Religion and Liberal Democracy

Kathleen M. Sullivan†

It has been a while since Catholics were tarred and feathered or Mormons dispatched by militias and mobs on forced marches to Utah. True, hostility to minority religions has not disappeared entirely: Reverend Sun Myung Moon did time in federal prison for tax crimes, Shree Bhagwan Rashneesh left the country one step ahead of the law, and the International Society for Krishna Consciousness lies largely bankrupt, to name a few examples. But contemporary claims of religious oppression are typically subtler than claims of outright persecution.

For example, Professor Michael McConnell, my opponent in this debate, laments what he depicts as a relentless pattern of "secularization" in which "serious religion—religion understood as more than ceremony, as the guiding principle of life"—has been "shoved to the margins of public life."[1] This secularization, he suggests, is a result of the increasing displacement of religious functions by an expanding welfare state, coupled with two kinds of error by the Supreme Court: (1) it has granted too few religious exemptions from public laws under the Free Exercise Clause; and (2) it has too often excluded religion from public programs in the name of preventing establishment. Professor McConnell would read both Religion Clauses as requiring government to respect a single "baseline": "the hypothetical world in which individuals make decisions about religion on the basis of their own religious conscience, without the influence of government."[2] On this view, the Court should mandate more exemptions and find fewer establishments in order to maintain religious pluralism.

I disagree with both the diagnosis and the cure. To begin, I find any picture of rampant secularization difficult to square with numerous indicators of religion's lively role in contemporary Amer-

---

† Professor of Law, Harvard Law School; Visiting Professor of Law, Stanford Law School. This Article was prepared for *The Bill of Rights in the Welfare State: A Bicentennial Symposium*, held at The University of Chicago Law School on October 25-26, 1991.

[1] Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U Chi L Rev 115, 126, 127 (1992).

[2] Id at 169.

ican social and political life. To name but a few examples, powerful Roman Catholic Archbishops such as John Cardinal O'Connor in New York and Bernard Cardinal Law in Boston exercise substantial political power from the pulpit—they control large constituencies and influence government policies on abortion, AIDS education and prevention, charitable services, and gay rights. Evangelical Protestant ministers such as the Reverend Jerry Falwell and the Reverend Donald Wildmon likewise play an active role in politics, having abandoned earlier fundamentalist approaches favoring retreat from the fallen world rather than engagement with it. Masters of direct mail campaigns experienced at monitoring and boycotting commercial media for "anti-Christian" or "anti-family" themes, Falwell and Wildmon recently mobilized a series of highly effective campaigns against publicly subsidized art they deemed blasphemy or filth. Roman Catholic clerical opposition to a public television documentary about gay protestors at St. Patrick's Cathedral led the Public Broadcasting System to pressure its member stations to take it off the air.[3] And religious convictions and institutions have played a pivotal role in nationwide political activism against abortion.

All of this is fine; such activity is fully protected by the right of free speech,[4] as well as by the right of free exercise.[5] True, the prominence of a few celebrated clergymen does not prove that religious freedom is alive and well, any more than the election of a few black mayors and the judicial interment of Jim Crow signalled an end to race discrimination. The fact of religious resilience does show, however, that if the Court was in the business of wholesale secularization, it has not succeeded. Indeed, religious organizations have thrived in part in opposition to the forces McConnell describes, converting charges of rising secularism into a rallying cry for yet more religious fervor. As McConnell himself concedes, "the resurgence of conservative religious movements among both Protestants and Catholics—and to a lesser extent among Jews—has made religion a more salient force in the political culture."[6]

More fundamental than our disagreement about the facts, however, is our disagreement about the proper reading of the Reli-

---

[3] See Eleanor Blau, *PBS Cancels Act-Up Film*, NY Times C16 (Aug 13, 1991). See also Sharon Bernstein, *KCET Pays Price In Flap With Church*, LA Times F1 (Oct 1, 1991) (San Francisco PBS station ran documentary anyway and lost $55,000 in contributions due to boycott).

[4] See *Widmar v Vincent*, 454 US 263 (1981).

[5] Ministers can even hold political office. See *McDaniel v Paty*, 435 US 618 (1978).

[6] McConnell, 59 U Chi L Rev at 134-35 (cited in note 1).

gion Clauses. In Section I, I will outline a reading of the Religion Clauses quite different from McConnell's. In Section II, I will discuss the implications of that interpretation for the Establishment Clause; in Section III, for the Free Exercise Clause.

I. Religious Baselines

The Free Exercise Clause and the Establishment Clause each harbor an unstated corollary. The right to free exercise of religion implies the right to free exercise of non-religion. Just as Caesar may not command one to transgress God's will, he may not command one to obey it. To do either is to run afoul of free exercise. As the Court put it in *Wallace v Jaffree*, "the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."[7] The "conscience of the infidel [or] the atheist" is as protected as any Christian's.[8]

Just as the affirmative right to practice a specific religion implies the negative right to practice none, so the negative bar against establishment of religion implies the affirmative "establishment" of a civil order for the resolution of public moral disputes. Agreement on such a secular mechanism was the price of ending the war of all sects against all. Establishment of a civil public order was the social contract produced by religious truce. Religious teachings as expressed in public debate may influence the civil public order but public moral disputes may be resolved only on grounds articulable in secular terms.[9] Religious grounds for resolv-

---

[7] 472 US 38, 52-53 (1985) (footnote omitted).

[8] Id at 52. See also John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U Chi L Rev 13, 29-30 (1992).

[9] See *Harris v McRae*, 448 US 297, 319-20 (1980) (rejecting establishment claim against ban on abortion funding). Specifically, the Court in *Harris* held that a law may be based upon community values that have a religious foundation, but the law must still have a valid secular justification. Id.

It remains debatable whether laws must be secularly motivated in order to satisfy the Establishment Clause, or rather merely susceptible to a post hoc secular rationale. Compare Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 Phil & Pub Affairs 259, 277-90 (1989) (favoring requirement of secular motivation), with Paul J. Weithman, *The Separation of Church and State: Some Questions for Professor Audi*, 20 Phil & Pub Affairs 52 (1991) (opposing principle of secular motivation as too stringent and favoring requirement of secular rationale). This debate resembles the debate over intent versus meaning or purpose in statutory and constitutional construction. My own view is that an articulable secular rationale is all that is required; a requirement of secular motivation trenches too far on the freedoms of conscience and expression of citizens and legislators.

ing public moral disputes would rekindle inter-denominational strife that the Establishment Clause extinguished.[10]

This reading of the Religion Clauses entails a baseline very different from McConnell's. To McConnell, the proper baseline from which to measure free exercise or establishment violations is undistorted prepolitical religious choice.[11] Government preserves religious liberty best, in his view, if it leaves intact the religious choices that would have been made in the absence of government: "The great evil against which the Religion Clauses are directed is government-induced homogeneity"[12] in matters of religion, and their great virtue, the preservation of the religious diversity or pluralism that emerges from unfettered private choice.[13] In other words, the war of all sects against all is to continue by other means after the truce.

McConnell's view wrongly ignores the affirmative implications of the Establishment Clause. The bar against an establishment of religion entails the establishment of a civil order—the culture of liberal democracy—for resolving public moral disputes. The baseline for measuring Religion Clause violations thus is not "undistorted" prepolitical religious choice. The social contract to end the war of all sects against all necessarily, by its very existence, "distorts" the outcomes that would have obtained had that war continued. Public affairs may no longer be conducted as the strongest faith would dictate. Minority religions gain from the truce not in the sense that their faiths now may be translated into public policy, but in the sense that no faith may be. Neither Bible nor Talmud may directly settle, for example, public controversy over whether abortion preserves liberty or ends life.

The correct baseline, then, is not unfettered religious liberty, but rather religious liberty insofar as it is consistent with the establishment of the secular public moral order. On this view, the exclusion of religion from public programs is not, as McConnell would have it, an invidious "preference for the secular in public

---

[10] It might be objected that separation of church and state is not necessary to extinguish wars of religion; all that is needed is a state monopoly of force. But such a view would ignore the historical correlation between government partiality toward faith and the existence of religious strife. See John Rawls, *The Idea of an Overlapping Consensus*, 7 Oxford J Legal Stud 1, 4 (1987) ("The social and historical conditions of modern democratic regimes have their origins in the Wars of Religion following the Reformation and the subsequent development of the principle of toleration . . . ."). In other words, the end of religious strife requires not just any Leviathan, but a fully agnostic one.

[11] McConnell, 59 U Chi L Rev at 169 (cited in note 1).

[12] Id at 168.

[13] Id at 168-69.

affairs."[14] Secular governance of public affairs is simply an entailment of the settlement by the Establishment Clause of the war of all sects against all. From the perspective of the prepolitical war of all sects against all, the exclusion of any religion from public affairs looks like "discrimination." But from the perspective of the settlement worked by the Establishment Clause, it looks like proper treatment.

What is this civil moral order that the religious truce established? Is it itself a countervailing faith or civil religion? Professor McConnell at times seems to treat it this way. For example, he criticizes contemporary Establishment Clause doctrine for favoring the teaching of "secular humanism" over creationism in public schools.[15] As he notes, the strategy of "portray[ing] secular ideology as the religion of 'secular humanism' . . . has been a failure."[16] While the Court readily strikes down as establishment much government approval of religion (too readily in his view), it never strikes down government "disapproval" of religion, even if that disapproval amounts to a kind of countervailing faith. McConnell would correct this asymmetry by reducing secular ideology to the status of just another competing faith among many in the war of all sects against all.[17] The perfect mechanism for his vision in the context of publicly financed education would be a voucher system in which families could pick and choose among parochial and public schools as a matter of undistorted private religious choice. "Public" schools presumably would serve as a default option for atheists.

The culture of liberal democracy may well function as a belief system with substantive content, rather than a neutral and transcendent arbiter among other belief systems. Various versions of this argument have been expressed not only by liberalism's critics,

---

[14] McConnell, 59 U Chi L Rev at 169 (cited in note 1).

[15] Id at 152. See *Epperson v Arkansas*, 393 US 97 (1968) (invalidating as establishment a state law forbidding public schools to teach evolution); *Edwards v Aguillard*, 482 US 578 (1987) (invalidating as establishment a state law requiring public schools to teach "creation science" if they also taught evolution). Compare *Mozert v Hawkins County Board of Education*, 827 F2d 1058 (6th Cir 1987) (rejecting free exercise claim by fundamentalist Christians seeking to prevent their children from being exposed to "secular humanist" values in public school reading class); *Smith v Bd. of School Commissioners of Mobile County*, 827 F2d 684 (11th Cir 1987) (rejecting establishment challenge to public school curriculum infused with "secular humanist" tenets). For a discussion of the complexity of this issue, see Nomi Maya Stolzenberg, *"He Drew a Circle that Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 Harv L Rev (forthcoming 1992).

[16] McConnell, 59 U Chi L Rev at 152 (cited in note 1).

[17] Id at 190-91.

but by contemporary liberal theorists themselves. On one such view, liberalism's purported procedural neutrality conceals implicit but unstated substantive ends that ought to be flushed out so that people can accept or criticize them.[18] For example, toleration of competing visions of the good is itself a vision of the good; and the idea of equal dignity and respect is itself a substantive rejection of social hierarchy. Another view, developed in the recent work of Professor John Rawls, sees the culture of liberal democracy less as an imperial third force overriding the embedded norms of social subcommunities than as a historically emergent statement of the "overlapping consensus" among them.[19] This view sees the commitment to religious tolerance that ends the war of all sects against all not as a neutral *modus vivendi*, but rather as a substantive recognition that there is more than one path to heaven and not so many as once thought to hell.

Under either of these views, the culture of liberal democracy might well look like a faith to those who disagree with it. For example, suppose a required public school reading text depicts Jane as a wage-earning construction worker and Dick as an unremunerated child-tending househusband. And suppose that a religious community views this a perversion of the sexual division of labor set forth in the book of Genesis. To the religionist, the text undoubtedly looks like an expression of a countervailing faith at odds with her own.[20]

But epistemology does not entail polity. McConnell errs in leaping from one to the other. Even if the culture of liberal democracy is a belief system comparable to a religious faith in the way it structures knowledge, it simply does not follow that it is the equivalent of a religion for political and constitutional purposes. Neither the Bill of Rights, the Republican Party platform, nor the American Civil Liberties Union Policy Guide is the constitutional equivalent of the Ten Commandments, whatever devotion they enjoy from their adherents. The Supreme Court has long drawn a

---

[18] See, for example, Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge, 1982).

[19] Rawls, 7 Oxford J Legal Stud 1 (cited in note 10).

[20] Non-traditional depiction of gender roles was one of the features of the public school reading texts to which fundamentalist parents objected in *Mozert*, 827 F2d at 1061-62. See also Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 Duke L J 977 (interpreting the clash over the teaching of creationism and evolution in the public schools as a clash between faith in God and faith in reason); Stanley Fish, *Liberalism Doesn't Exist*, 1987 Duke L J 997 (reply to Carter) (treating liberalism as an embedded interpretive norm fundamentally at odds with unquestioning religious faith).

distinction between religion and philosophy for purposes of limiting free exercise exemptions: secular pacifists do not get the same breaks from the military draft as pacifist Quakers,[21] and high school dropouts who march to the beat of Henry David Thoreau do not get the same breaks as those who follow the path of their Amish elders.[22] Similarly, a reading text depicting counter-traditional gender roles, while it does inculcate values, does not amount to the establishment of a "religion" of feminism. For constitutional purposes, feminism may be a "faith," but it is not a religion.

The culture of liberal democracy is the overarching belief system for politics, if not for knowledge. Numerous self-limiting features ought to keep at bay any concern that liberal democracy could be a totalistic orthodoxy as threatening as any papal edict. First, the content of the culture of liberal democracy is subject to continual revision in the crucible of pluralistic politics. Liberal democracy may have traditions, but it has no fixed canon or creed. Consider, for example, the vigorous debate now being waged over whether history textbooks in the public schools should shift from a "eurocentric" to a "multicultural" account in light of the rapidly changing demographics of the nation's major cities. Second, the guarantee of free speech ensures that no one may be forced to swear adherence to the culture of liberal democracy any more than to swear oaths of fealty to the Pope.[23] Third, the guarantee of free speech also ensures that religious points of view can participate in the public debate; it is not clear that the public culture of liberal democracy can ever deviate too far from the "overlapping consensus" among social subcultures, including religious subcultures.[24]

If the baseline from which to measure establishment or free exercise violations is the exercise of religious liberty insofar as compatible with the establishment of the secular public order, the secularization of the public order is not "discrimination" against religion. The Court therefore should take a broader view of establishment. But the Court should also take a broader view of free exercise so long as religion does not genuinely threaten to undermine the secular welfare state.

---

[21] See *Gillette v United States*, 401 US 437 (1971).

[22] *Wisconsin v Yoder*, 406 US 205, 215-16 (1972).

[23] *West Virginia Board of Education v Barnette*, 319 US 624 (1943) (holding that required pledge of allegiance in public schools violated Free Speech Clause).

[24] See Rawls, 7 Oxford J Legal Stud at 2 (cited in note 10).

II. The Establishment Clause

The Establishment Clause clearly forbids a government church, and with it oaths or tithes—that is, enshrinement of official religious belief or exaction of financial support for religion. Contemporary debates over the scope of the Establishment Clause center on just what degree of government action constitutes enshrining official belief or exacting financial support. The trend in both areas has been to permit greater inclusion of religion in public programs.

A. Enshrining Official Belief

In the area of belief, the Court has distinguished three degrees of government favoritism toward religion: "coercion," "endorsement," and "acknowledgement." Religious oaths enforced on pain of criminal penalty would presumably be the paradigm case of impermissible coercion.[25] The Court has considered recitation of prayer or biblical verses in the public school classroom a near equivalent.[26] The Court has treated the public school classroom as a setting particularly rife with coercive potential, given that school attendance is compulsory and that children presumably have not fully developed their faculties of resistance and consent. For similar reasons, the Court has considered the teaching of religious or religiously motivated tenets in the public curriculum the equivalent of forced adherence to a creed,[27] and has been strict in its interpretation of what constitutes such teaching.[28]

Outside of this narrow line of public school cases, however, the Court has been more tolerant of official sponsorship of religious speech and symbols. One key example is its decision permitting clergymen to recite denominational prayers at the opening of state legislative sessions.[29] Other examples are its decisions permitting government to display religious symbols during holiday seasons—first, the nativity scene that is the centerpiece of Christian

---

[25] See *Torcaso v Watkins*, 367 US 488, 495-96 (1961) (holding that oath of belief in God as condition of being notary public was unconstitutional).

[26] *Engel v Vitale*, 370 US 421 (1962); *Abington School District v Schempp*, 374 US 203 (1963); *Wallace v Jaffree*, 472 US 38 (1985).

[27] *Epperson v Arkansas*, 393 US 97 (1968); *Edwards v Aguillard*, 482 US 578 (1987).

[28] *Stone v Graham*, 449 US 39 (1980) (holding that posting Ten Commandments in school was establishment).

[29] *Marsh v Chambers*, 463 US 783 (1983) (rejecting establishment challenge both to prayers and to entire state-sponsored chaplaincy system).

liturgy[30]; later, the menorah that is associated with the Jewish holiday of Chanukah[31]—so long as they are sanitized by surrounding secular symbols.[32] Significantly, in each of these decisions, the Court found that the official recognition of religion in question was a mere "acknowledgement" of the background religious practices of the community, not rising to an "endorsement" of belief, much less to the "coercion" of non-believers.[33]

Even this much accommodation of religion in public life is not enough, however, for some members of the Court. At one time, five Justices supported Justice O'Connor's position that the establishment line should be drawn between impermissible "endorsement" and permissible "acknowledgement,"[34] with "endorsement" defined, at least by Justice O'Connor, as government's transmission of religious messages having exclusionary impact on religious or irreligious minorities.[35] This may be a fine line—for Justice O'Connor it meant that creches alongside reindeer and talking wishing wells in shopping districts were acceptable, while freestanding creches on courthouse steps were not.[36]

At least four Justices on the current Court, led by Justice Kennedy, would go even further and permit government "endorsement" of religion; for them, mere "acknowledgement" is not even a serious case.[37] In a pending case concerning a challenge to the recitation of a prayer at an eighth-grade graduation, the Solicitor General has expressed support for this limitation of Establishment Clause claims to cases of "coercion."[38]

---

[30] *Lynch v Donnelly*, 465 US 668 (1984) (rejecting establishment challenge to government-sponsored display of creche).

[31] *County of Allegheny v ACLU*, 492 US 573 (1989) (rejecting establishment challenge to government-sponsored display of menorah).

[32] See *Lynch*, 465 US at 691-92 (O'Connor concurring), in which Justice O'Connor reasoned that the creche was not an establishment because the surrounding display included secular holiday symbols, such as a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, a clown, an elephant, a sign that said "Season's Greetings," and a "talking" wishing well. The Court explicitly adopted Justice O'Connor's reasoning in *Allegheny*, 492 US at 594-97. There it permitted the menorah because it was surrounded by such secular symbols as a Christmas tree and a sign saluting liberty, id at 614, but forbade a nativity scene because it was not so surrounded. Id at 601-02.

[33] See *Marsh*, 463 US at 792; *Lynch*, 465 US at 692-93 (O'Connor concurring).

[34] See *Allegheny*, 492 US at 595-97 (Blackmun plurality).

[35] See, for example, *Lynch*, 465 US at 688 (O'Connor concurring).

[36] Id at 694 (O'Connor concurring); *Allegheny*, 492 US at 637 (O'Connor concurring).

[37] *Allegheny*, 492 US at 668-74 (Kennedy, joined by Rehnquist, White, and Scalia, dissenting as to invalidation of freestanding creche).

[38] See *Weisman v Lee*, 908 F2d 1090 (2d Cir 1990), cert granted, *Lee v Weisman*, 111 S Ct 1305 (1991).

Professor McConnell likewise favors a narrow test for defining establishment. He rejects Justice O'Connor's "endorsement" test, finds more promise in Justice Kennedy's "coercion" test, but ultimately discards even the "coercion" test for a different "pluralist approach."[39] He does note that "[t]he generation that adopted the First Amendment viewed some form of governmental compulsion as the essence of an establishment of religion."[40] He also cites Locke's distinction that " 'it is one thing to persuade, another to command.' "[41] But he tempers this strict originalist understanding of coercion as force with other historical evidence,[42] allowing him to agree with Justice Kennedy that government speech sometimes may be "coercive": "government does not have free rein to proselytize."[43] Finally, however, he rejects the coercion test in favor of his own proposed "pluralism" test for the Religion Clauses: He defines establishment as government action whose "purpose or probable effect is to increase religious uniformity . . . by forcing or inducing a contrary religious practice."[44] This test clearly goes beyond any force-based definition of coercion.

What government action is sufficient to "induce" religious practice? The answer is not clear. McConnell's theory of religious pluralism fails to resolve the question. It surely would "increase religious uniformity" for government to require a citizen to swear an oath of loyalty to the Pope. But the establishment problem would not disappear if the government offered the oath-taker multiple choices instead—swear an oath to be a Catholic *or* a Baptist, or a member of any sect listed as the genuine article down at the Internal Revenue Service. Defining an establishment requires distinguishing among a range of government means as well as government ends.

What McConnell would *not* regard as establishment is clearer. It seems he would allow significant religious speech and symbolic expression by government short of "proselytization." Absent captive audience problems such as those that exist in public school classroom or graduation settings, he would dismiss claims of dissenters whose only complaint is that they are "irritated," "of-

---

[39] McConnell, 59 U Chi L Rev at 175 (cited in note 1).

[40] Id at 154-56.

[41] Id at 159 (quoting from John Locke, *A Letter Concerning Toleration*).

[42] Id at 159 n 201.

[43] Id at 162. Indeed, Professor McConnell suggests that in the pending case of *Lee v Weisman*, the Court should find an establishment in a rabbi's delivery of a graduation invocation at a public school, because the graduation ceremony is inherently coercive. Id at 158.

[44] Id at 169.

fended," or stigmatized by such messages.[45] Indeed he would not have the courts trifle with "perceived messages" of endorsement much at all.[46] Apparently he would allow public-sponsored creches, proximate reindeers or not. Apparently he would also reverse *Edwards v Aguillard* and permit the government to enforce in the public classroom a kind of fairness doctrine for the expression of "a wide variety of perspectives, religious ones included"[47]—even through the mouthpiece of a public teacher.

The trend McConnell backs—of narrowing the test for establishment in the context of government speech and symbols—is exactly the wrong way to go. The establishment of the secular public order forbids government to put its imprimatur of approval on religion through any official action—period. Approving religious "acknowledgement," as both *Marsh v Chambers* and *Lynch v Donnelly* did, is like saying, "a little establishment is okay, but not too much." Both those cases were wrong. Approving religious "endorsement" would be even worse. Neither "acknowledgement" nor "endorsement" can be squared with the Religion Clauses when read in light of their unstated corollaries.

The explanation begins with the Free Exercise Clause. As argued above, the right to free exercise of religion implies the right to free exercise of non-religion. No one may be coerced into worship, any more than out of it. Freedom from coercion *not to* worship may be read to imply freedom from coercion *to* worship—just as current constitutional interpretation finds the right not to speak implied by the right of free speech,[48] and the right to divorce implied by a right to marry.[49] Thus the Free Exercise Clause would forbid the state to coerce minority sects or atheists into contrary beliefs, even without the Establishment Clause.

But the Establishment Clause cannot be mere surplusage. If the Free Exercise Clause standing alone guarantees free exercise of non-religion, the Establishment Clause must do more than bar coercion of non-believers. Thus a "coercion" test for establishment would reduce the Establishment Clause to a redundancy. If the Establishment Clause is to have independent meaning, it must bar something other than coercion of private citizens into confessions of official faith.

---

[45] McConnell, 59 U Chi L Rev at 164 (cited in note 1).

[46] Id at 155.

[47] Id at 193.

[48] *Wooley v Maynard*, 430 US 705, 714-15 (1977); *Barnette*, 319 US 624.

[49] *Zablocki v Redhail*, 434 US 374 (1978); *Boddie v Connecticut*, 401 US 371 (1971).

In the context of government speech and symbols, that "something else" is government stamps of approval upon religion. The official agnosticism mandated by the Establishment Clause requires not only even-handed government treatment of private religious groups, but also a standing gag order on government's own speech and symbolism; it prohibits official partiality toward religion. On this reading, the Establishment Clause does more than bar "coercion"; it bars "endorsement" and "acknowledgement" of religion as well.

This disability is unique to the Religion Clauses. No other topic beside religion is off limits to government in the course of its own activities, as opposed to its regulation or imposition of conditions on private activities. There is no political establishment clause.[50] To be sure, the Court's interpretation of the Free Speech Clause to bar government from compelling speech is a partial analogue: Justice Jackson's famous statement in *West Virginia Board of Education v Barnette* was that government officials may not "force citizens to confess by word or act their faith" in political or religious orthodoxy.[51] But protecting private citizens from forced confessions nearly exhausts this concept in the context of political speech.[52]

In the context of political speech, there is virtually no First Amendment limit on what government may say.[53] The Court has never taken literally the rest of Jackson's "fixed star in our constitutional constellation,"[54] and could not do so. "[O]fficial[s] high or petty" do "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" all the time in the sense

---

[50] For the reasons that follow, see notes 53-58 and accompanying text, I believe that Professor McConnell's intriguing comparison of the two in *Political and Religious Disestablishment*, 1986 BYU L Rev 405, overstates the similarities.

[51] *Barnette*, 319 US at 642.

[52] I say "nearly" because I believe some constitutional liberties may entail that government may not speak so as to discourage them. Can government teach public schoolchildren the message, "confessions are good for the soul; if you commit a crime, tell all to the police"? This appears at least inconsistent with the Fifth Amendment, if not a violation of it. On the other hand, police officers deliver the same message to criminal suspects all the time, with impunity, so long as they give the *Miranda* warnings. But the point here is that the Establishment Clause *explicitly* prohibits the government from adopting religious positions. Government may or may not adopt a position against the exercise of other rights, but as to religion, it emphatically must not.

[53] While some have criticized this leeway to government, see Mark Yudof, *When Government Speaks: Politics, Law and Government Expression in America* (California, 1983), current interpretation of the First Amendment does not confer anti-propaganda rights on citizens. See *Meese v Keene*, 481 US 465 (1987).

[54] *Barnette*, 319 US at 642.

that they endorse ideas ("prescription" in its weak sense).[55] It is hard to know what government would do if it did not so "speak." "Just say no to drugs," "End racism," and "Have babies, not abortions" are all messages government is free to endorse under current law;[56] it simply may not force private citizens to agree.

The same is not so for religion. The difference between government political speech and government religious speech is illuminated by cases in which individuals invoke the implied First Amendment right "not to speak." In these cases, the inquiry has been, for example, whether forcing citizens to bear such statements as "Live Free or Die" on state-issued automobile license plates is the equivalent of a flag salute or other "forced confession of faith by word or act"—in other words, whether turning a citizen into a billboard for the state's ideology is like using him as a mouthpiece.[57] There has never been serious question, however, that the state could emblazon "Live Free or Die" across the entrance to the state capitol. In contrast, even Justice Kennedy would find "the permanent erection of a large Latin cross on the roof of city hall" an impermissible attempt at government "proselytiz[ation]."[58]

If protection from forced confessions cannot exhaust the meaning of establishment, except by making the Establishment Clause redundant of the Free Exercise Clause, then Justice O'Connor's "endorsement" test comes closer to the mark than Justice Kennedy's "coercion" test. It is true that the application of the "endorsement" test has been unsatisfying. Not to see the creche as sending a message of exclusion to Jews, Muslims or atheists is to see the world through Christian-tinted glasses. Majority practices are myopically seen by their own practitioners as uncontroversial; asking predominantly Christian courts to judge the exclusionary message of creches may be a little like asking an all-male jury to judge a woman's reasonable resistance in a rape case. But the solution is simple: Banish public sponsorship of religious symbols from the public square.[59] That the endorsement test has been needlessly

---

[55] Id.

[56] For the reasons I gave in note 9, I see the third as much more dubious than the first two. *Harris v McRae*, 448 US 297, was mistaken to hold that government may implement a moral preference for childbirth over abortion through a funding program. Because the right of reproductive choice is, at least for now, "fundamental," it is not clear that the lesser disincentive conveyed by mere official exhortation is permissible.

[57] See *Wooley*, 430 US 705.

[58] *Allegheny*, 492 US at 661 (Kennedy dissenting in part).

[59] Thus *Lynch* and *Allegheny* were wrong to uphold the menorah, and *Marsh* was wrong to uphold the practice of opening legislative sessions with a prayer. But we need not melt down the national currency to get rid of "In God We Trust." Rote recitation of God's

complicated and unpersuasively applied does not mean that it asked the wrong question to begin with. The Supreme Court should not eliminate such a test from its Establishment Clause doctrine, but rather should more rigorously enforce it, and indeed extend it to what the Court now calls mere "acknowledgement."

In sum, government-sponsored religious symbols violate the Establishment Clause even if those who object to the symbols are not "coerced" into conversion or false swearing. True, this reading of the Establishment Clause singles out religion from other subject matter—or to the extent religion is a viewpoint, from other viewpoints—for unique exclusion from government speech and symbolism. But that is not invidious "discrimination"; it is simply an entailment of the establishment of the secular public order.

B. Exacting Financial Support

It is a commonplace that the government plays roles beyond that of policeman in the modern welfare state: Government acts now not only as a regulator but also in significant ways as proprietor, educator, employer, and patron. This expansion of government roles multiplies the opportunities for Establishment Clause conflict over whether government has lent religion impermissible financial support.

The Court's trend in this area—like the trend with religious symbols—has been to move away from the "no aid" position toward greater blessing on religious participation in public programs. The Court's recent decisions have suggested two main approaches government may take to sanitize financial aid to religious beneficiaries of Establishment Clause concerns: first, including religious beneficiaries in a scheme that also extends benefits to other comparable but non-religious beneficiaries[60]; second, allowing private individuals to choose how to use indirect tax benefits instead of centrally directing how cash grants will be used.[61] True, even while allowing fiscal integration of religion into public programs, the

---

name is easily distinguished as a *de minimis* endorsement in comparison with prayer or the seasonal invocation of sacred symbols. The pledge of allegiance is a closer question.

[60] See *Walz v Tax Commission*, 397 US 664 (1970) (upholding property tax exemption to churches as part of broad array of charitable and educational beneficiaries); *Bowen v Kendrick*, 487 US 589 (1988) (upholding grant of federal funds for adolescent sex education to religious organizations as part of broad array of family planning entities).

[61] Compare *Mueller v Allen*, 463 US 388, 399-400 (1983) (permitting parents to deduct parochial school tuition, textbook, and transportation expenses from their taxes), with *Lemon v Kurtzman*, 403 US 602 (1971) (forbidding state to reimburse parochial school teacher salaries and textbooks).

Court has still drawn the line at some forms of physical integration.[62] But several Justices key to thin majorities in such cases are no longer sitting on the Court.

Still, some see the trend in the aid cases as not accommodating enough, and Professor McConnell would appear to be one of them. He would find no establishment when religious organizations participate extensively in public facilities, public grant programs, and public education, so long as the religious organizations participate on an equal basis with secular organizations.[63] As to conditions on benefits, he divides the universe in two: He would forbid conditions if other participants in the program "have the right to engage in political or other controversial secular speech," but not if participants are being recruited to serve as the government's own message-specific mouthpieces.[64] He thus approves of both *Widmar v Vincent*, which requires—on free speech grounds—public schools to grant religious groups equal access to public school classrooms on extracurricular time[65]; and *Bowen v Kendrick*, which allows religious organizations to participate in a federal program to promote sexual abstinence among teenagers.[66] However, he attacks decisions such as *Board of Education v Allen*,[67] which allows government to provide textbooks on secular subjects to parochial schools only if they are the same textbooks used by public schools.[68] In his view, that condition on aid to parochial schools is an unacceptable "seculariz[ation of] their curriculum."[69]

My reading of the Religion Clauses leads me to a different view. I have argued above that one way the Establishment Clause avoids redundancy with the Free Exercise Clause is by barring symbolic government imprimaturs on religion, even in instances short of coercion. A second way in which establishment is more than a doctrine against coerced confession is that it protects individuals from compulsory financial support of other people's reli-

---

[62] See *Grand Rapids School Dist. v Ball*, 473 US 373 (1985) (forbidding state to pay part-time teachers in parochial schools); *Aguilar v Felton*, 473 US 402 (1985) (same). Compare *McCollum v Board of Education*, 333 US 203 (1948) (invalidating voluntary religious instruction for children during school hours on public school grounds), with *Zorach v Clauson*, 343 US 306 (1952) (upholding voluntary religious instruction for children during school hours but *off* public school grounds).

[63] McConnell, 59 U Chi L Rev at 185 (cited in note 1).

[64] Id at 186.

[65] 454 US 263.

[66] 487 US 589.

[67] 392 US 236 (1968).

[68] Id at 244-45.

[69] McConnell, 59 U Chi L Rev at 133 (cited in note 1).

gion through the tax system—not because such support will coerce conversion, but because it will cause profound divisiveness and offense.[70]

Again, there is an asymmetry between politics and religion. On the political side, the Court has found an implied right to be free of some kinds of financial exactions to support political or ideological speech that is anathema to the payor. The key case is *Abood v Detroit Board of Education*, which held that public employees may be compelled to pay fees for public union representation in collective bargaining but not for the union's political or ideological speech.[71] The Court has extended the principle to compulsory bar associations and certain other entities enjoying some kind of publicly conferred monopoly.[72] But crucially, the Court has never applied or even seriously entertained applying the principle to the tax system.[73] Perhaps payment into a general revenue fund so diffuses any one person's contribution to any government cause that it attenuates any attribution of the government's actions to an individual taxpayer. Or perhaps compulsory taxation does infringe the right against compelled speech, but is overwhelmingly justified by the crippling administrative and revenue burdens of requiring pro rata tax refunds to conscientious objectors to government policy. Whatever the reason, it is clear that the tax system has a bye in *Abood*-type controversies.

Not so for religion. In religion, the Establishment Clause confers a kind of non-disclaimable *Abood* right upon every taxpayer against government expenditures in support of religion—whether through promotion, endorsement, or, in my view, "acknowledgement." Hence the Court concluded in *Flast v Cohen* that the Establishment Clause creates an exception to the usual rule against taxpayer standing.[74] And the remedy in the religion context is injunction, rather than, as in *Abood*, pro rata refund.

Professor McConnell would minimize these distinctions. For example, he analogizes taxpayer objections to government expenditure of public funds to advocate religion to objections by religious opponents of abortion to government subsidization of advocacy of

---

[70] Professor McConnell, in contrast, would forbid only measures that increase religious homogeneity (i.e., foster conversion or lapses), and not measures that offend. Id at 164, 168-69.

[71] 431 US 209, 232, 237 (1977).

[72] *Keller v California*, 496 US 1 (1990).

[73] See Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 Rutgers L Rev 3, 16, 26 (1984).

[74] 392 US 83, 103-06 (1968).

abortion.[75] But government has quite different obligations toward these two sorts of objections. The Constitution mandates that government yield to the first; yielding to the second is a matter of political grace. No taxpayer has a right not to subsidize abortion; all taxpayers have a right not to subsidize religion. True, abortion, like religion, is divisive and controversial, but not all divisive and controversial questions have been privatized by the Constitution; only religious questions have. Abortion may not be turned into a religious question by analogy.[76]

Here lies the crux of my disagreement with Professor McConnell. In my view, the Establishment Clause uniquely privileges the right of conscientious objection to religious activity, speech, or expenditures by government. The key legal consequence is that I view asymmetries that McConnell would describe as discrimination against religion as mandated by the Establishment Clause. In particular, the Establishment Clause will often require excluding religious organizations from public programs, or will necessitate religion-restrictive conditions on their participation.

For example, the Court recently held that, if the government funds a public broadcaster, the Free Speech Clause forbids the government from making "non-editorializing" a condition of public funding.[77] The Court assumed that the broadcaster could not easily segregate its editorializing activity from its other activity—for the sake of the religious parallel, the broadcaster was "pervasively editorializing." This non-segregability made the no-editorials condition an impermissible "penalty" on the other activities supported by private funds.[78] The Court implied that requiring the broadcaster to segregate federally funded non-editorializing activity

---

[75] See Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 Harv L Rev 989 (1991). There Professor McConnell, in the third *Harris/Lemon* permutation (*Harris* was right; *Lemon* was right), suggests that preventing public funding for religious education and for abortions may both be justified as protecting conscientious objectors. Id at 1006-14.

[76] In *Harris v McRae*, 448 US at 319-20, the Court held that denying public medical insurance for abortion while providing it for childbirth does not establish religion, despite the religious motivation of much political opposition to abortion. But neither should free exercise grant religious opponents of abortion the rights of conscientious objectors. The program at issue in *Harris* was an act of political discretion, permissible only under a relaxed standard of review.

[77] *FCC v League of Women Voters*, 468 US 364 (1984) ("*LWV*"). See also McConnell, 104 Harv L Rev at 1016-17 (cited in note 75) (fourth *Harris/Lemon* permutation—*Harris* was right; *Lemon* was wrong).

[78] *LWV*, 468 US at 400.

physically from privately funded editorializing activity would likewise be an impermissible "penalty."[79]

But non-segregability in the religious context rightly cuts the other way. In a "pervasively sectarian" parochial school that cannot segregate religious from secular teaching, there is no way to prevent public tax dollars that go to that school from subsidizing religion, without some condition imposed. Either the state can require that the school stop teaching religious subjects altogether, which will obviously be untenable to the school, or the state can require that the school physically segregate religious from secular teaching.[80]

True, the "no religious teaching" condition is structurally similar to the "no editorializing" condition, and the physical segregation requirements in either case are likely to be prohibitively expensive. But this structural similarity does not decide the case. The "penalty" that is impermissible under the Free Speech Clause in the first case is necessitated by the Establishment Clause in the second. Only thus can government fulfill the constitutional requirement not to support religious teaching with public funds.[81]

---

[79] Id. This implication arose from the way the Court distinguished *Regan v Taxation With Representation*, 461 US 540 (1983) ("*TWR*"). In *TWR*, the Court upheld a "no lobbying" condition on non-profit organizations that received tax-deductible contributions. Id at 545-46. In *LWV*, the Court reasoned that the no-lobbying condition was not a penalty because tax-deductible dollars could still be used by non-lobbying, financially segregated affiliates. *LWV*, 468 US at 399-401.

The Court's view of segregation requirements remains confused. For private funding, the Court has treated even slight financial segregation requirements as a free speech burden requiring strong justification. See *FEC v Massachusetts Citizens for Life, Inc.*, 479 US 238 (1986) (invalidating statute that required organization to keep separate contributions fund for political activities). But for public funding, the Court has permitted financial and even physical segregation requirements as conditions upon the relevant benefit. *TWR*, 461 US at 544 & n 6 (TWR could obtain tax-deductible contributions only for its non-lobbying activity); *Rust v Sullivan*, 111 S Ct 1759, 1774-75 (1991) (upholding a requirement, under Title X of the Public Health Service Act, that a grantee's abortion-related activity be separate from family planning activity receiving federal funds).

[80] The Court required this physical segregation for the parochial schools in *Grand Rapids*, 473 US 303.

[81] A similar argument supports the conclusion that *Harris* was wrong but that *Lemon* was right. Professor McConnell argues that both of the following propositions *cannot* simultaneously be true: that forbidding the government to fund abortions in *Harris* in a public medical insurance program that funds childbirth is an impermissible "penalty" on abortion rights; but that forbidding the government to fund parochial schools in *Lemon* is merely a permissible "nonsubsidy" of parochial schools. Professor McConnell reasons that the two programs were structurally alike: each funded a mutually exclusive substitute for the activity denied funding—the program in *Harris* funded childbirth, while the program in *Lemon* funded public schools. McConnell, 104 Harv L Rev at 1006-14 (cited in note 75). But, while both *Harris* and *Lemon* imposed penalties in the sense that he argues, Professor McConnell

The asymmetrical treatment is an unavoidable feature of the unique demands of the Establishment Clause.

To consider an even more similar parallel, suppose that the government funded general health clinics for pregnant women, provided that the clinics speak favorably of childbirth and do not "encourage, promote, or advocate" abortion, for example by counseling or referring women to have abortions.[82] Compare this program to one in which the government funds religious schools, provided that the school does not "encourage, promote, or advocate" religion, for example by praying on school premises or by referring students to church services. In addition, the school must advise all students of their right to convert to another religion or to no religion. There can be little doubt that in each case, the government's condition would be a disincentive to the exercise of unfettered choice. And it is quite likely that Planned Parenthood in the first case and the Roman Catholic Church in the second would each rather forego the funds than accept the condition. But despite the structural similarity, the two conditions are constitutionally distinct. Whereas the Free Speech Clause should forbid the first, the Establishment Clause should require the second.[83]

Does this asymmetry give secular liberalism the upper hand, or in other words, "discriminate" against religion? It does so no more than the baseline set by the Religion Clauses requires. The Religion Clauses enable government to pursue and endorse a culture of liberal democracy that will predictably clash over many is-

---

curiously overlooks that the penalty in *Lemon* is compellingly justified by the conscientious objection concerns of the Establishment Clause.

[82] This condition differs from the anti-abortion counseling condition on public family planning funds upheld in *Rust*, 111 S Ct 1759. The hypothesized program is one of *general* health care for pregnant women, a universe logically including abortion counseling. In contrast, the Court managed to find the program at issue in *Rust* to be a program limited to "pre-conceptual" counseling about birth control, a universe logically excluding advice about abortion, a "post-conceptual" event. Id at 1772-73. Within the universe of general health care for pregnant women, a condition requiring pro-childbirth advice but forbidding pro-abortion advice would be just the sort of viewpoint discrimination that the Court in *Rust* said was still barred by the First Amendment. Id.

[83] It is not clear that McConnell would disagree with this conclusion. He advocates free speech for religious grantees only where the government has provided a forum for free speech by all grantees (as in *Widmar*, 454 US 263). McConnell, 59 U Chi L Rev at 186-87 (cited in note 1). He does not advocate free speech for religious grantees where the government has enlisted private grantees as mouthpieces for a specific government-backed viewpoint (as in *Kendrick*, 487 US 589, where McConnell agrees with the Court's suggestion that religious grantees may preach abstinence but not religion while participating in Adolescent Family Life Act programs). Id. If public education falls on the government speech side of this public forum/government speech dichotomy, then McConnell should permit, if not require, anti-proselytizing conditions.

sues with religious subcultures. The public classroom, for example, may inculcate commitments to gender equality that are incompatible with notions of the natural subordination of women to men drawn by some from the Bible. Protection for religious subcultures lies in exit rights, vigorously protected under the Free Exercise Clause: the solution for those whose religion clashes with a Dick and Jane who appear nothing like Adam and Eve is to leave the public school.[84] The privatization of religion reconciles the two Religion Clauses.

III. Free Exercise

Contemporary legislation rarely evinces outright hostility to religion. Like overt racism, explicit bigotry is hard to find on the face of contemporary laws. When religion is singled out, it is often out of express concern to avoid establishing religion rather than out of hostility.[85] Yet the Supreme Court increasingly has viewed such religious exclusions as overstating the establishment problem and thus as unjustified.[86]

The far more important free exercise problem today comes not from facially discriminatory laws, but rather from facially neutral laws that have a disparate impact on religion by making demands or causing consequences incompatible with religious practice. Most free exercise claims to reach the Supreme Court have been requests for exemption, not invalidation. The analogy in the speech context is challenges to content-neutral laws with an ancillary impact on speech, such as the (unsuccessful) claim in *United States v O'Brien* that a law against draft card mutilation could not constitutionally apply to burning a draft card as a means of political dissent.[87]

---

[84] See *Pierce v Society of Sisters*, 268 US 510 (1925) (upholding right of parents to withdraw children from public schools and educate them privately). Such exit rights are essential not only to the individual liberty of religious parents but also to the flourishing of their communities.

[85] To be sure, the government sometimes does discriminate against minority religions, especially unpopular ones such as Reverend Moon's Unification Church. See, for example, *Larson v Valente*, 456 US 228 (1982) (state's charitable solicitation act was an unconstitutional denominational preference because it exempted from registration and reporting requirements only those religions that receive more than half their total contributions from members).

[86] See *McDaniel*, 435 US 618 (permitting ministers to hold public office); *Widmar*, 454 US 263 (permitting religious organizations to gather on state-owned property); and *Witters v Department of Services*, 474 US 481 (1986) (permitting blind man to receive aid for education at religious college).

[87] 391 US 367 (1968).

The Supreme Court has overwhelmingly rejected free exercise exemption claims. None has succeeded, except in *Wisconsin v Yoder*, which held that Old Order Amish had a free exercise right to withdraw their children from the public schools, compulsory public school attendance notwithstanding;[88] and in the *Sherbert v Verner* line of cases, which held that people unemployed because their religious practices clash with the terms of available employment have a free exercise right to receive unemployment benefits.[89] The Court has used two techniques to reject other claims for exemption from facially neutral laws: First, it has sometimes applied a form of heightened scrutiny, but has found a government interest in the uniform application of the law that outweighs the burden on the religious practice of the claimant.[90] Second, and more typically in recent cases, it has found some reason to forego any searching judicial scrutiny at all.

There have been two variations on the latter approach. In one, the Court has found that a law burdens religion, but has also found that the "restricted environment" to which the law applies, such as the military or prisons, justifies greater deference to government and thus only rationality review.[91] In the other, the Court has found no burden on free exercise of religion in the first place, so as to obviate heightened justification at the threshold. For example, the Court has granted government nearly absolute discretion to conduct its own "internal affairs,"[92] even where the consequences for a religion are devastating. More sweepingly, the Court recently held in *Employment Division v Smith* that free exercise exemption claims from a "neutral law of general applicability" trigger no heightened scrutiny—no matter what the "incidental" impact on

---

[88] 406 US 205 (1972).

[89] *Sherbert v Verner*, 374 US 398 (1963). See also *Thomas v Review Bd. of Indiana Employment Security Division*, 450 US 707 (1981); *Hobbie v Unemployment Appeals Commission of Florida*, 480 US 136 (1987); *Frazee v Illinois Department of Employment Security*, 489 US 829 (1989).

[90] See, for example, *Braunfeld v Brown*, 366 US 599 (1961) (uniform day of rest); *United States v Lee*, 455 US 252 (1982) (uniform contribution to social security system).

[91] See, for example, *Goldman v Weinberger*, 475 US 503 (1986) (rejecting free exercise claim of Jewish officer who sought exemption from military headgear regulations forbidding yarmulke); *O'Lone v Estate of Shabazz*, 482 US 342 (1987) (rejecting free exercise claim of Muslim prisoner who sought exemption from prison security regulations forbidding him to attend Jumu'ah services).

[92] See, for example, *Bowen v Roy*, 476 US 693, 699 (1986) (rejecting free exercise claim by Native American seeking government benefits without assignment of a social security number to his daughter, which he believed would rob her of her soul); *Lyng v Northwest Indian Cemetery Protective Ass'n*, 485 US 439, 448-49 (1988) (rejecting free exercise claim by Native Americans seeking to prevent government foresters from destroying a sacred site).

religious exercise may be.[93] Deliberate targeting of religion will be strictly scrutinized, but government indifference to religious impact—even if negligent—will trigger only rationality review.[94] *Smith* thus amounts not to the *O'Brien*[95] of free exercise law, but rather to its *Washington v Davis*.[96]

Professor McConnell and I fully agree upon the big flaw in *Smith*: it entrenches patterns of de facto discrimination against minority religions. Note that not a single religious exemption claim has ever reached the Supreme Court from a mainstream Christian religious practitioner. Mainstream Christianity does not need judicial help; the legislature is likely already to be obliging. It did not take a lawsuit but only a statute to free sacramental wine from the strictures of Prohibition.[97] Claims for judicial exemption under the Free Exercise Clause, like claims for exemption under the Free Speech Clause, emanate almost invariably from members of relatively politically powerless groups, toward whom the majority is likely to be selectively indifferent or worse. Minority religionists, like political dissenters, rarely have the political muscle to secure exemptions for themselves on the legislative floor.[98] *Smith* wipes out their alternative recourse. The majoritarianism reflected in *Smith* complements the majoritarianism implicit in the permissive establishment cases: It is as if the Court wears blinders, so that it cannot see an establishment of mainstream Christianity and cannot see free exercise violations of anything else.

The Court's retreat on free exercise is related to its retreat on establishment in another respect as well: Both exhibit a retrogressive view of "coercion." A fundamental feature of the modern welfare state is that government can more easily burden rights with-

---

[93] 110 S Ct 1595, 1600 (1990).

[94] Specifically, *Smith* rejected a claim by Native Americans to exempt religiously mandated peyote ingestion from criminal prohibitions on drug use, holding that no heightened scrutiny attaches to claims for exemption from a "generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)." Id at 1599. For a strong critique, see Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U Chi L Rev 1109 (1990).

[95] See note 87 and accompanying text.

[96] 426 US 229 (1976).

[97] Volstead Act of Oct 28, 1919, 41 Stat 305, codified at 27 USC § 16 (1918), repealed, Act of Aug 27, 1935, 49 Stat 872.

[98] But sometimes they do have the muscle. As *Smith* noted, a number of states voluntarily exempt sacramental peyote use, and Oregon recently joined their number. *Smith*, 110 S Ct at 1606; Or Rev Stat § 475.992(5) (1991). Conversely, it is at least ironic to note that "mainstream Christianity" is today a political alliance, when it was intra-Christian conflict that motivated the Religion Clauses.

out the direct use of force.[99] By heading toward a "coercion" test in establishment while narrowing the definition of "coercion" in free exercise law, however, the Court is returning to a force-based definition of religious injury more appropriate to pre-New Deal government. This reverses the trend which Justice Brennan began in *Sherbert v Verner*, which established a capacious view of "coercion." Recall that in *Sherbert*, the Court held that a denial of unemployment benefits to a Saturday Sabbatarian who lost her job for refusing to work on her sabbath must be strictly scrutinized as the equivalent of a criminal fine on Saturday worship.[100] The key departure in *Sherbert* was to treat the indirect incentives created by a government benefit program as the constitutional equivalent of the use of force.[101] The theory is that one afraid of being denied unemployment benefits will be more likely to work on her Saturday sabbath—it matters little just how much more.

The Court's more recent free exercise cases, however, have shifted the focus back from effects to mechanism, and have resurrected force as the paradigm. In *Bowen v Roy*, the Court rejected a Native American's effort to prevent the government from assigning a social security number to his daughter, despite his belief that it would rob her of her soul. The Court reasoned that religious adherents have no "right to dictate the conduct of the Government's internal procedures."[102] The Court split on a second issue: whether the government could require Mr. Roy to use the soul-robbing social security number as a condition of obtaining Aid to Families with Dependent Children—an issue one might have thought was

---

[99] See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv L Rev 1413 (1989).

[100] 374 US at 404.

[101] It is a closer question whether establishment concerns justified denying unemployment compensation to Mrs. Sherbert. Writing for the Court, Justice Brennan rejected the dissenters' objection that granting the benefit would amount to a subsidy or windfall to Mrs. Sherbert's religion in violation of the Establishment Clause. Id at 409-10. As I have argued elsewhere, I believe that Brennan's reasoning effectively concedes the sovereignty of Mrs. Sherbert's religion. See Sullivan, 102 Harv L Rev at 1436 & n 84, 1440 (cited in note 99). The baseline for claims of unemployment compensation is involuntary unemployment. If Mrs. Sherbert is deemed voluntarily unemployed because she is choosing religion over work, then giving her (but not other Saturday shirkers) unemployment compensation looks like a subsidy. The denial of unemployment looks like a penalty, however, if Mrs. Sherbert is deemed involuntarily unemployed. Justice Brennan's implicit assumption must have been that the commands of God were no more within Mrs. Sherbert's conscious control than the local unemployment rate, and hence that her unemployment was involuntary. See McConnell, 59 U Chi L Rev at 184-85 (cited in note 1), for a full defense of this assumption. There is force, however, to the argument that this assumption gives preferential treatment to religion.

[102] *Bowen*, 476 US at 700.

controlled by *Sherbert*. While Chief Justice Burger's opinion was joined only by Justices Rehnquist and Powell, it reached the merits and found this condition constitutional on grounds that undercut *Sherbert*'s core premise:

> [W]hile we do not believe that no government compulsion is involved, we cannot ignore the reality that denial of such benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications.[103]

In *Lyng v Northwest Indian Protective Ass'n*,[104] such reasoning came home to roost. There the Court upheld the government's decision to develop public wilderness in a way that would destroy irretrievably Native American use of the land as a worship site.[105] Writing for the Court, Justice O'Connor (despite her dissent from the Burger opinion in *Roy*) read "prohibition" of free exercise to mean "coercion," and found no coercion.[106] *Lyng* ignored the government's monopoly of a unique worship site, which gave it decisive leverage over the minimal preconditions for the religion's exercise. In such a setting, government indifference becomes the equivalent of prohibitive regulation.[107]

The Court's increasing inattention to effects culminated in *Smith*, which applied deferential review even to a criminal law that literally "prohibited" a religious practice, but not intentionally. In *Smith*, even a coercive mechanism plus a prohibitive effect were not enough so long as the law was facially neutral with respect to religion.

By rejecting disparate impact as a trigger, and by so rarely finding "coercion" or its equivalent in the proprietary actions of the welfare state, the Court has narrowed free exercise too far. The common thread in these cases is an overstated fear of religious anarchy. The most extreme statement is Justice Scalia's in *Smith*: to permit frequent religious exemptions "would be courting anar-

---

[103] Id at 704.

[104] 485 US 439 (1988).

[105] *Lyng*, 485 US at 453.

[106] Id at 450-51.

[107] Compare *Webster v Reproductive Health Services*, 492 US 490, 510 n 8 (1989) (although prohibiting abortions in public hospitals is constitutional in a world with private hospitals, it might be unconstitutional in a world of universal public health care, where denying access to public hospitals for abortions would be the equivalent of a regulatory ban).

chy"—"a system in which each conscience is a law unto itself."[108] And Scalia found this danger especially potent in a society of many diverse religious beliefs.[109]

Such reasoning overestimates the practical dangers religious deviance from conventional practice currently poses to the rule of law.[110] The error began with *Reynolds v United States*, which disallowed a free exercise claim by Mormons for exemption from a territorial criminal ban on the practice of polygamy, which was key to spiritual elevation within their church at the time.[111] The Court's argument that polygamy was linked to despotic political regimes, and would have negative external effects on the state-sanctioned institution of monogamous marriage, seems no more persuasive than similar domino theories sometimes advanced today in defense of sodomy laws. Likewise, the conclusion that ceremonial peyote ingestion threatens to undermine the war on drugs seems widely off the mark, given the small market for the drug and the self-limiting requirement of religious ceremonial use.

Of course, it is a harder case if the religious practice causes direct physical harm. For example, should the homicide laws apply to a cult that reenacts Christ's crucifixion with a real crucifixion of its own? Assuming a willing adult flagellant—permitting religiously motivated infliction of harm on children would raise different concerns—it is difficult to make a powerful case that such a cult will have a major negative effect on others' views of the sanctity of life.[112] Perhaps even this practice should have free exercise exemption.

Linking each of these examples is a certain degree of physical insularity—sects living apart in enclaves demarcated from the civil order.[113] The Court showed a soft spot for the communal values of

---

[108] *Smith*, 110 S Ct at 1605-06.

[109] Id. To Justice Scalia, the cure of judicial balancing would be as bad as or even worse than the disease. Id.

[110] Under different social conditions—for example, a society whose religious population was bipolar rather than pluralistic—I might be less optimistic. In any event, Justice O'Connor's concurring opinion in *Smith* has the better of the argument: She suggests that if anarchy really threatens, judicial balancing in favor of the threatened government interest is capable to stave it off. *Smith*, 110 S Ct at 1611 (O'Connor concurring.)

[111] 98 US 145, 166-67 (1878).

[112] Willing self-sacrifice in the form of unpaid labor, in contrast, may have external effects on competition and so may justify imposing the minimum wage laws on religious businesses. See *Tony and Susan Alamo Foundation v Secretary of Labor*, 471 US 290 (1985); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U Chi L Rev 308, 314-15 (1991).

[113] See Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 Harv L Rev 4 (1983).

such an insular sect in *Yoder*.[114] Religious competition with the values of the secular civil order grows fiercer the more pervasive and integrated the religious practice. For example, when the Roman Catholic and some Protestant churches exclude women from the priesthood, they powerfully and visibly reinforce a social hierarchy rejected in the civil order. But such organizational autonomy is a price of free exercise, so long as it does not impede the functioning of the civil public order. Efforts to inject religious views of gender roles into the public school curriculum, for example, should be rejected.[115]

I thus substantially agree with Professor McConnell on the issue of religious opt-out from regulatory regimes. We both would tolerate more religious "anarchy" than would the Court.[116] We both would generally decline to protect adult "members of the religious community from the consequences of their religious choices."[117]

Where we disagree is on the question of religious opt-out from the redistributive programs of the welfare state. McConnell would grant to religious practitioners extensive withdrawal rights from such programs. For example, he would reverse the Court's unanimous ruling in *United States v Lee* denying the Amish the right to opt out of paying social security taxes,[118] and would likewise reverse the Court's unanimous ruling in *Tony and Susan Alamo Foundation v Secretary of Labor* denying an evangelical religious organization the right to pay workers in its businesses less than the minimum wage.[119] If the Amish believe in caring for their own elderly, he suggests, then they ought not have to pay into the system from which they draw nothing out.[120] The same goes for those "inspired to work for the glory of God for long hours at no pay."[121]

---

[114] 406 US 205. See note 22 and accompanying text.

[115] Thus *Mozert*, 827 F2d 1058, in which the Court rejected the free exercise claim of fundamentalist Christian parents against the exposure of their children to "secular humanism" in a public school, was correct. And *Edwards*, 482 US 578, in which the Court held that creationism may not be given equal time with other accounts of human origins in public schools, was also correct. The "establishment" of the public school curriculum requires that religious tenets be taught elsewhere.

[116] See McConnell, 57 U Chi L Rev at 1145-46 (cited in note 94) (arguing that the government has no power to intervene where the putative injury is internal to the religious community).

[117] See id at 1145.

[118] *Lee*, 455 US 252. McConnell, 57 U Chi L Rev at 1446 (cited in note 94).

[119] *Alamo Foundation*, 471 US 290. See McConnell, 57 U Chi L Rev at 1145-46 (cited in note 94), for his criticism of this decision.

[120] McConnell, 57 U Chi L Rev at 1445 (cited in note 94).

[121] Id at 1145.

Finally, he hints that legislative exemption of religious organizations from the religious antidiscrimination provisions of Title VII are not only permissible under the Establishment Clause, as the Court held in *Corporation of Presiding Bishop v Amos*,[122] but may be mandatory under the Free Exercise Clause.[123] Lurking one step beyond these conclusions is perhaps the view, never quite stated in his articles, that, as a matter of free exercise, those who prefer religious education for their children should not have to pay (through the property tax) for the public schools they do not use. On this view, vouchers permitting private direction of tax funds toward religious education would not only be permissible under the Establishment Clause, but would be mandatory under the Free Exercise Clause.

I do not favor such religious opt-out from the obligations of the welfare state. The reason stems again from my reading of the Religion Clauses outlined above. The affirmative implication of the Establishment Clause is the establishment of the civil public order. That order may appear to religionists to usurp some religious functions: The civil murder laws, not the tenets of Christianity or Islam, settle whether Salman Rushdie may legally be put to death for heresy. As the civil public order expands into greater welfare capacities, it may again appear to religionists to usurp some religious functions: public schools and unemployment benefits displace church classrooms and soup kitchens, all at common expense.

But it is a mistake to see these developments as a penalty on religionists who would rather handle education and charity their own way. All religions gain from the settlement of the war of all sects against all reflected in the establishment of the civil order. Religionists gain from the provision of universal public education even if they withdraw their children to private schools—just as the elderly or childless gain from the education of their fellow citizenry even in the absence of personal family gain. And religionists benefit indirectly from the establishment of universal social insurance programs. Just as religionists must pay for the secular army that engineers the truce among them, they must pay for the other com-

---

[122] 483 US 327 (1987).

[123] See McConnell, 59 U Chi L Rev at 170-71 (cited in note 1). Professor McConnell likewise hints that it violates the Free Exercise Clause to require Catholic institutions such as Georgetown University to comply with the District of Columbia human rights law forbidding discrimination against gay and lesbian people. See id at 138 & n 111 (discussing *Gay Rights Coalition v Georgetown University*, 536 A2d 1 (DC App 1987) (en banc)).

mon goods of the civil public order. Thus *Lee* was rightly decided, and vouchers are not compelled.

Conclusion

Professor McConnell and I differ more about establishment than about free exercise. Whereas he criticizes "secularists" such as Justice Stevens "who take a strong position on establishment and a weak position on free exercise,"[124] I believe Professor McConnell makes the opposite error: He takes a strong position on free exercise but too weak a position on establishment. The Court has taken a weak position on both. I favor a strong position on both.

The Court's trends under both clauses reflect too narrow a view of "coercion." To be sure, forced oaths amount to establishment, and tarring and feathering members of a hated sect prohibits free exercise, but in the modern welfare state, so does a great deal more. In interpreting the Religion Clauses, the Court is headed backward toward an eighteenth-century focus on intentional force and away from a twentieth-century understanding that the state has many subtler but equally effective means for controlling religious incentives. McConnell agrees with this point halfway: he criticizes the Court's narrowing definition of "coercion" on the free exercise side, and would count a broad range of actions by the welfare state as "burdens" on or "prohibitions" of religious exercise. But he endorses a narrow definition of "coercion" on the establishment side, downplaying how the expansion of the welfare state poses new threats of establishment by means subtler than coercion as well.

Both McConnell and the Court undervalue the Establishment Clause, and in particular, its affirmative implications. Just as the free exercise of religion implies the free exercise of non-religion, so the ban on establishment of religion establishes a civil public order, which ends the war of all sects against all. The price of this truce is the banishment of religion from the public square, but the reward should be allowing religious subcultures to withdraw from regulation insofar as compatible with peaceful diarchic coexistence. And while financial support is withdrawn from religion, religionists may still be required to give financial support to the state, for all religions gain from the truce and the common goods of the civil public order it established. Will this asymmetry have crippling in-

---

[124] McConnell, 57 U Chi L Rev at 1132 & n 108 (cited in note 94).

centive effects on religious practice? The evidence of religious revival points the other way, and suggests we should have more faith in faith.