>14</sup> so uncertainty at that level is a terrible indicator of overall uncertainty.

Despite the reality of helpful guidance by authoritative sources, troublesome questions can require an uncomfortable weighing of factors at various levels. When the constitutional standard is general and open-ended, as with the religion clauses, the Supreme Court may need to consider a range of values and underlying principles to arrive at more specific constitutional tests for courts to apply in particular disputes. This was true for the way the Supreme Court constructed the *Lemon* test<sup>15</sup> for establishment cases and the pre-*Employment Division v. Smith* test<sup>16</sup> for free exercise cases. For other kinds of problems, the move from constitutional language to a practical test is more straightforward.

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13. This strategy would throw back on voters how they should decide whether to favor a ski area, and were they to be good citizens, they would need somehow to assess how much weight they should give to their own preferences as compared with their sense of what is good for their fellow residents.

14. However, a case with one or more hard issues may include some easy ones as well.

15. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

16. See *Smith*, 494 U.S. at 884–85.

Both free exercise and nonestablishment are at odds with obvious discrimination that explicitly favors one religion over others.

Once the Court has formulated it, a constitutional test may leave open an imprecise weighing of factors. That the compelling interest free exercise test did so was a substantial basis for the Court's rejection of it in *Employment Division v. Smith*<sup>17</sup>—though Congress responded by reinstituting the same standard with its Religious Freedom Restoration Act.<sup>18</sup> Uncertainties about purpose, effect, and entanglement have underlain strong objections to the *Lemon* test. Justice O'Connor's "endorsement" approach may seem more focused, but uncertainties about what behavior constitutes endorsement greatly reduce its apparent simplicity.

One of the implicit messages of my books is that this deriving of tests from a multiplicity of relevant values works reasonably well in respect to the religion clauses, as it does in respect to the Free Speech Clause among other constitutional standards. Further, the more specific tests that the Supreme Court has devised provide adequate guidance for most cases, and some uncertainty at the edges is tolerable. Critics contest my position at both of these levels.

### III. RELIGIOUS PREMISES AND JUSTIFYING RELIGION'S SPECIAL TREATMENT

An important aspect of the claim that I fail to engage the genuine or best justification of the religion clauses is that it leaves me without any satisfactory answer to the "daunting challenge"<sup>19</sup> of whether and why religion should be treated as special. Our culture and law have long treated religion as special. Yet it is said, from the standpoint of secular reason, it is hard to see why religion should be favored or disfavored in relation to otherwise similar convictions or philosophies that are not religious. Some theorists have built upon this doubt a modern nondiscrimination theory of how the religion clauses should be interpreted.<sup>20</sup> One version of the attack on my stance is that if we accepted a religious justification for free exercise and nonestablishment, both the task of discerning religion's special place and other issues about religious freedom would be simplified. I believe things are more complicated.

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17. See *id.* at 883–85.

18. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb-1 to -4 (2006)).

19. This term is from Smith, *supra* note 2, at 1887.

20. See, e.g., CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007).



I want to say at the outset that I do not quarrel with the idea that in their history both freedom of religious conscience and ideas of nonestablishment were largely the fruits of religious conceptions of God's relation to human beings and their political institutions. John Locke and James Madison, for example, relied substantially on religious convictions. Although I believe the historical story also includes secular Enlightenment ideas, as well as the political reality of diverse religious perspectives in the American colonies, I accept the prominence of religious roots for our conceptions of the relation of government to religion.

I welcome scholars and others pointing out these religious roots *and* further claiming that the most powerful justifications for both free exercise and nonestablishment still lie in religious understanding. John Garvey has urged that the soundest justification for free exercise is religious,<sup>21</sup> and Steven Shiffrin's recent book, *The Religious Left and Church-State Relations*, makes a strong argument that disestablishment is desirable largely because it is healthy for religion.<sup>22</sup>

My contention is that if Supreme Court Justices and other judges rely directly on religious premises, then that in itself amounts to a kind of establishment. Perhaps nearly all religions converge on the premise that religion—or at least their religion—is special, but particular religions will have different conceptions of proper relations between religion and the state. For the vast majority of issues, judges cannot rely on religious premises writ large. If they rely, it must implicitly or explicitly be on particular religious premises. If we assume, as I do here, that their genuine bases for decisions should usually find their way into opinions, courts would, as one of our basic organs of government, be announcing those premises as true or sound. This is to reject competing religious premises as false or unsound.

Steven Smith argues that I have reasoned in a circular way in asserting that for a government to take positions on religious truth is to establish

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21. See JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 42–57 (1996).

22. See STEVEN H. SHIFFRIN, THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS 34–36 (2009). Michael J. Perry has urged a religious basis for fundamental human rights. See Michael J. Perry, *Morality and Normativity*, 13 LEGAL THEORY 211 (2007). I believe the idea that all human beings, regardless of capacity, are equal is difficult to defend on nonreligious grounds other than as a desirable premise for the political life of liberal democracies.

religion.<sup>23</sup> The steps to my conclusion involve two senses of “establish”: ordinary and constitutional. If the government formally announces that Jesus Christ is the son of God,<sup>24</sup> that is to make official that religious proposition—to “establish” it in the common sense—even if no particular Christian denominations are favored. If the formal favoring of particular religious institutions over others is an unconstitutional establishment, it is a very modest move—one I do not hesitate to take—to regard the formal favoring of particular religious propositions similarly.<sup>25</sup> This conclusion by itself leaves open whether *some* religious propositions are so widely accepted in the United States, and so in accord with our historical traditions, that governments may embrace or endorse them.

One way to resist my argument against judicial reliance on religious truth is to claim that rather than resting on a perceived transcultural, transhistorical religious justification, the Supreme Court should refer to the religious justifications the Framers accepted as all or part of the basis for its own analysis. Such an approach might be defended as part of an account that treats original understanding as conclusive or gives it considerable weight.

Given the application of the clauses to the states through the Fourteenth Amendment, the relevant original understanding would need to include the congressional enactors and the ratifiers of both the Bill of Rights and the later amendment. Would we be able to find a common religious justification, given that some of the First Amendment’s enactors and ratifiers were deists who placed little stock in traditional religions, while others were devout Christians, and that many enactors and ratifiers of the original clauses approved of *some degree* of establishment within their own states? Would seeking the religious justifications provide modern Justices much help, in comparison with trying to determine more directly what the Constitution’s drafters and adopters conceived as the range of free exercise and nonestablishment—an inquiry I regard as wholly appropriate? I am very doubtful.

It helps to have in mind just what practical issues are posed in respect to the special treatment of religion. Five of these are as follows: (1) are religions exemptions from ordinary laws constitutionally required?;

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23. Smith, *supra* note 2, at 1893.

24. I do not count presidential addresses, or choices about inauguration ceremonies, or most statements by other individual officials as formal announcements in this context. Judicial opinions, as part of the law, are different.

25. Noah Feldman, however would allow the government considerable latitude in taking religious positions. See NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* (2005).

(2) must any exemptions be extended to analogous nonreligious claims?; (3) what may government, including public schools, proclaim as true?; (4) when may religious organizations be favored over other similar organizations?; and (5) when must religious organizations be refused benefits given to nonreligious ones?

As a very rough approximation we might conclude that the original intent on the first question was uncertain; that the Founders did not envision compelled equal treatment for analogous nonreligious claims; that they would have regarded approval of nondenominational Protestantism as fine—certainly that was the message of most nineteenth-century public schools in states with nonestablishment clauses; and that they conceived whatever favorable or unfavorable treatment that was constitutionally required, or acceptable, concerning religious institutions, not organizations that were nonreligious but with similarities to religious ones. I do not think that these attitudes would have changed very much by the time of the Fourteenth Amendment.

Would it help very much if we turned to religious justifications as conceived by the Framers? We know that Locke, in defending free exercise and a degree of nonestablishment, did not think the government needed to exempt claims of religious conscience from generally applicable laws not themselves directed at religious practices. With the historical effort to establish freedom of religious conscience, not many religious believers in the eighteenth century had turned their attention to nonreligious conscience or possible discrimination in favor of one nonreligious group over another. A significant number of Protestants in the late eighteenth century regarded the Pope as the antichrist and had a thoroughly negative opinion of Roman Catholicism. Their religious convictions might have embraced freedom of worship for Catholics, but most would not have blinked at state endorsement of Protestantism against Roman Catholicism and other religious views.

Rather than focusing on the practical implications the Founders themselves drew from their religious beliefs, we might ask what are the *fair* implications of their most fundamental religious convictions. Thus, we might suppose that someone with a strong religious conviction that a religious pacifist should not be compelled to join the military would probably conclude upon due reflection that were there genuine nonreligious pacifists for whom such violence would be similarly abhorrent, they also should be excused. And once Protestants acknowledged that Roman Catholicism was a legitimate, though misguided, religious understanding,

they would have foregone state sponsorship of Protestantism. But this kind of exercise brings us back to modern judges discerning and highlighting central premises of citizens of an earlier time over their actual beliefs, a use of judgment not so different from what has seemed objectionable in accounts like mine. In short, both because of their diversity and because of the dilemma of what to make of their historically contingent understandings, it is doubtful that a serious exploration of the religious justifications of enactors and ratifiers would help us much more than directly assessing what they took as the scope of free exercise and nonestablishment. It is also doubtful whether either endeavor can resolve a great deal about modern controversies.

Although I reject originalism—in both its textualist and intentionalist versions—as a complete theory of interpretation, I do think original understanding matters.<sup>26</sup> As time elapses, more general principles of the original understanding should have increasing importance in relation to views about specific practices, and the views of those with the greatest insight should also increase in comparative importance. This approach does confer substantial latitude on modern judges, but I believe that is largely inevitable for open-ended constitutional clauses because the original understanding and what it implies for many modern practices is so elusive in any event.

#### IV. ECLECTIC APPROACHES AND THE LIMITS OF REASON

My own position about constitutional interpretation is fairly labeled “eclectic.” I believe a range of considerations are relevant besides original understanding, however that is conceived, and that no neat ordering or precise method of weighing can be assigned. Indeed, the power of any one factor depends on the particular context and the decisiveness with which it points in one direction in a particular case. Among the relevant considerations beyond the applicable constitutional text are prior legal decisions and the principles they announce, traditions

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26. I have written about this at somewhat greater length elsewhere, and I aim to do substantial work on statutory and constitutional interpretation over the next few years. See Kent Greenawalt, *Constitutional and Statutory Interpretation*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 268 (Jules Coleman & Scott Shapiro eds., 2002). In pointing out, in *Religion and the Constitution: Establishment and Fairness*, that much modern doctrine in many areas of constitutional law is not consistent with originalism, I did not take that as necessarily showing the defects of originalism, only as demonstrating that failure to accord with original understanding cannot be presented as a distinctive flaw in respect to religion clause doctrine. See 2 GREENAWALT, *supra* note 1.

within the country, contemporary values and understandings, the implications of fundamental principles, and the desirability of standards that can give relatively clear guidance to judges and to citizens. It is a straightforward exercise to enumerate various issues in which my conclusions do not align with conclusions that would place overarching importance on any one of these considerations.<sup>27</sup> Whether my conclusions are defensible or not, the basis for them is my conviction that all the factors are relevant.

A simple historical example in which fundamental premises should have overridden existing law and more particular social assumptions was the status of Christian blasphemy. Once the legitimacy of non-Christian religions was recognized, a law making only Christian blasphemy a crime should have been treated as an impermissible establishment. That would have left open the options of having no crime of blasphemy or a crime that treats blasphemies of other faiths similarly—although the latter option is at odds with the modern law of free speech and free exercise. More controversially, perhaps, I think courts in the nineteenth century that recognized promotion of Protestant Christianity in public schools as inappropriate were correct. It is on such a basis that I conclude the words “under God” ideally do not belong in a Pledge of Allegiance required for public school classrooms, a practice that should now be accepted as constitutional only upon a judgment that at this time a contrary decision would be highly counterproductive.

A relatively narrow issue about which achieving manageable standards has seemed determinative to me is public high school teachers explaining their own religious positions in some depth and encouraging classroom debates about the truth and soundness of various religions.<sup>28</sup> For the great majority of high school classes, students will not easily discount teacher explanations as the mere opinions of individuals, and both those and classroom debates may often have the effect of putting down minority views. Though believing that in some high school classes explanations and discussions would not do any damage, I suggest an absolute restriction because it is too hard for teachers, school

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27. See, e.g., Smith, *supra* note 2, at 1898–1903.

28. See 2 GREENAWALT, *supra* note 1, at 125–29; see also Bellia, *supra* note 8, at 260–61 (discussing the advantages and disadvantages of an absolute rule for this and other issues).

administrators, and judges to distinguish acceptable circumstances from unacceptable ones.

Although the balance of factors strikes me as yielding one result or constitutional test rather than another, typically I do not suppose I can demonstrate that a person who comes out differently is wrong.

This leads me to the criticism of my reasoning process. How does our reason really work? Sometimes we believe that a careful chain of reasoning can show that one position is much more convincing than its competitor. I believe this is true about whether the Federal Establishment Clause was *only* a protection of state decisions whether to have their own religious establishments. The language of the Clause alone seemed clearly to preclude Congress from establishing Presbyterianism as the official religion of the to-be-created District of Columbia—an area that was to lie outside the territory of any state. I believe reason also establishes a proposition I have mentioned earlier: if government cannot establish any official church—or favor one church over all others—it cannot proclaim as true a religious doctrine that is embraced by one or two churches to the exclusion of others. Congress cannot proclaim, for example, that the true significance of communion is transubstantiation.

But very often, reason does not work this way and does not get us to the end of the line. We survey the reasons on each side. In respect to graduation prayers at public schools, we can say that the mild endorsement of a particular form of religious practice and the pressure on and offense to those who do not subscribe to the underlying premises point toward invalidation;<sup>29</sup> the sense of many parents and children that some recognition of God's presence enriches this highly significant marking of the completion of one of life's vital stages counts toward allowing the prayer. I do not believe there is some process of reasons that settles which side is stronger. I have a similar view of the complicated reasons for and against aid given on a neutral basis that nonetheless supports the religious functions of nonpublic schools. For these and many other matters, all I can honestly say is that the reasons on one side seem to be stronger than the reasons on the other. If we realize we are at such a point, we rely on our intuitive judgments—judgments influenced by our cultural heritage, particular upbringing, and professional training.

Steven Smith correctly points out that in general I come down on the “progressive” side, which I take to include fairly strong positions in favor of free exercise protection and nonestablishment. Is it a coincidence

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29. This group includes some deeply religious people who are opposed to what they see as watered-down religion.

that I was raised as a Protestant, my father strongly opposed hierarchy within religious organizations, and he was strongly separationist in his convictions? Almost certainly not. Does it make any difference that I am now a poorly observant Protestant whose view of Christian faith has been substantially influenced by the writings of Reinhold Niebuhr, tempered by life experiences in which I have been deeply moved by the caring goodness of those close to me? Almost certainly so. I have tried to provide an analysis that does not depend directly on these various influences, but I would be incredibly naïve to suppose I had banished them from affecting my judgment.

Given all this, perhaps it would be better to line up the reasons, say there are good arguments on each side, and leave the reader to decide. This *is* often a good approach when one is teaching students, but it is a kind of author's evasion, not welcomed by most readers, to withhold one's own sense about the balance of reasons. Thus, what a critic might label "bald pronouncements," I prefer to regard as my intuitive sense of the stronger side of an argument, one that I admittedly cannot show convincingly to be correct.

For what it is worth, on this issue I would not do better if I directly employed my religious convictions. They do not typically yield more decisive answers to the sorts of questions that are involved than the sort of "detached" reasoning one expects of judges and of scholars who are considering what judges should decide. No doubt, certain other religious convictions applied directly would yield more determinative answers to some problems, but I doubt that this is generally true if one sought guidance from the religious convictions of those who enacted the constitutional provisions or if one sought a kind of amalgam of modern religious convictions in the United States.

## V. SPECIAL TREATMENT FOR RELIGION

My approach leaves ample room to believe religion deserves special treatment. Such treatment is provided in the First Amendment's text: it fits with both the religious convictions of most of our population and with the perception of any sensitive observer that religion has, over the course of human history, made strong claims on participants and deeply influenced their sense of what really matters in human life. All this does

not require reliance on the truth of any religious conviction or on a religious justification of the religion clauses.<sup>30</sup>

When I have written that it will not matter much if the best justifications for the religion clauses lie in a religious perspective and that judges must rely on justifications that do not depend on religion, I am not supposing that *all* conceivable justifications will yield the same results; that would be silly. But I do not think it is crucial whether one starts from a premise that some religion carries the truth, or that religion in general is valuable, or instead starts with the nature of religion and its place in American life, with most of our citizens regarding religious ideas and organizations as deeply significant and valuable. These truths are sufficient to sustain constitutionally required exemptions, treat teaching religion in public schools differently from teaching other ideas, bar judicial resolutions of religious doctrine, and permit a priest-penitent privilege that is more absolute than other privileges not to disclose confidential information. Whether grants of exemptions to religious claims of conscience should, and must, be extended to nonreligious claims is more debatable. I conclude that if particular kinds of individual nonreligious claims of conscience are common and truly analogous to religious ones, and if they do not present added dangers of fraud, they should be treated comparably.

Although I have written about “fairness” in relation to religion and the state, I do not perceive that as barring a jurisdictional approach, as conceiving some domains within our society, notably including churches and similar institutions of other religions, as largely outside the scope of state authority. Some doctrines I defend are best seen in these terms, and Richard Garnett and Paul Horwitz have presented strong arguments why such a conception should play a larger role than I have accorded it.<sup>31</sup>

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30. Some might say that relying on the importance of religion in people’s lives is a kind of religious justification. If so, it is a kind of religious justification I embrace. It may fairly be said that my approach assumes a kind of “free church” understanding of the relation of church and state. See Winnifred Fallers Sullivan, *Requiem for the Establishment Clause*, 25 CONST. COMMENT. 309, 309–10, 316 (2008). I believe both that that understanding, a version that leaves open what internal government within religions should be, is part of our constitutional heritage *and* that for most circumstances it is healthy for religions, even those like Roman Catholicism and Anglicanism that traditionally have conceived a closer connection of religion to government.

31. See Garnett, *supra* note 5, at 275; Richard W. Garnett, *The Freedom of the Church*, 4 J. CATHOLIC SOC. THOUGHT 59 (2007); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009); Horwitz, *supra* note 5, at 289–90.



Of course, drawing the line between religion and nonreligion, between religious institutions and nonreligious institutions, is complicated. In most actual instances, there is little doubt, but as with most social categorizations, difficult borderline cases arise. I support an approach that does not involve necessary and sufficient conditions, but asks whether the disputed instance is similar to undisputed, core examples of religion.

Although I may not have made this adequately clear, I believe borderline instances should be examined in light of the reasons why religion is treated as special.<sup>32</sup> Thus, the religion clauses and the reasons underlying them should influence categorizations to a considerable degree. Still, I do not think phenomena that fall outside any ordinary sense of “religious,” such as atheism, Marxism, and Benthamite utilitarianism, should be treated as religious on the basis of a moral or legal judgment that equality of treatment with standard religions is warranted in some respect. A constitutional judgment that atheists who are genuine pacifists should be treated like religious pacifists should be based on demands of equality derived from the religion clauses themselves and the Equal Protection Clause, not upon a preliminary conclusion that these convictions are, after all, religious views within the meaning of the religion clauses.<sup>33</sup>

## VI. PERVASIVE SKEPTICISM

Given all that I admit about the limits of reason, do I have any basis to resist a thoroughgoing skepticism about constraints on legal decisions? I believe, given accepted traditions of judgment, that it is only in difficult cases that one can think of the reasons on each side as being fairly equally balanced. And even then judges are not simply left to implement their own particular visions of desirable political life; they are constrained by authoritative legal sources, their sense of values dominant in the culture, and what can fairly be drawn out of these sources. Further,

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32. Larry Alexander expresses doubt that my approach allows normative considerations to play a role. See Larry Alexander, *Kent Greenawalt and the Difficulty (Impossibility?) of Religion Clause Theory*, 25 CONST. COMMENT. 243, 244 (2008).

33. To be somewhat more precise, atheism is undoubtedly a view *about* religion. The Free Exercise Clause guarantees a right to reject all religious views, and the Establishment Clause protects against some forms of government favoritism towards religion over its rejection.

although one cannot expect universal agreement about any of the competing approaches to religious freedom, the nature of religion and liberal democracy can provide guidance, with concepts like fairness and neutrality playing significant roles. Is there room for judgment and disagreement? Yes. Does that mean that all we have in the final analysis are the personal political preferences of judges? I do not think so.

A somewhat different form of skepticism, one that is more modest, does not challenge the possibility of coherence but claims that the Supreme Court's decisions in this area are radically irreconcilable. Because any answer to this criticism demands close analysis of many cases, I will not repeat here my response to that form of skepticism.<sup>34</sup>

## VII. PRACTICAL CONCERNS

This brings us to the very serious practical responses to the complexity and the degree of indeterminacy that I suggest: judges need simpler, more absolute principles and rules, or they should defer to the political branches. These questions touch virtually *all* constitutional protection of individual rights, not only the religion clauses.

The proposal for more straightforward and absolute principles and rules *could* be made about the underlying approaches to determining concrete constitutional standards. A kind of pure textualism, focusing either on original meaning or what the text conveys in ordinary language today, might be proposed as such an alternative. Without delving deeply into theories of constitutional interpretation, I shall say only that such an approach omits too much that should be relevant.

A more appealing argument for simplicity is in respect to matters that lie closer to the surface of decision—the governing standards courts are to apply and perhaps principles that lie immediately behind these. A rule of “no government teaching of religious truth,” backed by a broader principle against government sponsorship of religious views, would qualify in this respect. As some critics have noted, I actually support a number of concrete standards that are relatively precise,<sup>35</sup> but I also support a substantial burden-compelling interest standard for free exercise exemptions and an inquiry into whether government displays of

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34. Frederick Mark Gedicks defends his thesis that Supreme Court decisions have rested on two incompatible approaches against my suggestions about reconciliations. See Gedicks, *supra* note 7, at 279–83.

35. See Bellia, *supra* note 8, at 260–62; Marc DeGirolami, *Tragic Minimalism: A Theory of Religious Liberty* (May 2010) (unpublished doctoral dissertation, Columbia Law School) (on file with author). I think some of these standards flow directly from the best understanding of the religion clauses; others are called for by judicial manageability.

religious symbols—such as crèches—do support a religious view or are dominantly secular. These inquiries are complex. Executive officials and lower courts may disagree about applications, and affected individuals and citizens may not know what courts will decide.

We can conceive the uncertainty problem as involving indeterminacy about resolution by the Supreme Court, variations among lower courts, and inadequate guidance to citizens and officials about what is required and permitted. The cost of uncertainties of these kinds varies tremendously among different subjects of legal standards; the costs, whatever they are, need to be compared with those of the alternatives.<sup>36</sup> My present sense is that the costs in the areas I have noted are not particularly great.

Very few situations are even litigated, and an extremely small percentage will rise to the Supreme Court. Indeterminacy about what the Court will or would decide is not of overarching significance in and of itself. As far as free exercise exemptions are concerned, the only plausible alternative to a balancing approach is to deny exemptions across the board, the result in *Employment Division v. Smith*. Unless altered by legislation, that alternative is worse for prisoners and others who seek accommodations than is a flexible balancing approach, and given the deference to official judgments denying exemptions,<sup>37</sup> the balancing approach's uncertainty does not impose an undue hardship on officials. Something similar may be said about public displays of religious symbols. In considering the virtue of clear rules, it helps to remember that in some local communities, very clear nonestablishment rules laid down by the Supreme Court, such as no oral prayer by public school teachers and their classes, have been disobeyed without formal complaint. The fact that lower courts will reach different conclusions from each other about borderline situations is moderately troubling, but the resulting differential treatment is not a major social problem, and those raising constitutional claims will certainly prefer occasional uncertainty to rules that render their claims totally ineffective.

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36. See Bellia, *supra* note 8, at 259–61; Tebbe, *supra* note 8, at 317, 319–20.

37. The deference is especially great for prison officials. See *Cutter v. Wilkinson*, 544 U.S. 709, 717, 723 (2005). Given the latitude that these officials have, it will be an unusual circumstance when an accommodation that falls within the bare minimum that a court would demand will cause genuine interference with prison operations.

An approach that involves very substantial deference to the political branches is one kind of clear rule or principle,<sup>38</sup> and it shows respect for the judgments of elected branches.

What should courts do if legislatures and the executive branch, politically responsible to the electorate, have adapted measures that one might reasonably defend as constitutional? My bottom line here is that in respect to many constitutional guarantees, political actors, ranging from legislators to prison officials, are not sufficiently to be trusted to respect unpopular, idiosyncratic claims of rights.<sup>39</sup> We need the extra protection that courts that are not highly deferential can provide. Also important, for most areas, is that courts provide extra protection for individual rights even if judges are no more favorable overall to those rights than are legislatures or executive officials. That is because the impairment of rights requires *both* legislative approval and court acceptance. This analysis holds true for most free exercise claims that do not raise serious establishment problems. Because impingements on free exercise require legislative or executive action in the first place, active judicial review can only add to free exercise protection. In respect to possible establishments that do not raise serious competing free exercise claims, judicial review of legislative and executive action can only contribute to nonestablishment. Of course, when a court's sustaining of an argument that rests on nonestablishment does impinge on free exercise, or vice versa, a judicial decision upholding the claim that the political branches have acted unconstitutionally will either curtail free exercise or allow establishment to a greater degree than the legislature or executive has chosen. Although the "inevitable extra protection" argument does not apply simply to those situations, nevertheless, given that religion clause claims are often raised by minorities, the basic supposition that judges are more capable of giving a balanced appraisal holds even then.

## VIII. CONCLUSION

I have quickly surveyed some absolutely fundamental questions about how the religion clauses should be understood. Whether or not the criticisms raised against my own approach have been phrased just as I

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38. See Garnett, *supra* note 5, at 276–77.

39. Before invoking James Bradley Thayer's "clear mistake" approach, we do well to recall that his main practical concern was the Court's substantive due process decisions about economic regulation. See James B. Thayer, *Constitutional Law: The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

would like them, they have demonstrated how contestable are many of my underlying assumptions and conclusions. My effort here has been to explain some of these assumptions and conclusions, and suggest certain drawbacks to alternatives. I have not provided decisive refutations of competing perspectives, but I hope I have helped clarify just what is at stake.

