Legal Studies Research Paper Series

Research Paper No. 11-060
August 2011

The Paralyzing Paradox of Religious Neutrality

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[1] THE PARALYZING PARADOX OF RELIGIOUS NEUTRALITY

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Religious freedom entails that government must be neutral in matters of religion. A government committed to religious freedom must therefore refrain from endorsing or disapproving any religious view, or from taking sides among the various competing religious views. Let us call this the "neutrality proposition."

The neutrality proposition is one that seems, to many scholars and judges today, axiomatically true. Not surprisingly, therefore, the proposition has been widely embraced by jurists and theorists; it has become a central element in American religion clause jurisprudence. Although the neutrality proposition may be axiomatic, however, looked at more critically, the proposition also seems manifestly untenable, and self-subverting.

In this conundrum lies a potentially paralyzing paradox for religious freedom. We will explore that paradox in this essay.

I.

The neutrality proposition is closely linked to the familiar idea that religious *freedom*, in its full realization, demands more than *toleration*. A government content to be merely tolerant might maintain an established church or, short of that, might endorse or support or align itself with contested creeds or faiths, while conceding to adherents of nonestablished religions (or of no religion) the liberty to profess and practice their unfavored faiths. These dissenters would be

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tolerated, but they would still in a sense be outsiders or second-class citizens– subjects to be "put up with" rather than fully included as equals. Or so it may seem. To modern egalitarian sensibilities, this differential treatment is unacceptable: mere toleration is intolerable. Michael Walzer explains the objection, and the aspiration.

> To tolerate someone else is an act of power; to be tolerated is an acceptance of weakness. We should aim at something better than this combination, something beyond toleration, something like mutual respect.[2]

Full religious freedom, in short, seems to require more than toleration; it seems to mean that government must treat all religions and religionists (and nonreligionists) *equally*. This equality in turn seems to entail *neutrality* toward religion on the part of government. After all, if government by its words or actions conveys approval of one religion or one family of religions (such as Christianity) among many, then even if the government refrains from coercive measures, how can it be said that government is treating the different religions and different believers (or nonbelievers) equally? So it turns out that religious equality and religious neutrality is two sides of the same liberal coin. Or so it may seem.

The transition from mere religious toleration to full religious freedom, and hence to religious equality, and hence (by implication) to religious neutrality, was indicated early on in American history. When Virginians were adopting their Declaration of Rights, George Mason offered a proposal to protect "the fullest Toleration in the Exercise of Religion." A young James Madison objected, and succeeded in having Mason's proposal replaced by a measure providing

[2] Michael Walzer, On Toleration 52 (1997) (footnote deleted).

that "all men are *equally* entitled to the full and free exercise of religion, ..."[3]

Neutrality, though, is more than just a conceptual corollary of a commitment to religious freedom. In addition, at least in a religiously diverse society, neutrality may seem to be a practical political necessity. If citizens identify with a variety of different faiths or worldviews, it will be difficult for government to approve or appeal to one of those faiths or worldviews without thereby alienating or losing the support of the adherents of competing views. The obvious lesson, it may seem, is that government should maintain a diplomatic neutrality among the various faiths and views.

Not surprisingly, therefore, as religious diversity in the United States increased, the imperative of neutrality imposed itself ever more forcefully on the legal understanding. A landmark case in the American constitutional regime was *Abbington School District v. Schempp*.[4] In that case, a more reasoned sequel to the previous term's peremptory *Engel v. Vitale*,[5] the Supreme Court ruled that the longstanding practice in many public schools of beginning the school day with a brief Bible-reading and prayer exercise violated the Constitution. The majority opinion by Justice Tom Clark and concurring opinions by Justices William Brennan, Arthur Goldberg, and William Douglas all emphasized the state's obligation of religious neutrality. Even the lone dissenter, Justice Potter Stewart, joined in affirming this obligation, although (for reasons we will return to) Stewart disagreed with the conclusion

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[3] The incident is recounted in John T. Noonan, Jr., The Lustre of Our Country: The American Experience of Religious Freedom 69-70 (1998).

[4] 374 U.S. 203 (1963).

[5] 370 U.S. 421 (1962). I discuss the cases and their significance at much greater length in Steven D. Smith, Constitutional Divide: The Transformative Significance of the School Prayer Decisions, 38 Pepperdine L. Rev. 945 (2011).

condemning school prayer.

Since *Schempp*, the Court has emphasized over and over again the government's obligation to remain neutral both among religions and as between religion and nonreligion.[6] The Court has attempted to embody this obligation in a doctrine– the so-called *Lemon* test[7]– that basically equates neutrality with governmental secularity: government remains neutral toward religion, the doctrine assumes, by confining itself to acting for secular purposes and in ways that do not either advance or inhibit religion. On the basis of this doctrine and the obligation of neutrality implicit in it, the Court has invalidated numerous laws and practices, including forms of aid to religious schools,[8] public school policies or curricula that oppose evolution,[9] and governmental religious expressions such as nativity scenes or Ten Commandments displays.[10]

The commitment to religious neutrality is evident not only in law but in political philosophy as well. John Rawls's influential account of political liberalism can be taken as representative. Although over time he qualified the constraint in various ways, Rawls's essential contention was that in debating and deciding the most important public issues, citizens and officials should refrain from appealing to their "comprehensive doctrines" (of which a religious

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[6] See, e.g., McCreary County v. ACLU, 545 U.S. 844 (2005); Epperson v. Arkansas, 393 U.S. 97 (1968).

[7] The doctrine is named after the case in which it was annouunced, Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[8] See, e.g., Aguilar v. Felton, 473 U.S. 402 (1985); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).

[9] Edwards v. Aguillard, 482 U.S. 578 (1987); Epperson v. Arkansas, 393 U.S. 97 (1968).

[10] E.g., McCreary County v. ACLU, 545 U.S. 844 (2005); County of Allegheny v. ACLU, 492 U.S. 573 (1989).

faith is probably the most obvious instance) but should instead confine themselves to a more generally available "public reason" reflecting a "overlapping consensus."[11] Other prominent philosophers, including Robert Audi,[12] Stephen Macedo,[13] and even Charles Taylor,[14] have elaborated similar positions. Vocabulary differs, of course, but a "religious neutrality" theme is conspicuous in all of these positions.

In sum, religious neutrality can seem to be a necessary concomitant of full religious freedom as well as a political necessity in a religiously diverse society. Critics point out, to be sure, that the courts have been erratic in enforcing this obligation of religious neutrality: courts have found ways to uphold or excuse expressions such as "under God" in the Pledge of Allegiance,[15] the national motto ("In God We Trust"),[16] and a Ten Commandments monument on the Texas state capital grounds.[17] Notwithstanding this inconsistency in implementation, however, the ideal of neutrality has been overwhelmingly and repeatedly approved.

Thus, the obligation of religious neutrality is treated as essential and central both in law and in a good deal of contemporary political philosophy. There is one awkward inconvenience,

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[11] See generally John Rawls, Political Liberalism (paperback edition 1996).

[12] See, e.g., Robert Audi, Religious Commitment and Secular Reason (2000).

[13] See, e.g., Stephen Macedo, In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases?, in Natural Law and Public Reason 11, 13 (Robert P. George & Christopher Wolfe eds., 2000).

[14] See Charles Taylor, Modes of Secularism, in Secularism and Its Critics 31 (Rajeev Bhargava ed., 1998)

[15] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49-50 (2004).

[16] Newdow v. Lefevre, 598 F.3d 638 (9th Cir. 2010).

[17] Van Orden v. Perry, 545 U.S. 677 (2005).

however: upon closer reflection, it seems that . . . . religious neutrality is impossible.

II.

We can appreciate the difficulty on more than one level. Start with the matter of justification. Religious freedom is not a political inevitability, or a universally self-evident good; a quick survey of history or global politics today should make that much painfully clear. Consequently, it seems that a commitment to religious freedom calls for justification. The justification will necessarily contain, at least implicitly, some understanding of what religion is, and it will offer reasons why religion is deserving of distinctive legal treatment of some kind. These reasons will themselves necessarily contain, at least implicitly, ideas about freedom, law, and the proper role of government. Of course all of these matters– religion, freedom, law, government– have been the subjects of intense reflection and debate, and such reflection and debate has given rise to and manifested itself in a variety of theological, philosophical, and political "comprehensive doctrines" (to borrow Rawls's term). The upshot is that justifications for religious freedom will inevitably assert, or sound in, or presuppose one or another comprehensive doctrine.[18]

Historically, the defense of religious freedom in Western nations has centrally depended on (contestable) religious premises. Although the justifications have been various, perhaps the most common and influential justifications have been one form or another of what we can call the "voluntary faith" rationale. "[T]rue and saving religion consists in the inward persuasion of

[18] The point is elaborated in Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom 63-75 (1995).

the mind," John Locke insisted, "without which nothing can be acceptable to God. And such is the nature of the understanding that it cannot be compelled to the belief of anything by outward force."[19]

James Madison elaborated this idea in his celebrated *Memorial and Remonstrance Against Religious Assessments*.[20] Madison contended that religious duty, or "the duty of every man to render [homage] to the Creator," is "precedent, both in order of time and in degree of obligation, to the claims of Civil Society." But the content of religion, and hence of this religious duty, must be determined by each person for himself: that is because "the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men. . . . ." Consequently, "[t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."

The classic "voluntary faith" rationale for religious freedom can be broken down into two main claims. First, religious goods or duties are of extraordinary value or importance, exceeding more mundane goods and duties. "What is a man profited, if he shall gain the whole world, and lose his own soul?"[21] Second, religious goods (like salvation) can only be obtained, and religious duties can only be discharged, by a sincere and voluntary exercise of faith. Both claims are theological in character; not only that, but they are propositions upon which religionists and

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[19] John Locke, A Letter Concerning Toleration, in John Locke, The Second Treatise of Government and A Letter Concerning Toleration 119 (Dover ed. 2002)

[20] The *Memorial and Remonstrance* is reprinted in The Sacred Rights of Conscience 309 (Daniel L. Dreisbach and Mark David Hall eds. 2009).

[21] Matt. 16:26.

theologians (and others) have differed. Not everyone agrees that religious goods and duties are superior to other kinds of goods and duties; indeed, skeptics believe that such goods or duties are illusory. And not all religionists believe that only a voluntary faith has value.[22] Consequently, it would seem that government could not endorse these propositions– and acting on the propositions is perhaps the most genuine and emphatic form of endorsement[23]-- without violating the obligation of religious neutrality. But remove these claims, or either of them, and the classic justification for religious freedom loses its force.

In this way, a neutrality-oriented religious freedom, by rendering its own supporting rationales inadmissible, can have a self-cancelling quality. To make the point less abstract, consider Thomas Jefferson's Virginia Statute for Religious Freedom, arguably the seminal legal enactment of religious freedom in the United States.[24] The Statute began by setting forth, in an eloquent preamble, its justification: "Almighty God hath created the mind free," and governmental coercion in matters of religion is "a departure from the plan of the holy author of our religion, who being lord both of body and mind, yet chose not to propagate it by coercions

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[22] Cf. Steven H. Resnicoff, Professional Ethics and Autonomy, in Law and Religion 329, 334 (Richard O'Dair & Andrew Lewis, eds., Oxford University Press, 2001) (emphasis added, footnotes omitted):

> In a society governed by Jewish law, rabbinic leaders would use coercion– including physical force if necessary– to induce an individual to perform a commandment requiring a specific action. . . . Jewish law believes that a person is metaphysically affected by his deeds. Fulfillment of a commandment, even if not done for the right reason, leads a person to performing more commandments and, *ultimately, to doing so for the right reason.* . . . Thus, such coercion leads to the coerced individual's ultimate perfection.

[23] See infra notes and accompanying text.

[24] Although the statute applied only to Virginia, the Supreme Court later read the statute into the First Amendment, so that it became the source of the meaning of the Establishment Clause as well. See Everson v. Board of Education, 330 U.S. 1, 13 (1947).

on either, as was in his Almighty power to do."[25] This rationale is plainly an endorsement of a particular religious position. Ironically, therefore, under any uncontorted application of current constitutional doctrine, which in the spirit of neutrality purports to forbid government to endorse religion,[26] Jefferson's celebrated statute is patently unconstitutional *as a violation of religious freedom.*

Of course, the "voluntary faith" rationale is not the only justification for religious freedom; indeed Madison's *Memorial and Remonstrance* went on to give a variety of other justifications. Some of the other major historical rationales are also theological in nature,[27] however, and hence run afoul of the neutrality proposition in the same way the "voluntary faith" rationale does. But other rationales do not appear to be theological in nature. So, perhaps religious freedom, with its corollary of religious neutrality, could be adequately justified by purely secular rationales?

This appears to be the strategy of choice among contemporary proponents of religious

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[25] Virginia Act for Religious Freedom, reprinted in The Sacred Rights of Conscience 250 (Daniel L. Dreisbach and Mark David Hall eds. 2009).

[26] See, e.g., Allegheny County v. ACLU, 492 U.S. 573 (1989).

[27] For example, Christians have often made a jurisdictional argument suggesting that God has divided reality into "spiritual" and "temporal" domains and has not given the secular state jurisdiction over the spiritual sphere. For example, the eighteenth-century Connecticut legislator and Yale rector Elisha Williams: "[I]f CHRIST be the *Lord* of *Conscience*, the sole King in his own Kingdom; then it will follow, that *all such* as in any Manner or Degree *assume* the Power of directing and governing the Consciences of Men, are justly chargeable with *invading* his rightful Dominion; He alone having the Right they claim." Elisha Williams, The Essential Rights and Liberties of Protestants: A Seasonable Plea for the Liberty of Conscience, and the Right of Private Judgment, In Matters of Religion, Without any Controul from human Authority 12 (1744).

freedom.[28] One difficulty with the strategy is that the persuasiveness and the implications of the non-theological rationales appear to depend on complex historical contingencies. Consider one of the most common justifications– namely, that because religion can be contentious, religious freedom is the best way of avoiding divisiveness and securing civil peace. Among current Justices, Stephen Breyer in particular tends to emphasize this rationale.[29] But the truth and force of the rationale seem entirely contingent. Imagine a mostly religiously homogeneous society in which a small dissenting sect has developed. Is the best strategy for maintaining civil peace to forswear reliance on the society's traditional religion and embrace religious neutrality? Or to ignore, suppress (or even deport, or exterminate) the minority? It is hard to say in the abstract: the answer, as they say, "depends on the facts."[30]

As a contemporary illustration of this uncertainty, think of the controversy over the words "under God" in the Pledge of Allegiance. Michael Newdow, the plaintiff in a much discussed challenge to the phrase,[31] argues plausibly that these words are inconsistent with a commitment to religious equality and neutrality. But as the public reaction to an appellate court decision agreeing with Newdow's position demonstrated, if the goal is to reduce civil division, a judicial decree invalidating the words will likely provoke more anger and division that it will

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[28] See, e.g., Kent Greenawalt, Religion and the Constitution: Establishment and Fairness 482-96 (2008); Douglas Laycock, 1 Religious Liberty: Overviews and History 67 (2010).

[29] See, e.g., Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring).

[30] For a helpful discussion, see Richard W. Garnett, Religion, Division, and the First Amendment, 94 Geo. L.J. 1667 (2006).

[31] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

allay.[32]

Given the contingency of the non-theological rationales, contemporary thinkers who trust to these rationales as an adequate support for a commitment to religious freedom may well be trading on cultural capital remaining from a particular political tradition of religious freedom built in large part on the strength of theological rationales like those asserted by Madison and Jefferson. Whether that commitment can remain vigorous without the support of those rationales is doubtful.[33]

In this respect, a recent essay by Douglas Laycock is instructive.[34] Laycock has long been a leading proponent of religious neutrality, and he has insisted that although neutrality excludes reliance on the theological rationales that were historically important, secular justifications are nonetheless fully adequate to maintain that commitment.[35] In the recent essay, however, Laycock notes increasing opposition to the very idea of religious freedom. Gay rights advocates regard religious freedom as an obstacle to achievement of their goals; atheists, agnostics, and nonreligious citizens see religious freedom as unwarranted "special interest" favoritism. In the past, when nearly all Americans identified with one religion or another, religious freedom could be viewed as a mutually beneficial non-aggression treaty; but those

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[32] Cf. Martha C. Nussbaum, Liberty of Conscience: In Defense of America's Tradition of Religious Equality 314 (2007) ("Given public feeling on the issue, it would cause a national crisis were the Supreme Court to say that the words 'under God' are unconstitutional.").

[33] I have developed these doubts at greater length in Steven D. Smith, Religious Freedom and Its Enemies, 32 Card. L. Rev. 2033 (2011); Steven D. Smith, Discourse in the Dusk: The Twilight of Religious Freedom (reviewing Kent Greenawalt, *Religion and the Constitution: Establishment and Fairness*), 122 Harv. L. Rev. 1869 (2009).

[34] See Douglas Laycock, forthcoming.

[35] See Laycock, supra note

conditions no longer obtain. In the end, Laycock laments the perceived decline in support for religious freedom, but he has little to say to those who challenge the justification for this commitment. His essay is more successful in explaining why various constituencies are doubtful about religious freedom than in explaining why they are wrong to doubt.

In short, the propensity of a neutrality-oriented version of religious freedom toward self-subversion is no longer just an academic curiosity. Even so, for purposes of discussion, let us now bracket this concern about justification and suppose that the basic commitment to religious freedom is safe and secure after all. With one difficulty stipulated away, another promptly appears. That is because the neutrality proposition creates serious problems on the level of application as well.

III.

On the level of application or implementation, the basic objection can be simply and crudely stated: *religious neutrality is not religiously neutral.* We can set to one side the most obvious form of this objection– namely, the claim that some religious citizens do not favor religious neutrality, so that in rejecting their beliefs (which may be religious in character), religious neutrality is itself a self-defeating violation of religious neutrality. Proponents of neutrality try to deflect this objection with what they take to be a logically necessary exception: they say that government must neutral toward all views *except* those that reject religious neutrality, or religious freedom.[36] We need not try to decide here whether this attempt at deflection succeeds, however, because the difficulty remains with respect to religious positions

[36] See, e.g., Laycock, supra note at 60-61.

that are happy enough to sign onto a basic commitment to religious freedom, or even to religious neutrality, but who understand that commitment in different ways.

This problem was apparent in the Supreme Court's first major and deliberate affirmation of religious neutrality– namely, in the *Schempp* case. As noted, most of the Justices in the case thought that neutrality precluded prayer and Bible-reading exercises in public schools.[37] While agreeing that the Constitution requires governmental neutrality toward religion,[38] however, Justice Potter Stewart pointed out that many citizens believe (sometimes as a matter of their own religious faith) that prayer is a public obligation, and that it should be said in the schools. In rejecting the religious beliefs of these citizens, Stewart reasoned, a ruling prohibiting school prayer offended neutrality.

So, which conclusion was correct? But the question is a hopeless one because, depending on which facts and views one chooses to look at, both positions were cogent. Thus, the majority applied the neutrality requirement with an eye to those (such as the plaintiffs) who opposed the Bible and prayer exercise, and so the Court plausibly concluded that *school prayer* was not neutral. Justice Stewart, by contrast, seemed more cognizant of those who believed that public prayer was proper or obligatory, and he accordingly inferred that *a prohibition of school prayer,* by rejecting the religious beliefs and commitments of these citizens, violated neutrality. Both views made sense by reference to different constituencies– to people who disbelieve in and oppose prayer in public schools, and to people who believe that such prayer is good or even obligatory– that are real enough (as the ongoing controversy over school prayer reflects). So the

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[37] See text accompanying supra note

[38] 374 U.S. at 313 (Stewart, J., dissenting).

logical conclusion is that either school prayer or a prohibition of school prayer rejects and violates *someone*'s beliefs, and hence to that extent is not neutral.

The conundrum is even more starkly apparent in another case decided by the Court a few years after the school prayer cases. In *Epperson v. Arkansas*,[39] the Court struck down an Arkansas law, adopted in the 1920s, which prohibited the teaching of evolution in the public schools. In *Epperson* the Court was more than normally emphatic about the obligation of neutrality. "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice," the Court solemnly intoned. Consequently, "the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion. *This prohibition is absolute.*"[40] The Court also said that evolution is inconsistent with the teachings of some religions, and that Arkansas had adopted the law in order to insulate such religions against contrary views; that motivation made the law less than neutral toward religion, and hence constitutionally invalid.[41] And perhaps the Court was right. But on the Court's own premises– namely, that evolution directly contradicts the teachings of some religions and that the Constitution imposes an "absolute" prohibition against a school curriculum that "'aid[s] or oppose[s]' any religion," it follows with at least equal logical force that the *teaching of evolution* in the public schools is constitutionally prohibited.[42] Thus, without going beyond the Court's

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[39] 393 U.S. 97 (1968).

[40] Id. at 103, 106 (emphasis added).

[41] Id. at 107-09.

[42] I say "with at least equal logical force" because in fact the Court's conclusion requires an additional premise– namely, that the Constitution prohibits laws or measures that might not themselves "aid or oppose" religion but that are *motivated by* a purpose of aiding or opposing religion– that might be contestable, and that the counterargument does not require.

own assertions, one can logically conclude (a) that the Constitution forbids states to prohibit the teaching of evolution and (b) that the Constitution forbids states to teach evolution.

In fact, the problem is not limited to measures or laws addressing issues like prayer or evolution that everyone thinks of as touching on some people's religion. A wide range of laws at least implicitly reject some people's religious beliefs. When government wages war, it at least tacitly rejects the views of religious pacifists, such as Quakers. Laws requiring parents to obtain medical treatment for their children reject the beliefs of parents– Christian Scientists and others-- who are religiously opposed to such treatment. A law prohibiting racial discrimination rejects the beliefs of people who have a religious basis for favoring racial segregation– the Aryan Nations Church, for example. In a nation of over three hundred million diversely-minded citizens, it is a fair bet that almost anything government does will be at odds with, and will effectively reject, the religious beliefs of at least a few citizens.

Andrew Koppelman, another prominent defender of religious neutrality, responds that on this logic, a law prohibiting murder involves a rejection of the religious beliefs of Aztecs who favor human sacrifice.[43] Koppelman offers the example, it seems, in an effort to trivialize the objection, but in fact his example merely serves to underscore the problem.

It may be that there are few if any Aztecs in the United States today who are religiously committed to human sacrifice. And even if there are a few lingering devout Aztecs, the trade-off between respecting their religious freedom and protecting human life will be an easy one. Even so, the Aztecs religious beliefs will have been rejected. Thus, Koppelman's example shows not

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[43] See Andrew Koppelman, The Troublesome Religious Roots of Religious Neutrality, 84 Notre Dame L. Rev. 865, 885 (2009).

that neutrality is possible, but only that the impossibility of adhering to such a position is more vividly obvious in some situations than in others.

Indeed, Koppelman acknowledges that "any time the state does anything, it is implicitly endorsing some religious claims and rejecting others."[44] He attempts to minimize the significance of this concession by introducing a distinction between "implicit" and "explicit" endorsements: now, it seems, the government *can* endorse or disapprove religious beliefs so long as it does so implicitly rather than explicitly. By this point, though, the case for neutrality is growing desperate. For one thing, the implicit/explicit distinction is an elusive one.[45] Suppose a biology teacher in a public school says, "All of the evidence indicates that life evolved over millions of years": is this an "explicit" or "implicit" rejection of the belief that the world was created in six days? And why should it matter anyway? The implicit/explicit distinction does not answer to the purposes that support a commitment to religious neutrality. If government says or does things that clearly reject some people's religious beliefs and are perceived as doing so, what difference does it make whether the rejection is "explicit" or "implicit"? Either way, the judgment of rejection is both real and understood.[46]

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[44] Id.

[45] For criticism of the distinction, see Steven D. Smith, Barnette's Big Blunder, 78 Chicago-Kent L. Rev. 625, 645-47 (2003).

[46] Indeed, Koppelman himself elsewhere recognizes and even insists on the point; he contends that laws based on religious beliefs violate the Constitution by implicitly endorsing religion and thereby violating neutrality. See Andrew Koppelman, Secular Purpose, 88 Virg. L. Rev. 87, 110-12 (2002):

> The axiom that government may not declare religious truth entails restrictions on government conduct. It is a familiar point in free speech law that conduct which is not itself speech may nonetheless communicate a message and so be appropriately treated as speech. This means that the Establishment Clause's restriction on government speech is also a restriction on symbolic conduct. If government cannot

Koppelman also employs another more sophisticated strategy– one used by various theorists, often in less elaborate form– to salvage the ideal of neutrality.[47] Neutrality, the argument goes, is not a self-implementing ideal; it depends on what is usually described as a "baseline."[48] Think about an athletic contest– a baseball or basketball game, for example. The umpires or referees are expected to be "neutral" in officiating the game. This expectation entails that the officials will enforce the rules, whatever they are, evenly and consistently against both teams. The requirement of neutrality has meaning relative to the "baseline" of the rules of the game; conversely, without such rules, the demand that the officials call the game in a "neutral" fashion would have little meaning. Moreover, so long as the officials enforce the rules consistently, they are behaving "neutrally," even though they will call fouls against some players and in favor of others, and even if they call more fouls against one team than against the other.

Similarly, given some constitutional baseline about how government is supposed to treat religion, the government can be neutral by complying consistently with that baseline, or by

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> declare religious truth, then it cannot engage in conduct the meaning of which is a declaration of religious truth. . . .
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> Suppose a statute is passed that makes it a crime for anyone to break the commandment to obey the Sabbath, as that commandment is understood by Orthodox Jews. That is, the law makes it a felony to operate machinery on the Sabbath, to drive a car, to turn on an electric appliance, or to make a telephone call, and the law applies to private as well as public conduct, so that one can violate it by turning on the television while one is alone at home. There is no substantive constitutional right to do any of these things. The problem with this law lies in the message it contains: It implicitly asserts the correctness of the commandment to keep the Sabbath holy and of the Orthodox rabbis' interpretation of that sentence. It declares religious truth.

[47] See Koppelman, supra note ; Andrew Koppelman, Religious Neutrality in American Law (forthcoming).

[48] See also Laycock, supra note at 17-19; Larry Alexander, Liberalism, Religion, and the Unity of Epistemology, 30 U. San Diego L. Rev. 763, 793 (1993).

enforcing it evenly against all citizens and institutions, whatever their religious beliefs or dispositions. Or so the argument goes. If the baseline is "governmental secularity," for example, as the majority in *Schempp* seemed to suppose, then government will be neutral by foregoing public prayer and by teaching evolution but not creationism, even if these policies conflict with some citizens' religious views. Koppelman's proposed baseline is mostly consistent with the governmental secularity effectively adopted in *Schempp*, but he adds some qualifications and complexities calculated to accommodate other features of the case law. For example, he thinks it is permissible for government to favor religion in a generic sense, and he would "grandfather" in an exception for traditional expressions (like the national motto) that can fit into the ill-defined category of "ceremonial deism."

So, does this more sophisticated strategy succeed in salvaging the ideal of religious neutrality? Yes and (more pertinently) no. Koppelman's approach illustrates one undeniable point– namely, that the term "neutrality" can be and is used in various ways.[49] As a result, it is always possible to define neutrality so as to avoid the difficulties discussed in this essay. In addition, Koppelman is correct to observe, as others have, that neutrality is not self-defining; it at least implicitly depends on some sort of explicit or assumed criteria, or on some "baseline." And since the ideal of neutrality does not itself supply the baseline, there is nothing to stop someone from declaring that the baseline will be, basically, "what we've been doing"; indeed, Koppelman comes close to prescribing some such position as his preferred baseline (although his interpretation of "what we've been doing"– of the American political tradition, in other words–

[49] I examine a variety of conceptions of neutrality in Smith, Foreordained Failure, supra note at 77-97.

is highly contestable).. In that case, so long as government continues to do basically what is has been doing already, it will be "neutral" by definition, or by stipulation.

But this tactic merely pushes the problem down to a deeper level. To be sure, it is possible to say that a decision approving the teaching of evolution and forbidding the teaching of creationism, say, is religiously neutral even though it emphatically rejects and burdens the religious beliefs of biblical literalists; the decision is neutral *by reference to a baseline of governmental secularity.* Evolution is a secular doctrine; creationism isn't. In similar fashion, it could logically (if ludicrously) be said that a law requiring all citizens to recite the "Hail Mary" ten times daily is religiously neutral– relative to a baseline of Roman Catholicism, that is-- so long as the law is enforced consistently against all citizens, whether they are Catholic, Protestant, Hindu, or agnostic. But the obvious objection in each instance is that although the decision or law may be neutral relative to the baseline, *the baseline itself* is manifestly not neutral.

Moreover, a non-neutral baseline is at least as destructive of the aspirations reflected in the ideal of neutrality as a non-neutral decision, law, or policy is. If government treats some citizens unequally by supporting religious views they do not accept or rejecting views they *do* accept, the problem is not cured by adding that government is consistently following a baseline that happens to be incompatible with their religious views. Similarly, if government offends or alienates some citizens by expressing religious views they do not accept, it equally offends them by adopting or acting in accordance with a baseline they do not accept. If anything, the invocation of the "baseline" aggravates the problem; it amounts to telling the citizen who complains that the government has rejected or disparaged her religion, "But that's our consistent policy. We always do things that way." Or, in other words: "You didn't just happen to lose *this*

time; you can expect to lose *consistently*." How does this explanation help matters?

The point is easy enough to appreciate when we observe it from a distance. In the nineteenth century, for example, acting on what amounted to a baseline of generic Protestantism, even "progressive" thinkers like Horace Mann favored a public school curriculum that included prayer and reading without commentary from the King James Bible. When Catholics and others objected that these practices violated their beliefs, the schools typically responded that the curriculum should be unobjectionable because it was "nonsectarian."[50] In essence, the claim was that the Lord's Prayer and the King James Bible were neutral relative to a baseline of generic Protestantism. And perhaps they were, but that of course was the problem: the baseline itself was manifestly not neutral.

In this respect, Martha Nussbaum castigates the nineteenth-century proponents of "nonsectarianism" for failing to recognize the exclusionary effects of their policies. "It's rather extraordinary," Nussbaum remarks, "that people had so little sense of history that they didn't notice this, or perhaps they simply didn't care."[51] Nussbaum's criticism seems cogent– but also ironic, because she and like-minded thinkers typically show a similar lack of cognizance (and perhaps even a "rather extraordinary" lack of cognizance) with respect to the numerous citizens today who protest that wholly secular public schools or a secular public order are hostile to *their* beliefs and values.[52] And yet such citizens are far from being a negligible or idiosyncratic minority. As Noah Feldman observes, "[t]he constitutional decisions marginalizing or banning

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[50] See generally Noah Feldman, Non-Sectarianism Reconsidered, 18 J. Law & Politics 65 (2002).

[51] Nussbaum, supra note at 218.

[52] See, e.g., id. at 8, 28.

religion from public places have managed to alienate millions of people who are also sincerely committed to an inclusive American project."[53]

If this lack of cognizance, in both its nineteenth-century and its more contemporary versions, seems puzzling, the example of "nonsectarianism" may give us a clue. Nineteenth-century advocates of nonsectarian schools could persuade themselves that their position was neutral or inclusive because nonsectarianism was not partial to any particular religion. Despite their differences, Episcopalians, Methodists, Presbyterians, and Baptists might all find the "nonsectarian" program perfectly innocuous. Dissenters, such as Catholics or Jews, occupied a more marginal cultural and political status, and it was perhaps easy to discount their objections, or to suppose that they were merely being unreasonable. In the same way, a "secular" baseline is not necessarily hostile to "religion" per se (if there is such a thing[54]), and the species of religious faith to which that baseline is in some respects antithetical– Christian fundamentalism, for example– are likely to seem marginal, at least in the eyes of legal and academic proponents of public secularity.[55] Even if legal and academic elites succeed in marginalizing the dissenters, however, the fact remains that a secular baseline is not "neutral" in any meaningful sense relative to them.

What would be needed, it seems, is a religiously neutral *baseline*– a baseline, in other words, that was itself consistent with the religious (and parallel secular) views of all citizens. But in a religiously diverse society, it is most improbable that any such baseline exists.

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[53] Noah Feldman, Divided by God 15 (2005).

[54] For an argument that there is no useful category of "religion" in general, see William T. Cavanaugh, The Myth of Religious Violence 57-122 (2009)

[55] Laycock, on Christians in universities

Proponents of neutrality may thus protest (as Koppelman does[56]) that they cannot be expected to provide what does not exist, or to do the impossible. They would be right. That, once again, is the point.

III.

So then, it seems that in a diverse society committed to religious freedom, religious neutrality is both imperative and impossible. Where does that awkward situation leave us? What are the prospects and possibilities for resolving this paradox?

One possibility would be to accept, first, that religious freedom entails religious neutrality and, second, that religious neutrality is impossible. The obvious conclusion would be that religious freedom is impossible– a conclusion that in fact has already been announced.[57] Candor might then counsel that we should renounce the commitment to religious freedom. As noted, observers like Douglas Laycock worry that important constituencies are already moving to this position.[58]

Given the longstanding nature of the constitutional commitment to religious freedom, however, it seems unlikely that the judiciary, say, will openly embrace this position anytime soon. A more serious possibility is that religious freedom will not be so much explicitly repudiated as quietly reduced away, so to speak. And indeed, a strong reductionist movement is already evident. Thus, over the last couple of decades, the Supreme Court has often treated

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[56] Koppelman, supra note at

[57] See Winnifred Fallers Sullivan, The Impossibility of Religious Freedom (2007).

[58] See supra note and accompanying text.

disputes over religion as free speech cases and has decided them under free speech doctrine.[59] In a similar vein, scholars often prefer to address matters involving religion and claims of religious freedom using the principles and doctrines of free speech, freedom of association, or equal protection.[60]

But perhaps our society is unready or unwilling to relinquish a distinctive constitutional commitment to religious freedom. In that case, and given the impossibility of religious neutrality, it might be advisable to rethink what we have called the "neutrality proposition." We might thus reconsider whether religious freedom needs to entail a commitment to religious neutrality. Perhaps the classical theological rationales for religious freedom should once again be deemed admissible and reenlisted into active duty:[61] if this means acknowledging that religious freedom is inevitably a species of "toleration," so be it.[62] More generally, perhaps we should open up the discourse of religious freedom to whatever pertinent beliefs and premises citizens in fact hold, whether religious or nonreligious or antireligious, instead of treating a whole range of potentially relevant beliefs as ruled out in advance by the constraints of "neutrality."

Still, the neutrality ideal is deeply entrenched; moreover, the religious diversity that made

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[59] See, e.g., Christian Legal Society v. Martinez, 130 S. Ct. 2971 (2010); Rosenberger v. University of Virginia, 515 U.S. 819 (1995).

[60] I discuss this reductionist tendency at greater length in Steven D. Smith, The Disenchantment of Secular Discourse 138-48 (2010).

[61] For efforts in this vein, see John H. Garvey, What Are Freedoms For? 42-57 (1996); Kathleen Brady, (forthcoming).

[62] For supporting discussion, see Steven D. Smith, Toleration and Liberal Commitments, in NOMOS XLVIII: Toleration and Its Limits 243 (2008).

religious equality (and by implication religious neutrality) attractive in Madison's day is by now far advanced. It would be difficult for judges and advocates to repudiate that ideal. So, if religious neutrality is impossible, and if we are nonetheless unwilling to renounce either religious freedom or religious neutrality, what alternatives remain?

The remaining possibility, it seems, is to continue to do what the courts have been doing for the last several decades. We might call this the method of equivocation and evasion. We can continue to profess a commitment to religious neutrality; when dissenting citizens protest that some decision or policy contradicts their religious belief, we can try not to notice, or else insist through clenched teeth that they are mistaken (much in the way Ronald Dworkin argues that people who *think* they believe abortion is murder fail to understand what they really believe[63]). The dissenters may think the decision or policy conflicts with their beliefs, but in fact it doesn't. Or so the judges and professors will explain to them.

The malleability of the notion of neutrality will permit such explanations, if artfully devised, to carry a thin plausibility– enough, perhaps, to satisfy those who are determined that government *must* be neutral, some way, somehow. That is because there *are* senses of neutrality, as we have seen, in which the controversial policies can be said to be "neutral"; in saying so we can try to avoid noticing that we are using the term "neutrality" in senses that do not fulfill the promises of equality and impartial inclusiveness that typically accompany our prescriptions of neutrality and that make that ideal seem so imperative.

Purely as a predictive matter, it seems that this last prospect is the most likely. If courts and commentators persist in the method of equivocation and evasion, of course, critics will

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[63] Ronald Dworkin, Life's Dominion 9-19 (1994).

likewise persist in discerning a deep incoherence or implicit hypocrisy at the heart of the jurisprudence of religious freedom. The reigning "neutrality," while purporting to treat all citizens equally, in reality treats some citizens as more equal than others. This is what uncooperative critics will say, and they will be right.