RELIGION AS BASIS OF LAWMAKING?
HEREIN OF THE NONESTABLISHMENT OF RELIGION

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The question whether in a liberal democracy religion—religious rationales—may serve as a basis of (coercive) lawmaking must be disaggregated into two distinct questions: First, is religion a morally legitimate basis of lawmaking in a liberal democracy? Second, is religion a constitutionally legitimate basis of lawmaking in the United States? I have addressed (elsewhere) the first question—as have many others. In my judgment, the answer is yes; and, again in my judgment, the most powerful defense of that answer is philosopher Christopher Eberle’s important book Religious Conviction in Liberal Politics (2002). This

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4 See also Christopher J. Eberle, "Religious Reasons in Public: Let a Thousand Flowers Bloom, But Be Prepared to Prune" (unpublished ms. 2007). Indeed, given a recent paper by Gerald Gaus, in which he agrees with Eberle that citizens and their elected representatives may rely solely on religious reasons in making political choices, I am inclined to think that the debate is largely over. See Gerald F. Gaus, "The Place of Religious Belief in Public Reason Liberalism" (unpublished ms. 2007). (The two papers just cited, by Eberle and Gaus, were presented at the annual meeting of the American Philosophical Association,)
Essay addresses the second question. The second question, which is about constitutional legitimacy, should not be confused with the first question, which is about moral legitimacy.

Like other liberal democracies, the United States is committed to the right to freedom of religious practice. Unlike most other liberal democracies, however, the United States is also committed to the nonestablishment of religion. According to the constitutional law of the United States, this includes the ban on state aid to religious schools:

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In a clear and unmistakable manner Habermas condemns all those who keep trying to sentence the religious discourse in the public square to silence, to eliminate and liquidate it all together. "It is in the best interest of the constitutional state to act considerately (schonend) toward all those cultural sources out of which civil solidarity and norm consciousness are nourished." Communicativeness implies necessarily and by its very definition the effort of mutual understanding.

Like the United States, France is constitutionally committed to the nonestablishment of religion, which in France is called "laïcité". See Cécile Laborde, "Secular Philosophy and Muslim Headscarves in Schools," 13 J. Political Philosophy 305, 308 (2005):

On 11 December 1905, republicans in power [in France] abolished the Concordat which, since 1801, had regulated the relationships between the French state and "recognized religions" and had, in practice, entrenched the political and social power of the dominant Catholic Church. The first two articles of the 1905 Law of Separation between Church and State read:

Article 1. The Republic ensures freedom of conscience. It guarantees the free exercise of religions.

Article 2. It neither recognizes nor subsidises any religion.

The principle of separation between church and state has since been recognized as a quasi constitutional principle, and is implicitly referred to in Article 1 of the 1946 Constitution, according to which "France is an indivisible, laïque, democratic and social republic".
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United States, government—that is, lawmakers and other government officials—may neither prohibit the "free exercise" of religion nor "establish" religion. Does the nonestablishment norm (so I like to call it) ban religion as a basis of lawmaking? More precisely, should the nonestablishment norm be understood to ban laws (and policies) for which the only discernible rationale—or, at least, the only discernible rationale other than an implausible secular rationale—is religious? (As I have explained elsewhere, an implausible secular rationale—a secular rationale that rational, well-informed, and thoughtful fellow citizens could not affirm—

6 The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." I concur in Kent Greenawalt's judgment that "[b]y far the most plausible reading of the original religion clauses—based on their text, the history leading up to their enactment, and legislation enacted by Congress is that Congress could protect but not impair free exercise is carrying out its delegated powers for the entire country and within exclusively federal domains, that Congress could neither establish a religion within the states nor interfere with state establishments [of religion], and that Congress could not establish religion within exclusively federal domains." Kent Greenawalt, "Common Sense about Original and Subsequent Understandings of the Religion Clauses," 8 J. Constitutional Law 479, 511 (2003). See also id. at 491.

The religion clauses have long been held to apply—it is constitutional bedrock that they apply—not just to Congress but to the entire national government, and not just to the national government but to state government as well. In effect, then, the clauses provide that government may neither establish religion nor prohibit the free exercise thereof. See Michael W. McConnell, "Accommodation of Religion: An Update and Response to the Critics," 60 George Washington L. Rev. 685, 690 (1992): "The government may not 'establish' religion and it may not 'prohibit' religion." McConnell explains, in a footnote attached to the word "establish", that "[t]he text [of the First Amendment] states the Congress' may make no law 'respecting an establishment' of religion, which meant that Congress could neither establish a national church nor interfere with the establishment of state churches as they then existed in the various states. After the last disestablishment in 1833 and the incorporation of the First Amendment against the states through the Fourteenth Amendment, this 'federalism' aspect of the Amendment has lost its significance, and the Clause can be read as forbidding the government to establish religion." Id. at 690 n. 19. (As I have explained elsewhere, a constitutional doctrine is constitutional bedrock if the doctrine is well-settled and there is no significant support—in particular, among the political elites—for abandoning the doctrine. See Michael J. Perry, We the People: The Fourteenth Amendment and the Supreme Court 19-23 (1999).)
is constitutionally inadequate.\textsuperscript{7} R is the only discernible rationale for a law if but for R--if in the absence of R--the law would not have been enacted.

Is it a good thing that government in the United States is constitutionally forbidden to establish religion. So far as I can tell, there is a virtual consensus among us citizens of the United States, including those of us who are religious believers, that, all things considered, it is good both for religions and for social harmony that our lawmakers may not establish religion. The serious question among us, therefore, is not whether the constitutional law of the United States should include the nonestablishment norm but what the nonestablishment norm should be understood to mean--to forbid--in one or another context.\textsuperscript{8} In this Essay I ask what the nonestablishment norm should be understood to forbid in the context of lawmaking. I conclude that the answer to the question whether the nonestablishment norm should be understood to ban laws for which the only discernible rationale is religious, depends: yes with respect to some religious rationales, no with respect to others. I also conclude, however, that insofar as the nonestablishment norm is concerned, lawmakers are free to support laws--to vote to enact laws--on the basis of any religious rationale whatsoever. Those two conclusions may seem to pull in opposite directions; I explain in this Essay why they do no.


\textsuperscript{8} However, "[o]ne current Justice on the Supreme Court[, Clarence Thomas,] . . . twice has asserted that the states should be bound by Free Exercise Clause norms, but should not be bound by Establishment Clause norms." Ira C. Lupu & Robert W. Tuttle, "Federalism and Faith," 56 Emory L. J. 19, 49 (2006). See id. at 49-51.
I. The Central Meaning of the Nonestablishment Norm

The idea of an "established" church is familiar. For Americans, the best known and most relevant example is the Church of England, which from before the time of the American founding to the present has been the established church in England. (Though the Church of England was much more strongly established in the past than it is today.)

9 If the idea is insufficiently familiar, see Michael W. McConnell, "Establishment and Disestablishment at the Founding, Part I: The Establishment of Religion," 44 Wm & Mary L. Rev. 2105 (2003). According to McConnell:

An establishment is the promotion and inculcation of a common set of beliefs through governmental authority. An establishment may be narrow (focused on a particular set of beliefs) or broad (encompassing a certain range of opinion); it may be more or less coercive; and it may be tolerant or intolerant of other views. During the period between initial settlement and ultimate disestablishment, American religious establishments moved from being narrow, coercive, and intolerant to being broad, relatively noncoercive, and tolerant. Although the laws constituting the establishment were ad hoc and unsystematic, they can be summarized in six categories: (1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church.


10 Cf. Akhil Reed Amar, "Foreword: The Document and the Doctrine," 114 Harvard L. Rev. 26, 119 (2000). "Let us recall the world the Founders aimed to repudiate, a world where a powerful church hierarchy was anointed as the official government religion, where clerics ex officio held offices in the government, and where members of other religions were often barred from holding government posts."


The special status of the Church of England manifests through legal links with the British crown. Under legislation, the reigning queen or king is "supreme governor" of the church and swears a coronation
States, however, unlike in England, there may be no established church. The nonestablishment norm forbids government to treat any church as the official church of the political community. (When I say "any church", I mean to include any range of theologically kindred churches—for example, Christian churches, which, though denominationally diverse,

(oath to maintain it. As such, the monarch may not be a Catholic, or marry a Catholic, and must declare on accession to the throne that he or she is a Protestant.

This is surprising enough in a western liberal democracy at the end of the twentieth century. But there is more. The monarch also appoints the archbishops and other reigning church dignitaries. Twenty-six of these "Lords Spiritual" sit in the upper house of the legislature, the House of Lords. The British Parliament can legislate for the church and can prescribe modes of worship, doctrine and discipline. And the church has delegated legislative authority in relation to church affairs. Measures initiated by the church may be accepted or rejected, but not amended, by the Parliament and override earlier inconsistent law.

Professor Saunders then states:

As usual with the British system of government, however, what you see is not exactly what you get. In advising the crown on appointments to church positions, the prime minister draws names from a list provided by church authorities. As a practical matter, Parliament is unlikely to veto legislative measures initiated by the church, or to act unilaterally in relation to other church affairs. Vernon Bogdanor draws attention to a House of Commons debate on the ordination of women priests in 1993, in which several Members expressed the view that the House should not be discussing the view at all.

are sometimes referred to in the singular, as "the Christian church". More precisely, to say that government may not establish religion is to say that government may not privilege any church in relation to any other church on the basis of the view that the favored church is, as a church, as a community of faith, better along one or another dimension of value—truer, for example, or more efficacious spiritually or politically,12 or more authentically American.13 In particular, government may not privilege, in law or policy, membership in any church—in the Fifth Avenue Baptist Church, for example, or in the Roman Catholic Church, or in the Christian church generally;14 nor may it privilege a worship practice—a prayer, liturgical rite, or religious observance15—or a theological doctrine peculiar to any church.

12 More efficacious politically? Imagine: A macchiavellian advisor counsels the powers-that-be—who, let us assume, are atheists—that it would be better for social harmony if there were an established church, and that because the vast majority of the citizens are members of Church A, it makes more sense to establish Church A than Church B or Church C (etc.).

13 As Justice William Brennan once put it: "It may be true that individuals cannot be 'neutral' on the question of religion. But the judgment of the Establishment Clause is that neutrality by the organs of government on questions of religion is both possible and imperative." Marsh v. Chambers, 463 U.S. 783, 821 (1983) (Brennan, J., joined by Marshall, J., dissenting).

14 For an example of a position that privileges the Christian church generally, see "Other Faiths Are Deficient, Pope Says," The Tablet (London), Feb. 5, 2000, at 157: "The revelation of Christ is 'definitive and complete', Pope John Paul affirmed to the Congregation for the Doctrine of the Faith, on 28 January. He repeated the phrase twice in an address which went on to say that non-Christians live in 'a deficient situation, compared to those who have the fullest of salvific means in the Church.' Nonetheless, '[Pope John Paul II] recognised, following the Second Vatican Council, that non-Christians can reach eternal life if they seek God with a sincere heart. But in that 'sincere search' they are in fact 'ordered' towards Christ and his Church.' Id.

15 Cf. Douglas Laycock, "Freedom of Speech That Is Both Religious and Political," 29 U. California, Davis L. Rev. 793, 812-13 (1996) (arguing that '[a]t the core of the Establishment Clause should be the principle that government cannot engage in a religious observance or compel or persuade citizens to do so").
There is no serious controversy among constitutional scholars, jurists, or lawyers in the United States today about the central meaning of the nonestablishment norm: The norm centrally means—it centrally forbids—what the preceding paragraph says it forbids. There are serious controversies, however, about what the nonestablishment norm forbids—that is, about what the norm should be understood to forbid—beyond what it centrally forbids.

II. Does the Nonestablishment Norm Forbid Government to Affirm Religious Premises?

Let's turn to one such controversy: *Given its uncontested central meaning, should the nonestablishment norm be understood to forbid government to affirm religious (theological) premises?*

16 See, e.g., Carl H. Esbeck, "The 60th Anniversary of the Everson Decision and America's Church-State Proposition," 23 J. L. & Religion (2007-08, forthcoming): "While Americans robustly debate religious beliefs and doctrine, it is the promise that our government will not throw its weight behind one side or the other of these debates. . . . The government, rather, is to maintain a form of 'neutrality.'"

17 I have addressed one such controversy elsewhere. See Perry, Under God?, n. #, at 3-19.

I don't discuss here here the nonestablishment caselaw fashioned by the justices of the Supreme Court of the United States. It bears mention, however, that if Justice Clarence Thomas is right, that caselaw "is in hopeless disarray . . . " Rovnerberge v. Rector and Visitors of University of Virginia, 515 U.S. 819, 861 (1995) (Thomas, J., concurring). Many constitutional scholars have said much the same thing. See, e.g., Jesse H. Choper, Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses 174-76 (1995); William Van Alstyne, "Ten Commandments, Nine Justices, and Five Versions of One Amendment—The First. ('Now What?')," 14 Wm. & Mary Bill Rts. J. 17 (2005). Akhil Amar has referred to "the many outlandish (and contradictory) things that have been said about [the nonestablishment norm] in the United States Reports." Amar, n. #, at 119.
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There are many different ways in which government in the United States affirms, or has affirmed, one or more religious premises. Here are some prominent examples: In 1954, the Congress of the United States added the words "under God" to the Pledge of Allegiance ("one nation under God").\(^{18}\) Also in 1954, "Congress requested that all U.S. coins and paper currency bear the slogan, 'In God We Trust.'" On July 11, 1955, President Eisenhower made this slogan mandatory on all currency. In 1956 the national motto was changed from 'E Pluribus Unum' to 'In God We Trust.'\(^{19}\) The proceedings of many courts in the United States, including the United States Supreme Court, begin with a court official intoning "God save the United States and this Honorable Court."\(^{20}\) Some states provided that their public schools should begin the day with Bible reading or prayer.\(^{21}\) Some state officials, including some state judges, posted the Ten Commandments on government property, such as a public school classroom or hallway, a courtroom wall, or a courthouse lawn.\(^{22}\) In at least some such instances, government was affirming one or more religious premises. It the nonestablishment

\(^{18}\) For a history of the Pledge of Allegiance, which makes its first appearance in 1892, see John W. Baer, The Pledge of Allegiance: A Centennial History, 1892-1992 (1992). The story of adding "under God" to the Pledge involves both the Knights of Columbus (a Roman Catholic organization) and post-World War II anti-communism. See id. at 62-63.

\(^{19}\) Id. at 63.

\(^{20}\) See Marsh v. Chambers, 463 U.S. 783, 786 (1983): "In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, 'God save the United States and this Honorable Court.' The same invocation occurs at all sessions of this Court."


norm best understood to forbid government to affirm any religious premise whatsoever, no matter what the premise?

I am about to sketch two different understandings of what the nonestablishment norm forbids. But it bears emphasis that no sensible understanding of what the norm forbids denies either of these two propositions:

First, the nonestablishment norm forbids government to affirm any religious premise whose affirmation by government would violate the central meaning of the norm. For example, government may not affirm—explicitly or implicitly, directly or indirectly—that Jesus is Lord, or that the Roman Catholic Church is the one true church.

Second, if there are one or more religious premises government may affirm—one or more premises, that is, whose affirmation by government would not violate the central meaning of the nonestablishment norm—government, in affirming such a premise, may not coerce anyone to affirm the premise or disadvantage anyone who refuses to do so.23

Given the central meaning of the nonestablishment norm, the first proposition follows as night follows day. We don’t need the nonestablishment norm to warrant the second proposition; the free exercise norm—the right to the free exercise of religion—is sufficient. As a moment’s reflection will confirm, the free exercise norm protects not only one’s freedom to practice one’s own religion, but also one’s freedom not to practice, not to participate in, someone

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23 Sharp disagreement about whether government is in fact coercing anyone—or, more generally, about what, at the margin, “coerce” should be understood to mean—is not uncommon. See, e.g., Lee v. Weisman, 505 U.S. 577 (1992).
else's religion or indeed any religion at all. That "negative" freedom—that freedom not to practice a religion one does not accept—includes the freedom not to affirm a religious premise one does not accept.

Now, imagine two different understandings of what, in the context at hand, the nonestablishment norm forbids. According to the first, and more restrictive, understanding, government may not affirm any religious premise whatsoever. According to the second, and less restrictive, understanding, government may affirm any religious premise whatsoever whose affirmation by government would not violate the central meaning of the norm.²⁴ The

²⁴ Bill Marshall has written that "First Amendment law is relatively settled on the theoretical position that explicit state sponsorship of religion is impermissible." It is clear from his article that "state sponsorship of religion" Marshall means to include the kind of state affirmation of religious premises entailed by state sponsorship of prayer. Marshall cites two cases in support of his statement of what is "relatively settled": Santa Fe Independent School District v. Doe, 530 U.S. 290, 309 (2000); Lee v. Weisman, 505 U.S. 577, 587 (1992). See William P. Marshall, "The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy," 78 Notre Dame L. Rev. 11, 21 & n. 57 (2002). Now, I don’t mean to deny that the Supreme Court’s nonestablishment rhetoric lends much support, direct and indirect, to the proposition that "state sponsorship of religion is impermissible." (But see Marsh v. Chambers 463 U.S. 783 (1983).) Nonetheless, the decision in each of the two cases Marshall cites can readily be understood on the basis of the rule—a rule most naturally assimilated to the free exercise norm—that if there are one or more religious premises that government may affirm—one or more premises, that is, whose affirmation by government would not violate the central meaning of the nonestablishment norm—government, in affirming such a premise, may not coerce anyone to affirm the premise.

Still, I am undoubtedly swimming against the tide of much scholarly opinion in arguing for the less restrictive understanding of the nonestablishment norm. For a sampling of that opinion, see Kent Greenawalt, "Five Questions about Religion Judges Are Afraid to Ask," in Nancy L. Rosenblum, ed., Obligations of Citizenship and Demands of Faith 196, 197 (2000) (declaring that "[t]he core idea that government may not make determinations of religious truth is firmly entrenched"); Andrew Koppelman, "Secular Purpose," 88 Virginia L. Rev. 87, 108 (2002) (stating that is it an "axiom" that the "Establishment Clause forbids the state from declaring religious truth"); Douglas Laycock, "Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers," 81 Northwestern U. L. Rev. 1, 7 (1986) ("In my view, the establishment clause absolutely disables the government from taking a position for or against religion. . . . The government must have no opinion because it is not the government’s role to have an opinion."). But see Steven H. Shiffrin, "The Pluralistic Foundations of the Religion Clauses," 90 Cornell L. Rev. 9, 72 (2004). "[T]he United States
more restrictive understanding would make sense only if there were no religious premise whose affirmation by government would not violate the central meaning of the nonestablishment norm. But there are some religious premises whose affirmation by government does not violate the central meaning of the norm. A single example will suffice. Since 1954, the Pledge of Allegiance has echoed Abraham Lincoln’s Gettysburg Address in declaring that we are “one nation under God”. (At Gettysburg, Lincoln resolved that “this nation, under God, shall have a new birth of freedom . . .”) In affirming, with Lincoln, that ours is a nation that stands under the judgment of a righteous God, government is not

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Constitution is best interpreted to be consistent with monotheistic ceremonial prayers that do not involve coercion.\(^{25}\)

\(^{25}\) The Declaration of Independence, which marks the first formative moment in the emergence of the United States of America, famously relies—explicitly so—on belief in God: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights . . .” (Emphasis added.) If the Declaration marks a formative moment in the birth of the United States, two texts of Abraham Lincoln mark formative moments in the nation’s rebirth: the Gettysburg Address and the Second Inaugural Address, which is surely one of the most theologically intense political speeches in American history. “The Almighty,” said Lincoln in his Second Inaugural, “has his own purposes. ‘Woe unto the world because of offences! for it must needs be that offences come; but woe to that man by whom the offence cometh!’” Lincoln continued:

> If we shall suppose that American Slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through his appointed time, He now wills to remove, and that He gives to both North and South, this terrible war, as the woe due to those by whom the offence came, shall we discern there any departure from those divine attributes which the believers in a Living God always ascribe to Him? Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue, until all the wealth piled by the bond-man’s two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn by the sword, as was said three thousand years ago, so still it must be said “the judgments of the Lord, are true and righteous altogether.” With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in . . .

Although we citizens of the United States of America don’t recite the Declaration, the
treat any church—including the denominationally diverse Christian Church—as the official church of the political community; government is not favoring any church in relation to any other church on the basis of the view that the favored church is, as a church, as a community of faith, better along one or another dimension of value; government is not privileging membership in, a worship practice of, or a theological doctrine peculiar to any church. The less restrictive understanding of what the nonestablishment norm forbids in this context makes more sense than the more restrictive understanding, because there are some religious premises whose affirmation by government does not, or would not, violate the central meaning of the nonestablishment norm.  

Gettysburg Address, or Lincoln’s Second Inaugural, we do recite, frequently, the Pledge of Allegiance. According to the Pledge, the United States of America is a nation “under God”: a nation that, as Lincoln insisted in his Second Inaugural, stands under the judgment of a righteous God. Politicians and others are fond of asking God to “bless” America. Lincoln understood that the God who can, in judgment, bless America can also, in judgment, damn her: “He gives to both North and South, this terrible war, as the woe due to those by whom the offence came . . . [A]s was said three thousand years ago, so still it must be said ‘the judgments of the Lord, are true and righteous altogether.’”

For most of our history as an independent nation, the words of the constitutional prohibition against enactment of an law ”respecting an establishment of religion” were commonly assumed to mean what they literally said. The provision was not understood as prohibiting the state from merely giving voice, in general terms, to religious sentiments widely shared by those of its citizens who profess a belief in God. . . . [T]he principal thrust of the prohibition was to prevent any establishment by the national government of an official religion, including an established church such as that which existed in England at the time the American colonies won their independence from the Crown.
Let’s look more closely at the less restrictive understanding, according to which, again, having “under God” in the Pledge, or the like, does not violate the nonestablishment norm. Would it violate the nonestablishment norm, according to the less restrictive understanding, to have “under Christ” in the Pledge (“one nation under Christ”) or “In Christ We Trust” (or “Jesus Is Lord”) as the national motto, or to begin a session of court with “Christ save the United States and this Honorable Court”? To arrive at the right answer, we must inquire: In adding “under Christ” to the Pledge, is government treating any church as the official church of the political community? Is it favoring any church in relation to any other church on the basis of the view that the favored church is, as a church, as a community of faith, better along one or another dimension of value? It seems undeniable that in adding “under Christ” to the Pledge, government is treating the Christian church—the Christian church as a whole, though not any particular denomination of it—as the official church of the political community; government is favoring the Christian church in relation to other churches and communities of faith on the basis of the view that the Christian church is, as a church, as a community of faith, better along one or another dimension of value. So, according to the less restrictive understanding of what the nonestablishment norm forbids, having “under Christ” in the Pledge would violate the norm.27 For government to affirm any religious premise (or premises) that is ecumenical (nonsectarian) as among the great monotheistic faiths—Judaism, Christianity, and Islam—would not be for it to violate the nonestablishment norm.28 By contrast, for


28 Cf. id. at ---:

In the recent Decalogue Cases [Van Orden v. Perry, 125 S.Ct.
government to affirm any religious premise that is sectarian as among the monotheistic faiths would be for it to violate the norm. In affirming any religious premise that is not ecumenical as among Christians, religious Jews, and Muslims—for example, the premise that Jesus is Lord—government is violating the nonestablishment norm, even according to the less restrictive understanding of what the norm forbids.  

Why shouldn’t we go further and embrace an understanding of the nonestablishment norm according to which government may not affirm any religious premise whatsoever? Again, the central meaning of the nonestablishment norm does not require such an understanding. Moreover, no historically grounded reading of the norm—no reading grounded in American history—supports that understanding, and it is, after all, the American Constitution we are expounding. "[The establishment clause] was not . . . understood to be a prohibition against employing generalized religious language in official discourse. The notion that the

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2854 (2005); McCreary County v. ACLU, 125 S.Ct. 2722 (2005)), Justice Scalia conceded that government cannot invoke the blessings of "God," or even say his name, "without contradicting the beliefs of some people that there are many gods, or that God pays no attention to human affairs." Nevertheless, Justice Scalia declares that the contradiction is of no constitutional moment, because the historical understanding of the Establishment Clause permits government wholly to ignore those who do not subscribe to monotheism. Noting that more than 97% of American believers are either Christians, Jews, or Muslims, Justice Scalia concludes that the government invocation or endorsement of belief in a monotheistic God does not violate the Establishment Clause.

29 Justice Scalia has opined that "our constitutional tradition . . . ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).
First Amendment was designed to impose a secular political culture on the nation would have
struck most 19th Century judges as absurd.30 I can discern no good reason either for
expecting the Supreme Court to accept and enforce an understanding of the nonestablishment
norm that is not historically grounded or for thinking that the Court should accept and enforce
such an understanding.31 It is surely at least a minor virtue of the understanding of the

30 ACLU of Ohio v. Capitol Square Review & Advisory Board, 243 F.3d 289, 297
(6th Cir. 2001). Earlier in its opinion, the court quoted the following passage from an article
by Steven Smith:

In approving the establishment clause, the framers had adopted a
principle of institutional separation, but they had undertaken neither to
impose a secular political culture on the nation nor consented to abandon
their own religious values or culture when serving as public officials.
Indeed, any such undertaking would have required a seemingly
impossible intellectual and psychological surgery: Proclaiming a
national day of thanksgiving, or inviting a chaplain to offer a prayer
before congressional sessions, were actions of undeniable religious
import. But through these actions the government did not intrude into
the internal affairs of any church. Nor did these actions confer
governmental authority upon churches; Congress did not endow the
chaplain with authority to debate, vote, or directly influence
governmental decisions. Hence thanksgiving proclamations and
legislative prayers were simply not inconsistent with the decision
reflected in the establishment clause.

Id. at 297 (quoting Steven D. Smith, "Separation and the 'Secular': Reconstructing the
Disestablishment Decision, 67 Texas L. Rev. 955, 973 (1989)).

31 I began the paragraph accompanying this note by asking why shouldn’t we go
further and embrace an understanding of the nonestablishment norm according to which
government may not affirm any religious premise whatsoever. However, someone may want
to ask a question that pushes in the opposite direction: Why shouldn’t we embrace an
understanding according to which government may affirm a specifically Christian premise if
the premise is nonsectarian as among Christians? The simplest answer: It is constitutional
bedrock that government may not affirm such a premise.

A bit of American history is interesting here. The National Association to Secure the
Religious Amendment to the Constitution was formed in 1864 4to propose the following
change to the preamble to the Constitution (in brackets): 4We, the People of the United States,
[recognizing the being and attributes of Almighty God, the Divine Authority of the Holy
Scriptures, the Law of God as the paramount rule, and Jesus, the Messiah, the Savior and
Lord of all,] in order to form a more perfect union, establish justice, ensure domestic
tranquility, provide for the common defense, promote the general welfare, and secure the
nonestablishment norm I am defending here—the less restrictive understanding—that it does not entail a conclusion—namely, that having "under God" in the Pledge or "In God We Trust" as the national motto, or beginning a session of court with "God save the United States and this Honorable Court", violates the constitutional imperative that government not establish religion—most citizens of the United States would greet as ridiculously extreme.32

(bolding of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."—Jay Alan Sekulow, Witnessing Their Faith: Religious Influence on Supreme Court Justices and Their Opinions 125 (2006). The Christian Amendment, as it was called, "was considered twice by Congress: once in 1874 and again in 1894. The House Judiciary Committee rejected the amendment on both occasions." Id. at 126. Other interesting bits of American history are recounted in this op-ed by Jon Meacham, the editor of Newsweek: "A Nation of Christians Is Not a Christian Nation," New York Times, Oct. 7, 2007.

32 As even those who reject the less restrictive understanding of the nonestablishment norm will likely agree, the Supreme Court will not, in any remotely foreseeable future, rule that having "under God" in the Pledge (or "In God We Trust" as the national motto, or the like) is unconstitutional. If the Supreme Court, in a science-fiction scenario, were to so rule, the citizeny of the United States would rush to amend the Constitution to overrule the Court. Cf. Steven G. Gey, "'Under God,' the Pledge of Allegiance, and Other Constitutional Trivia," 81 North Carolina L. Rev. 1865, 1866-69 (2003) (reporting on the virtually unanimous negative response to the federal court’s (subsequently amended) decision in Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002)); Evelyn Nieves, 'Judges Ban Pledge of Allegiance from Schools, Citing 'Under God',' New York Times, June 27, 2002; Howard Fineman, 'One Nation, Under ... Who?,' Newsweek, July 8, 2002, at 20. Religious liberty scholar Steven Shiffrin has argued that the United States has evolved from a country that is historically Christian into a country that is "officially monotheistic." See Steven H. Shiffrin, "Liberalism and the Establishment Clause," 78 Chicago-Kent L. Rev. 717, 727 (2003). See also Shiffrin, "The Pluralistic Foundations of the Religion Clauses," n. #, at 70-73.

Proponents of a high wall between church and state, who would remove "under God" from the Pledge of Allegiance, are wishing for a country that does not exist and probably never will. Our Constitution must be interpreted in the light of our evolving traditions—like it or not. So we make compromises and today government can say "In God we trust" on its coins but not "In Christ we trust."

Id.
True, having "under God" in the Pledge, "In God We Trust" as the national motto, and the like, offends some citizens of the United States. But so long as government fully respects one’s right to the free exercise of religion, government’s affirmation of one or more religious premises does not violate anyone’s human rights. For example, that the Constitution of the Republic of Ireland makes a number of theological affirmations—while also vigorously protecting every Irish citizen’s right to freedom of religious practice—does not violate anyone’s human rights. More generally, the international law of human rights features the right to


[The very concept of "alienation," or symbolic exclusion, is difficult to grasp. How, if at all, does "alienation" differ from "anger," "annoyance," "frustration," or "disappointment" that every person who finds himself in a political minority is likely to feel? "Alienation" might refer to nothing more than an awareness by an individual that she belongs to a religious minority, accompanied by a realization that at least on some issues she is unlikely to be able to prevail in the political process. . . . That awareness may be discomforting. But is it the sort of phenomenon for which constitutional law can provide an efficacious remedy? Constitutional doctrine that stifles the message will not likely alter the reality—or a minority’s awareness of that reality.]

34 In its Preamble, the Irish Constitution affirms a nonsectarian Christianity: “In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, we, the people of Eire, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, . . . do hereby adopt, enact, and give to ourselves this Constitution.” Moreover, Article 6 states, in relevant part: “All powers of government, legislative, executive, and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in the final appeal, to decide all questions of national policy, according to the requirements of the common good.” (Emphasis added.) And Article 44 of the Constitution states, in relevant part: “The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honor religion.” On “religion in the Preamble”, see Gerard Hogan & G.F. Whyte, J.M. Kelly’s The Irish Constitution 6-7 (3d ed., 1994). (Although it affirms Christianity, the Irish Constitution explicitly disallows the “endowing” of any religion. Article 44.2.1 states: “The State guarantees not to endow any religion.”)

Given the religious commitments of the vast majority of the people of Ireland, it is not
freedom of religious practice but does not include anything like a nonestablishment norm; in particular, the Declaration on the Elimination of All Forms of Intolerance and of

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at all surprising that the Irish Constitution affirms Christianity. In so doing, the Irish Constitution violates no human right. Three things are significant here. First, the religious convictions implicit in the Irish Constitution's affirmation of Christianity in no way deny—indeed, they affirm—the idea that every human being, Christian or not, is inviolable; they affirm, that is, the idea of human rights. Second, the Irish Constitution's affirmation of Christianity is not meant to insult or demean anyone; it is meant only to express the most fundamental convictions of the vast majority of the people of Ireland. Third, and most importantly, the Irish Constitution protects the right, which is a human right, to freedom of religious practice; moreover, it protects this right not just for Christians, who are the vast majority in Ireland, but for all citizens. Article 44 states, in relevant part: "Freedom of conscience and the free profession and practice of religion are guaranteed to every citizen. . . . The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status." Article 44 also states that "[l]egislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to effect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school." (Emphasis added.) Therefore, the conclusion that in affirming Christianity the Irish Constitution violates a human right—or that in consequence of the affirmation Ireland falls short of being a full fledged liberal democracy—is, in a word, extreme. For an excellent essay on religious liberty in Ireland, see G.F. Whyte, "The Frontiers of Religious Liberty: A Commonwealth Celebration of the 25th Anniversary of the U.N. Declaration on Religious Tolerance—Ireland," 21 Emory International L. Rev. 43 (2007).

If what Brian Barry says in the following passage is true with respect to England, which has an established church, then it is even more true—n is true in spades—with respect to the United States, which has no established church but only such comparatively minor things as "under God" in the Pledge and "In God We Trust" as the national motto:

We must, of course, keep a sense of proportion. The advantages of establishment enjoyed by the Church of England or by the Lutheran Church in Sweden are scarcely on a scale to lead anyone to feel seriously discriminated against. In contrast, denying the vote to Roman Catholics or requiring subscription to the Church of England as a condition of entry to Oxford or Cambridge did constitute a serious source of grievance. Strict adherence to justice as impartiality would, no doubt, be incompatible with the existence of an established church at all. But departures from it are venial so long as nobody is put at a significant disadvantage, either by having barriers put in the way of worshipping according to the tenets of his faith or by having his rights and opportunities in other matters (politics, education, occupation, for example) materially limited on the basis of his religious beliefs.

Brian Barry, Justice as Impartiality 165 n. c (:995).
Discrimination Based on Religion or Belief, which is the principal international document concerning religious freedom, includes nothing like a nonestablishment requirement.  

35 I have explained elsewhere why liberal democracies, given their commitment to the morality of human rights—to the inherent dignity and inviolability of every human being—should and do protect, as a legal right, the right to freedom of religious practice. See Michael J. Perry, Religious Faith, Liberal Democracy, and Moral Controversy 000-000 (forthcoming). It is not the case, however, that given their commitment to morality of human rights, liberal democracies should refrain from establishing religion. From the perspective of the morality of human rights, it is a matter of indifference whether liberal democracies establish religion—so long as they comply fully with the right to freedom of religious practice. See also John Finnis, "Religion and State: Some Main Issues and Sources," http://ssrn.com/abstract=943420 (2006), at 30 (arguing that so long as they comply fully with the right to freedom of religious practice, "in establishing their constitutional arrangements a people might without injustice or political impropriety record their solemn belief about the identity and name of the true religious faith and community"). As a practical matter, then, a liberal democracy may establish religion only in a weak sense of "establish". A liberal democracy may not, for example, discriminate against any of its citizens because they are not members of the established church. As the cardinals and bishops of the Catholic Church stated at Vatican II:

If, in view of particular circumstances, obtaining among peoples, special civil recognition is given to one religious community in the constitutional order of society, it is at the same time imperative that the right of all citizens and religious communities to religious freedom should be recognized and made effective in practice.

Finally, government is to see to it that the equality of citizens before the law, which is itself an element of the common good, is never violated, whether openly or covertly, for religious reasons. Nor is there to be discrimination among citizens.

Dignitatis Humanae, section 6.
God We Trust” as the national motto, or beginning a session of court with “God save the United States and this Honorable Court”, is unconstitutional. Is there a way for one who accepts the more restrictive understanding to avoid that conclusion, which, again, most citizens of the United States would greet as ridiculously extreme?

Consider the suggestion that having "under God” in the Pledge or "In God We Trust" as the national motto (or the like) is not unconstitutional because such statements do not really constitute an affirmation by government of a religious premise; instead, such statements are merely patriotic or ceremonial utterances devoid of authentically religious content.36 In 1983, Supreme Court Justice William Brennan, joined by Justice Thurgood Marshall, wrote:

I frankly do not know what should be the proper disposition of features of our public life such as "God save the United States and this Honorable Court," "In God We Trust," "One Nation Under God," and the like. I might well adhere to the view . . . that such mottoes are consistent with the Establishment Clause . . . because they have lost any true religious significance.37

In 2004, Chief Justice William Rehnquist, joined by Justice Sandra Day O’Connor, said something similar: "The phrase ‘under God’ is in no sense a prayer, nor an endorsement of any religion . . . Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church."38

36 Cf. Marshall, n. #, at 23 (discussing “ceremonial deism”).


38 Elk Grove Unified School District v. Newdow, 542 U.S. 1, 31 (2004) (concurring in judgment). Newdow is the case in which it was claimed that just as having public school children recite a prayer violates the nonestablishment norm, so too having them recite the Pledge of Allegiance violates the nonestablishment norm, because the Pledge states that the United States is a nation “under God” and recitation of the Pledge is therefore a religious exercise. The U.S. Court of Appeals for the Ninth Circuit agreed, and the case ended up in the U.S. Supreme Court, where
Asserting that "one nation under God" or "In God We Trust" are merely patriotic or ceremonial utterances devoid of authentically religious content is obviously a convenient strategy for avoiding the conclusion that under the more restrictive understanding of the nonestablishment norm, having "under God" in the Pledge or "In God We Trust" as our national motto is unconstitutional. It is also a palpably disingenuous strategy.\(^{39}\) There are some citizens, no doubt, for whom the statements are merely ceremonial, religiously empty utterances; it is simply mistaken, however, to think that the statements are religiously empty for most, or even for many, citizens of the United States—or that they were religiously empty

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Six Justices reversed on a procedural ground, arguing that Newdow did not have standing to bring the action. Three justices, however, namely, Chief Justice Rehnquist and Justices O'Connor and Thomas, disagreed with [the Ninth Circuit on the merits.]

Analyzing [the Ninth Circuit's] opinion requires separation of two issues: First, is the Pledge a religious exercise, and, second, can a government actor constitutionally require that the Pledge be part of the official public school day? Chief Justice Rehnquist and Justice O'Connor both denied that the Pledge was a religious exercise and, therefore, concluded that it could be a part of the official public school day. Justice Thomas coincided that the Pledge was religious but . . . argued it was constitutional nonetheless.

Shiffrin, "The Pluralistic Foundations of the Religion Clauses," n. #, at 65-66. Shiffrin argues "that the Pledge is religious and that it is constitutional for Congress to encourage its use, but that it should not be considered constitutionally permissible to use the Pledge in public school classrooms." Id. at 66.

for the members of Congress who, in 1954, added "under God" to the Pledge.\textsuperscript{40} For most Americans, the statements resonate, as indeed they were meant to, with an authentically and rick theological content: that there is a God; that God created us and sustains us; that every human being has a God-given dignity and inviolability; and that, as Lincoln proclaimed in his Second Inaugural, we stand under the judgment of that righteous God.\textsuperscript{41}

There is no intellectually honest way for one who accepts the more restrictive understanding of the nonestablishment norm to avoid the conclusion that having "under God" in the Pledge or "In God We Trust" as the national motto, or beginning a session of court with "God save the United States and this Honorable Court", is unconstitutional. For one who is intellectually honest, to accept the more restrictive understanding is to accept that conclusion.\textsuperscript{42}

\textsuperscript{40} No one with any doubt on this score should fail to read Steven Gey’s article. See Gey, n. \#; at 1873-80.

\textsuperscript{41} See n. \#. See Douglas Laycock, "Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes, Missing the Liberty," 118 Harvard L. Rev. 155, 000 (?255, ?226) (2004) (arguing that recitation of the Pledge of Allegiance is a profession of faith); id. at 226-27 & n. 458 (noting others who argue that recitation of the Pledge is a profession of faith).

\textsuperscript{42} See Shiffrin, "The Pluralistic Foundations of the Religion Clauses," n. \#, at 66-70 (explaining why the positions of Rehnquist and O’Connor in the Newdow case [see n. \#] are untenable).
III. Does the Nonestablishment Norm, Properly Understood, Ban Religion as a Basis of Lawmaking?

Now, the question-in-chief: Is religion a legitimate--a constitutionally legitimate--basis of lawmaking in the United States? More precisely, should the nonestablishment norm be understood to ban laws (and policies) for which the only discernible rationale (at least, other than an implausible secular rationale) is religious?43

Two clarifications:
First, the principal laws at issue are those that are coercive, because coercive laws for which the only discernible rationale is religious seem to some to be a kind of religious imposition on those they coerce.44 Kent Greenawalt, for example, has written of laws "that enforce a purely religious morality[]" that "they unacceptably impose religion on others." He gives, as an example, "laws against homosexual relations based on the view that the Bible considers such relations sinful . . ."45

43 Steve Shiffrin has addressed much the same question and, unless I misunderstand him, has given much the same answer I give here. See Steven Shiffrin, "Religion and Democracy," 74 Notre Dame L. Rev. 1631, 1652-56 (1999).

44 Cf. Robert Audi, "Liberal Democracy and the Place of Religion in Politics," . . . 32: "[N]on-religious people often tend to be highly and stubbornly passionate about not being coerced to [act in accordance with religious reasons]. . . . [M]any who are not religious are incensed at the thought of manipulation in the name of someone else's non-existent deity."

45 Kent Greenawalt, "History as Ideology: Philip Hamburger's Separation of Church and State," 93 California L. Rev. 367, 390-91 (2005). See also Kent Greenawalt, "Religiously Based Judgments and Discourse in Political Life," 22 St. John’s J. Legal Commentary 445, 487 (2007): "[R]equiring people to comply with the moral code of a religion, absent any belief about ordinary harm to entities deserving protection, is a kind of imposition of that religious view on others." Cf. Stephen Macedo, "Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism," 26 Political Theory 56, 71 (1998) ("The liberal claim is that it is wrong to seek to coerce people on grounds that they cannot share without converting to one’s faith."); Robert
Second, by a "religious" rationale I mean a rationale that depends, at least in part, on a religious premise; a "secular" rationale, by contrast, does not depend on any religious premise. By a "religious" premise I mean, in this book, a premise--a claim--about the existence, 46 nature, activity, or will of God, such as the premise that same-sex unions are contrary to the will of God. 47

I argued in the preceding section that according to the most balanced understanding of what it forbids, the nonestablishment norm forbids government to affirm some religious premises--but that it also leaves room for government to affirm some religious premises, namely, premises whose affirmation by government does not, or would not, violate the central meaning of the nonestablishment norm. 48 It follows from that argument that the

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47 Cf. Eberle, Religious Conviction in Liberal Politics, n. #, at 71:

I shall understand a religious ground . . . as any ground that has theistic content. Paradigmatic religious grounds are, for example, a putative experience of God as affirming racial harmony, the claim that God has revealed in the Bible that homosexual relations are morally forbidden, the testimony of a religious authority that God abhors despoliation of the environment.

48 Although under the nonestablishment norm there are some religious premises government may not affirm--for example, the premise that God created the universe not 6,000 years ago, as some "young-earth creationists" claim, but billions of years ago--government may nonetheless affirm a premise that is consistent with a religious premise it may not affirm, so long as government's rationale for affirming the nonreligious premise does not rely on a religious premise government may not affirm. So government may affirm the premise that the
nonestablishment norm should not be understood to ban laws for which the only discernible rationale is a religious rationale that depends on a premise (or premises) government may affirm (because its doing so does not, or would not, violate the central meaning of the nonestablishment norm), such as the premise that every human being has a God-given dignity and inviolability. It also follows, however, that the nonestablishment norm should be understood to ban laws for which the only discernible rationale is a religious rationale that depends on—and in that sense affirms—a religious premise government may not affirm.

A lawmaker supports a law—she votes to enact a law—"on the basis of" a religious rationale if but for the religious rationale—she would not vote enact the law; put another way, a lawmaker votes to enact a law "on the basis of" a religious rationale if there is no secular rationale that by itself would move her to enact the law. However, the nonestablishment ban I am articulating here is indifferent to whether a lawmaker who voted to enact a law actually did so, either wholly or partly, on the basis of

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universe is billions of years old.

49 Cf. Edwards v. Aguillard, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting): "Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions. We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved. . . . [P]olitical activism by the religiously motivated is part of our heritage."

50 Cf. Eberle, Religious Conviction in Liberal Politics, n. #, at 73:

Whether [one] supports a given law on the basis of his religious convictions alone depends on the answer to a counterfactual question: would [he] continue to regard moral claim C (on the basis of which he supports a proposed law) as sufficient reason for that law if he didn’t believe that theistic claim T constitutes adequate reason for C?
an "offending" religious rationale—a rationale that depends on a religious premise government may not affirm. There are several good reasons for that indifference:

- It is unrealistic to expect most lawmakers to have a confident answer to the question whether they would have voted to enact a law but for an offending religious rationale.

- The ban, qua legal, is meant to be judicially enforceable. If most lawmakers themselves don't have a confident answer to the question whether they would have voted to enact a law but for an offending religious rationale, how is a court supposed to know whether they would have done so?

- Moreover, if courts were in the business of speculating about whether the lawmakers would have voted to enact a law but for an offending religious rationale, some lawmakers would respond by engaging in strategic behavior aimed at making it appear that they would have voted to enact the law on the basis of a plausible secular rationale and/or a non-offending religious rationale.

- Finally, consider this scenario: A court speculates that the lawmakers in State A would have voted to enact law L on the basis of a plausible secular rationale and therefore concludes that L is not unconstitutional, while a different court speculates that the lawmakers in State B would not have voted to enact the very same law on the basis of any plausible secular rationale and therefore concludes that L is unconstitutional. In State A, L is constitutional; in State B, L is unconstitutional. What an unseemly state of affairs that would be!

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So the nonestablishment norm is better understood not to forbid a lawmaker to support a law on the basis of an offending religious rationale, but only to ban laws for which the only discernible rationale is an offending religious rationale.

As a practical matter, how significant is a ban on such laws? In the United States today there are, and in the foreseeable future there will be, almost no actual or proposed laws—at least, almost no proposed laws that have a realistic chance of becoming actual laws—that fit the profile "laws for which the only discernible rationale is an offending religious rationale". For example, and as I explained elsewhere, there is a plausible secular rationale—a secular rationale that rational, well-informed, and thoughtful fellow citizens could affirm—for laws banning most abortions.\textsuperscript{51} There is one policy, however, with respect to which the ban may have bite: Many states refuse to recognize—they refuse to extend the benefit of law to—same-sex unions. If no plausible secular rationale can account for that policy—if the only rationale that accounts for the policy depends on the premise that same-sex sexual conduct is contrary to the will of God—this becomes the determinative question: May government affirm the premise that same-sex sexual conduct is contrary to the will of God? I address elsewhere, in the course of discussing the controversy over same-sex unions.\textsuperscript{52}

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\textsuperscript{52} See Perry, Religious Faith, Liberal Democracy, and Moral Controversy, n. #, at 000-000.
As I said at the beginning of this Essay, the principal question at issue here—whether religion (religious rationales) is a constitutionally legitimate basis of lawmaking in the United States—should not be confused with a different question that has been contested in the United States (and elsewhere) for the last thirty years or so: Is religion a morally legitimate basis of lawmaking in a liberal democracy; more precisely, is it morally legitimate for lawmakers in a liberal democracy to enact laws on the basis of a religious rationale? Again, the answer to that question, in my judgment, is yes. 53

Some who give that answer may be inclined to think that the nonestablishment ban articulated and defended here—the ban on laws for which the only discernible rationale is an offending religious rationale—is unduly restrictive of religious believers. So let me explain why they should resist that thought:

First, laws for which the only discernible rationale depends on a religious premise government may affirm, including the premise that every human being has a God-given dignity and inviolability, are not subject to the ban.

Second, although laws for which the only discernible rationale is an offending religious rationale are subject to the ban, in the United States today there are, and in the foreseeable future there will be, as I just remarked, few if indeed any actual or proposed laws that fit that profile.

The serious question, then, is not whether the nonestablishment ban on laws for which the only discernible rationale is an offending religious rationale is unduly restrictive, but whether as a practical matter the ban has much if any bite at all.

53 See an. # & #.
Moreover, insofar as the nonestablishment norm is concerned, a lawmaker is free to support a law on the basis of any religious rationale whatsoever, even an offending religious rationale;\textsuperscript{54} she is free to support a law that but for an offending religious rationale—a rationale that depends on a religious premise that under the nonestablishment norm government may not affirm—she would not vote to enact.\textsuperscript{55} As it happens, however, the vast majority of religious

\textsuperscript{54} This is not to deny that a religious rationale may be inconsistent with the morality of liberal democracy or with one or more constitutional norms other than the nonestablishment norm or with both. Consider, for example, the religious claim that in God’s created order, some human beings do not have inherent dignity.

\textsuperscript{55} Cf. Audi & Wolterstorf, n. \#., at 105 (Wolterstorf writing; emphasis in original):

It belongs to the religious convictions of a good many religious people in our society that they ought to base their decisions concerning fundamental issues of justice on their religious convictions. They do not view it as an option whether or not to do so. It is their conviction that they ought to strive for wholeness, integrity, integration, in their lives: that they ought to allow the Word of God, the teachings of the Torah, the command and example of Jesus, or whatever, to shape their existence as a whole, including, then, their social and political existence. Their religion is not, for them, something other than their social and political existence; it is also about their social and political existence.

It is sometimes suggested that in liberal democracies—or at least in religiously pluralistic liberal democracies like the United States—it is inappropriate to bring religious arguments about contested political issues into the public square; one should leave one’s religious arguments at home and bring only secular arguments into the public square. However, if one concludes—as Chris Eberle and I both do—that religious rationales are a morally legitimate basis of lawmaking in a liberal democracy, then presumably one also concludes that religious rationales may be brought into the public square—that is, that religious arguments are a morally legitimate subject of public political argument. But even if one were to reject the conclusion that religious rationales are a morally legitimate basis of lawmaking in a liberal democracy, one should still conclude that religious rationales are a morally legitimate subject of public political argument: It would make little if any sense to discourage lawmakers and other citizens from presenting religious rationales in public political argument, because, like it or not, in some liberal democracies it is inevitable—certainly in the United States it is inevitable—that from time to time some lawmakers and other citizens will support a contested law on the basis of a religious rationale. It is obviously better that the rationale (unless it is politically quite marginal) be critically engaged in public political argument than that it be ignored. See Perry, Under God?, n. \#., at 38-44.
belivers in the United States offer nonreligious rationales for their political positions on controversial moral issues. Even "[m]ost religious conservatives do, frequently and loudly, make arguments for their positions on nontheological grounds... [T]he evils of abortion, the value of heterosexual monogamy, the costs of promiscuity and pornography--all these issues are constantly being raised by social conservatives without appeals to the divine inspiration of the Bible."  

56 So, again, the serious question is not whether the nonestablishment ban on laws for which the only discernible rationale is an offending religious rationale is unduly restrictive, but whether as a practical matter the ban has much if any bite at all.  


58 John Finnis represents the Roman Catholic Church's view of the relationship among morality, reason, and religion when he writes:  

[Individual voters and legislators can rightly and should take into account the firm moral teachings of a religion if it is the true religion, so far as its teachings are relevant to issues of law and government. ... In saying that voters and other bearers of public authority have this liberty, I assume that the true religion itself holds out its moral teaching as a matter of public reason, i.e. as accessible and acceptable by a purely philosophical enquiry and only clarified and/or made more certain by divine revelation or the theological-doctrinal appropriation of that revelation.  

Finnis, n. #, at 29. So for Roman Catholics bishops pronouncing on controversial political issues, the nonestablishment norm has no bite.
The right to freedom of religious practice, which I have discussed elsewhere,\textsuperscript{58} is widely regarded as a human right to which every government should be committed and to which liberal democracy, as such, is committed. I have not argued in this Essay that every nation, or even every liberal democracy, should be committed to the nonestablishment of religion. Whether it is a good thing (on balance) that in the United States government is constitutionally forbidden to establish religion and whether it would be a good thing for government in, say, the United Kingdom to be forbidden to establish religion are separate questions; an affirmative answer to the former question does not entail an affirmative answer to the latter (although an affirmative answer to the latter question may well be correct). It is often the case that, as Kent Greenawalt has written, "what principles of restraint, if any, are appropriate . . . depend on time and place, on a sense of the present makeup of a society, of its history, and of its likely evolution."\textsuperscript{59}

It is an important question, but not one I address here, whether it would be a good thing for government in some or even all other liberal democracies to be forbidden to establish religion. As a citizen of the United States, my concern is whether it is a good thing that government in the United States is constitutionally forbidden to establish religion. As I said at the beginning of this Essay, there is, so far as I can tell, a virtual consensus among us citizens

\textsuperscript{58} See Perry, Religious Faith, Liberal Democracy, and Moral Controversy, n. #, at 000-000.

\textsuperscript{59} Greenawalt, Private Consciences and Public Reasons, n. #, at 130.
of the United States, including those of us who are religious believers, that, all things considered, it is good both for religions and for social harmony that our lawmakers, state as well as federal, may not establish religion. The serious question among us, therefore, is not whether the constitutional law of the United States should include the nonestablishment norm but what the nonestablishment norm should be understood to mean—to forbid—in one or another context. In this Essay I asked what the nonestablishment norm, given its central meaning, should be understood to forbid in the context of lawmaking: Should it be understood to ban laws for which the only discernible rationale is religious? My answer: Yes, but only if the rationale depends on a religious premise that under the nonestablishment norm government may not affirm.60

60 Kent Greenawalt has articulated a position close to the one I defend here. See Greenawalt, "Religiously Based Judgments and Discourse in Political Life," n. #, at 474-91.

[A]s a matter of theoretical principle, I think enactment of a religious morality could violate the Establishment Clause, even if the religion, as a set of beliefs and religious practices, is not promoted or endorsed in the more straightforward sense. . . . A law violates the Establishment Clause if the dominant ascertainable reason for its passage was a view that acts are immoral, based on a religious point of view and detached from any perspective about harm in this life that would be sufficient to justify a prohibition or regulation.

Id. at 487 & 489. Moreover, Greenawalt says about his position what I have said in this Essay about mine: that his position "will rarely, if ever, lead a court to invalidate a law. . . . [T]he limits on appropriate grounds for laws [entailed by Greenawalt’s position] are too narrow to have much practical significance." Id. at 489 & 491.