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Tolerance, Society, and the First  
Amendment: Reconsiderations

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*Fides et Iustitia*

ARTICLE

**TOLERANCE, SOCIETY, AND THE FIRST  
AMENDMENT: RECONSIDERATIONS**

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Tolerance is so indispensable for a pluralistic society that the state has a compelling interest in promoting it. For this reason, it is commonly assumed that the state must not privilege religious beliefs over secular ones: to do so, it is feared, would unleash religious intolerance. This assumption is well-grounded in English and European history: for instance, during the sixteenth and seventeenth centuries, the right of rulers to choose their subjects' religion was firmly established in England by King Henry VIII and in Europe by the Peace of Westphalia. Even pre-revolutionary American colonies could be differentiated by the religious beliefs of their founders: for instance, the Puritans (Congregationalist Calvinists) settled New England; Puritan dissenters settled Rhode Island; members of the Church of England settled Virginia, the metropolitan counties of New York, the Carolinas, and Georgia; the Quakers settled Pennsylvania and Delaware; and Catholics settled Maryland but lost control in 1689.<sup>1</sup> This history of religious establishment prior to 1776 may lead one to assume that religious beliefs breed intolerance, that tolerance compels the state to adopt a strict separation of church and state, and that the First Amendment requires a strict neutrality between religious belief and unbelief, as held in *Everson v. Board of Education of Ewing Township*.<sup>2</sup> But, as we shall see, these assumptions not only are historically unsound, but also misconstrue the nature of tolerance and its proper relationship with truth and coercion. If so, the state's compelling interest in promoting tolerance requires the Supreme Court to adapt its current interpretation of the First Amendment to permit the state to support the religious belief in God in a noncoercive and evenhanded way.

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1. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1422-27 (1990); see also Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* (MacMillan Co. 1902); Benjamin Hart, *Faith & Freedom: The Christian Roots of American Liberty* (Here's Life Publishers 1988).

2. 330 U.S. 1, 18 (1947).

The notion that the separation of church and state is required in order to prevent religious intolerance stems not only from history, but also from the notion that religious intolerance is necessitated by the certitude so characteristic of religious beliefs. The assumption here is that only uncertainty grounds tolerance. The difficulty with this argument is that it not only identifies tolerance with intellectual virtue but restricts it to cases where one's opponent could be right.<sup>3</sup> However, if this were so, tolerance would not be virtuous in cases of certitude. But tolerance is most needed when opponents are certain the other is wrong. Thus, it is absurd to ground tolerance in incertitude. We must therefore look elsewhere for the proper ground of tolerance. There are four additional possibilities: the argument from coercion's impotence; the argument from human dignity considered apart from the common good; the argument from the common good; and the divine sovereignty argument.

The gist of the practical argument from the impotence of intolerance begins by identifying intolerance as attempting to produce beliefs through some kind of coercion. It proceeds by arguing that since coercion relies on pain, either physical or psychic, while persuasion requires insight into a new perspective, it is not possible for beliefs to be coerced. Accordingly, while a person might claim to have a belief in order to avoid ostracism, jail, a fine, torture, or death, the corresponding inner belief cannot be so generated. As put in 1685 by John Locke, "[I]f Truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her."<sup>4</sup>

This argument from epistemology correctly argues that the ways of truth are not the ways of coercion: truth requires free inquiry. Freedom is especially presupposed by beliefs, including religious beliefs; after all, as pointed out by Thomas Aquinas, "[T]o believe depends on the [free choice]."<sup>5</sup> However, although coercion adds nothing to truth's persuasiveness, it is not the case that beliefs are only generated by insights into truth. For, if this were so, there would be no false beliefs. Nor would cults be able to induce a false belief by the use of various physical techniques, e.g., isolation and sleep deprivation. The use of such physical techniques is especially effective when victims lack the experiences that would contradict the false belief, when the falsehood is pervasive and persistently propagated, and when victims lack the ability to properly evaluate the belief. Without free inquiry, coercion may produce beliefs. If beliefs can thus be coerced, coercion's impotence cannot be the proper ground of tolerance.

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3. For a detailed argument that tolerance cannot be an intellectual virtue, see Etienne Gilson, *Dogmatism and Tolerance*, 8 *Intl. J.* 7, 15 (1952-53) ("Against political fanaticism, a philosophical relativism is the weakest conceivable protection.").

4. John Locke, *A Letter Concerning Toleration*, in *On Politics and Education* 21, 52 (Howard R. Penniman ed., Walter J. Black, Inc. 1947).

5. Thomas Aquinas, *Summa Theologica*, Pt. II-II, Question 10, art. 8.

If tolerance cannot be based on coercion's impotence or on the lack of certitude, than tolerance cannot be an intellectual virtue. Rather, it is a moral and political virtue, as pointed out by Etienne Gilson:

Tolerance is a moral and a political virtue, not an intellectual one. As rational beings, our only duty towards ideas is to be right, that is to say, to seek truth for its own sake and to accept it as soon as we see it. As to error, whether it be found in ourselves or in the minds of other men, our only duty towards it is to denounce it as false. . . . The two notions of "tolerance" and of "intolerance" simply do not apply to the order of ideas. What we really mean by saying that we tolerate certain ideas is that we tolerate the existence of certain men who hold those ideas and that we respect their freedom of speech.<sup>6</sup>

If tolerance is properly a moral and political virtue, then its proper ground seems to simply be human dignity and the obligations of justice.

The argument basing tolerance on human dignity holds that since human dignity is based on human freedom and rationality, diverse human beliefs must be tolerated. The key problem with this argument, however, is that while it succeeds in forbidding any attempt to coerce beliefs, it cannot preclude the anarchy that could arise when individuals choose incompatible ends. Community life requires common ends.

Could then community life be the proper basis for tolerance? Etienne Gilson thought so:

[W]e tolerate [these men] . . . because, even though we know that their ideas are wrong, these men are our fellow countrymen with whom we have to live in peace just as they themselves have to put up with us. Aristotle used to say that two moral virtues are the very pillars of political life: justice and friendship, which is what we today call the "good neighbor policy." Tolerance is nothing else than a particular application to the needs of political life, of the moral virtue of friendship.<sup>7</sup>

In other words, since no pluralistic community can exist without toleration, and since we tolerate only those with whom we are joined in some degree of friendship or community, neighborly love is the basis of toleration. Indeed, communities united in a common love identify the pursuit of some common good as indispensable for each of its citizens. Hence, such communities institute procedures of dissent and resolution,<sup>8</sup> for it is only through such procedures that dissenters can participate in the community's common good. In the words of Karol Wojtyla, "[T]he structure [of a community] must not only allow the emergence of the opposition, give it the

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6. Gilson, *supra* n. 3, at 12.

7. *Id.* at 12–13.

8. This material on Wojtyla is largely taken from my *Global Morality and Thomistic Natural Law: The Challenges* sec. 3 (forthcoming).

opportunity to express itself, but also must make it possible for the opposition to function for the good of the community.”<sup>9</sup> Without such procedures, intolerance rules; and community members disengage from participating in the common good. The vices of “avoidance” or “conformism” thereby become rooted.<sup>10</sup> Avoidance is the simple refusal to partake in the community’s life; conformism is the projection of caring about the common good while remaining indifferent to it.<sup>11</sup> These vices reacting to intolerance can only be avoided in communities that are structured to encourage “dialogues of opposition.” Within such a community, tolerance would be seen as a social virtue that advances the common good by welcoming dissent and adjudicating it in ways that further involvement with the community’s specific common goods.<sup>12</sup> Within the United States, legislative and judicial forums provide dissenters with avenues for making changes while retaining their participation in the community. Legislative and judicial forums thus inculcate respect for differences. By so doing, these forums promote tolerance and identify intolerance as unjust.

Thus, it is possible to justify religious tolerance by arguing that since the common good requires maximizing the participation of citizens by respecting the human capacities for free choice and rationality, the common good is furthered by the state’s guarantees of free speech and belief, which then establishes the right to religious freedom and toleration. This argument triumphed in the twentieth century by underwriting the Universal Declaration of Human Rights. Its preamble reads,

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

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9. Karol Wojtyla (Pope John Paul II), *The Individual and the Common Good: Toward a Theory of Participation*, in *Toward a Philosophy of Praxis* 24, 49 (Alfred Bloch & George T. Czuczka eds., Crossroad Publ. Co. 1981) (emphasis omitted).

10. *Id.* at 50–51.

11. Both avoidance and conformism originate within the conviction “that the community is taking away his self, and that is why he attempts to take his self away from the community.” *Id.* at 52 (emphasis omitted).

12. Dissidents seek to redefine the common good so that one can “participate more fully and effectively in the community.” *Id.* at 49.

The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations.<sup>13</sup>

The hard-won insights of this argument from human dignity and the common good mark it as one of the great treasures of human intellectual history. Its power and philosophical soundness are not to be underestimated.

However, despite this argument's insightfulness and historical significance, it fails to persuade two groups. The first group consists of strict secularists who consider religious beliefs to be so harmful to the body politic as to warrant their elimination from society. These strict secularists argue that law should be hostile to religious belief and practices. They would never have condoned the Constitution's Free Exercise Clause.

The second group, unpersuaded by the argument from the common good, are ideologues who identify the state as the means for insuring doctrinal conformity. For ideologues, religious freedom and toleration breed a vicious pluralism, since they identify free inquiry, the marketplace of ideas, and the toleration of diverse religious practices as the vices that permit indecency and immorality to run rampant in the state. By so doing, the ideologue assumes that conformity with his own doctrinal beliefs is so essential to the community's wellbeing that anyone who fails to adhere to his doctrines attacks the body politic. The ideological conflation of doctrinal and political goods, however, cannot long endure when the fervent, holding diverse doctrines, must unite politically—at least, that was the case in colonial America. For although colonial America was largely settled by religious ideologues, or theocrats, willing to risk a long and dangerous sea voyage to a hostile new world in order to establish political societies that reflected their own religious beliefs,<sup>14</sup> by the time of the Constitutional Convention, the reality of America's religious pluralism precluded using either the strict secularist or the theocratic model of government and necessitated toleration for the free exercise of religious faith. For there would not have been a new nation if the Calvinists of New England had not united with the dissident Puritans in Rhode Island; the Quakers in Pennsylvania and Delaware; the Anglicans of Virginia, South Carolina, North Carolina, and Georgia; as well as with the various religious believers who lacked a colony or state to call their own, e.g., the Catholics and the Jews. The need for these diverse religious believers to join together and establish a "more perfect union" led them to formulate the First Amendment, so that the free exercise of their religious beliefs would be protected not only from the establishment of a national church, but also from any other law.

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13. Universal Decl. of Human Rights, G.A. Res. 217A, preamble, U.N. GAOR, 3d Sess., U.N. Doc A/810 (1948), available at <http://www.un.org/Overview/rights.html>.

14. Although there were notable exceptions (Pennsylvania, Delaware, the Carolinas, and Rhode Island) the American colonies were not founded as religiously tolerant societies. McConnell, *supra* n. 1, at 1425, 1430.

These religious believers established religious freedom, and thereby tolerance, not on the basis of human dignity,<sup>15</sup> but on the basis that one's obligations to God could not be contravened by the state.<sup>16</sup> Accordingly, the new republic based religious freedom and tolerance on the grounds that the justice owed to the Creator was greater than the justice owed to any political community or government. Indeed, this innovative American ground of tolerance was self-consciously adopted when language in earlier versions of the First Amendment was stricken because it would have obligated the toleration of any basic worldview as being entailed by the right of conscience.<sup>17</sup> By striking the right of conscience from these early versions, the founders were not attempting to exempt belief in general from the domain of the state, but only the belief in God. In other words, certitude that God exists and that religious obligations are beyond the scope of the states' oversight led America's founders to privilege the religious exercise of belief and to mandate religious freedom and tolerance. Accordingly, religious toleration was considered by most delegates at the Constitutional Convention to be a social and political virtue rather than an intellectual one. Thus, it was the religious belief in God and his sovereignty that generated the religious tolerance mandated by the First Amendment's free exercise and establishment clauses.

If the American founders are right that justice toward God is the proper source of religious toleration, then the state has a compelling interest in supporting the religious belief in God, albeit in ways that discriminate neither against the nonbeliever nor against minority religions. But, as the next section shows, the Supreme Court's predominant interpretation of the First Amendment permits no such support. If so, then the Court is failing, not only to accord with the insights of our founders, but also to properly nurture the tolerance so indispensable for our religiously pluralistic community.

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15. *Id.* at 1497 ("The freedom of religion is unalienable because it is a duty to God and not a privilege of the individual. . . . Much of the criticism of a special deference to sincere religious convictions arises from the assumption that such convictions are necessarily mere subcategories of personal moral judgments. This amounts to a denial of the possibility of a God (or at least of a God whose will is made manifest to humans). But . . . [this skeptical position] . . . is a peculiar belief to project upon the framers and ratifiers of the first amendment, for whom belief in the existence of God was natural and nearly universal. It is an anachronism, therefore, to view the free exercise clause as a product of modern secular individualism.") (citation omitted).

16. *Id.* McConnell supports this claim with painstaking and careful research into various historical documents. This research also supports his claims that Madison rejected the Lockean/Jeffersonian view of religious toleration as based on the irrelevance of religious faith for the secular world in favor of the position that the demands of state had to be subordinated to those of God. *Id.* at 1449–55.

17. *Id.* at 1491, 1493–97. McConnell also points out a less likely possibility for striking the phrase "liberty of conscience" from earlier versions of the First Amendment, namely, that it was stricken as redundant, since "conscience" was so widely taken as pertaining to religious belief.

## INTERPRETATIONS OF THE ESTABLISHMENT CLAUSE AND TOLERANCE

For the last several decades, the Supreme Court has held that the Establishment Clause requires government to refrain from promoting religious belief in God. As put by Justice Black in *Everson v. Board of Education of Ewing Township*:<sup>18</sup>

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”<sup>19</sup>

This maximist interpretation contains at least five different principles: 1) the principle that forbids the establishment of a national church; 2) the principle that forbids the coercion of religious belief, or disbelief; 3) the principle of neutrality or evenhandedness between religions; 4) the principle of neutrality or evenhandedness between belief and disbelief; and, 5) the principle of secularism that forbids any religious aid. The last two secularist principles led to the *Lemon* test, in *Lemon v. Kurtzman*.<sup>20</sup> This test holds that laws do not violate the Establishment Clause if they have a secular legislative purpose, if their primary effect neither advances nor inhibits religion, and if they are not excessively entangled with religion. Hence, essential to the maximist interpretation is that the Establishment Clause forbids the support of religious belief and establishes a legal preference for secularism.

The maximist or secularist interpretation need not, however, be considered proper. Justice Rehnquist argued, in his 1985 dissent in *Wallace v. Jaffree*,<sup>21</sup> that it is historically incorrect to interpret the Establishment Clause as requiring neutrality between religion and irreligion. Indeed, the First Amendment’s Establishment Clause “should be read no more broadly than to prevent the establishment of a national religion or the governmental preference of one religious sect [within Christianity] over another.”<sup>22</sup> Rehn-

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18. 330 U.S. 1 (1947).

19. *Id.* at 15–16 (quoting *Reynolds v. U.S.*, 98 U.S. 145, 164 (1878)).

20. 403 U.S. 602 (1971).

21. 472 U.S. 38, 113 (1985) (Rehnquist, C.J., dissenting).

22. *Id.* at 100.

quist continued by noting that there is nothing in the Establishment Clause that prohibits a general “‘endorsement’ of prayer.”<sup>23</sup> Nonetheless, despite the insightfulness of Rehnquist’s analysis, *Wallace* proscribed silent meditation in public schools in order to prevent silent prayer. The Court thus decided that voluntary and silent prayer in public schools was not to be tolerated. Likewise, the Court decided in *Lee v. Weisman*<sup>24</sup> that school graduations could not tolerate invocations and benedictions.

The Court’s adherence to interpreting the Establishment Clause according to the principles of secularism and neutrality between belief and unbelief led the Court to rule, in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*,<sup>25</sup> that a nativity crèche—clearly identified as sponsored by the Holy Name Society—could not be displayed in the Allegheny County courthouse, because that would entangle government in the endorsement of religion. Government must remain secular. To do otherwise would be an endorsement of religion that “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”<sup>26</sup>

The Court however did not adequately consider whether the refusal of governmental agencies to permit religious displays sends a message that religious believers are outsiders, while atheists and agnostics are “insiders, favored members of the political community.”<sup>27</sup> Neither did the Court consider whether the act of exclusion necessarily establishes insiders and outsiders. Nor did the Court consider whether a policy of non-exclusiveness or accommodation would have better supported the nation’s interest in promoting tolerance, while avoiding the establishment of any particular church. Most significantly, the Court failed to consider whether the outlawing of a nativity crèche on the basis of its religious message interferes with the Free Exercise Clause by burdening religious expression with the suspicion that it is so dangerous and harmful as to be forbidden within governmental spaces. By not considering the constitutionality of religious displays in the context of its Free Speech and Free Exercise rulings, the Court failed to consider whether the maximist reading of the Establishment Clause, as forbidding all but secular messages, establishes secularism as the nation’s religion. After all, in *Torcaso v. Watkins*,<sup>28</sup> the Supreme Court explicitly identified secular humanism as a religion.<sup>29</sup> This identification in *Torcaso* set the Court’s free

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23. *Id.* at 114.

24. 505 U.S. 577 (1992).

25. 492 U.S. 573 (1989).

26. *Id.* at 595 (quoting *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O’Connor, J., concurring)).

27. *Allegheny*, 492 U.S. at 595.

28. 367 U.S. 488 (1961).

29. *Id.* at 495 n. 11 (“Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others. [See *Washington Ethical Socy. v. Dist. of Columbia*, 249 F.2d 127 (D.C.

exercise jurisprudence at odds with her establishment jurisprudence, which considers unconstitutional those laws that fail to be secular. Thus, it was the myopia of the Court's maximist interpretation of the Establishment Clause that led her to forbid the Allegheny crèche.

Outlawing the Allegheny crèche sent the message that religious beliefs in God are unworthy of public spaces. Or, as Justice Kennedy put it in his dissent, *Allegheny* "reflects an unjustified hostility toward religion."<sup>30</sup> This hostility arises, according to Kennedy, from the "clear message of disapproval" sent by the wall of separation.<sup>31</sup> Disapproval is embedded in the requirement that the government tolerate only the secular aspects of Christmas and other holidays, which means that the government can respect holidays "only as celebrated by nonadherents."<sup>32</sup>

In the last few decades, the Court's hostility, or religious intolerance, has waxed and waned. On the one hand, in *Agostini v. Felton*,<sup>33</sup> the *Lemon* test was modified so that the neutrality of the primary effect subsumes the requirement of avoiding excessive entanglement. The revised criteria proscribed government indoctrination and the identification of aid recipients by reference to religion. Although *Agostini* retained the principle of neutrality between the religious, irreligious, and areligious, it argued that reliance on private choices precludes an establishment of religion. And, in *Lamb's Chapel v. Center Moriches Union Free School District*,<sup>34</sup> *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>35</sup> and *Good News Club v. Milford Central School*,<sup>36</sup> the Supreme Court ruled that the Free Speech Clause required public schools to accommodate religious groups and religious speech when there was little danger that the public would think that the schools were endorsing religion or a particular creed. As Justice Thomas put it for the Court in *Good News Club v. Milford Central School*, "Instead, we reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."<sup>37</sup> In other words, given that the topic is secular, discussion

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Cir. 1957); *Fellowship of Humanity v. County of Alameda*, 315 P.2d 394 (Cal. App. 1st Dist. 1957); John Clark Archer, *Faiths Men Live By* 120–38, 254–313 (2d ed., Ronald Press 1958); *Encyclopaedia of the Social Sciences* vol. 2, 293 (Dushkin Publ. Group 1975); *Encyclopaedia Britannica* vol. 4, 325–27 (Walter Yust ed., Encyclopaedia Britannica 1957); *Id.* at vol. 21, 797; *Year Book of American Churches* 29, 47 (Nat'l. Council of Churches of Christ in Am. 1961); *World Almanac and Book of Facts* 695, 712 (Press Publ. Co. 1961).]".

30. *Allegheny*, 492 U.S. at 655 (Kennedy, J., Rehnquist, C.J., White & Scalia, JJ., concurring in part and dissenting in part).

31. *Id.* at 657.

32. *Id.* at 664.

33. 522 U.S. 803 (1997).

34. 508 U.S. 384 (1993).

35. 515 U.S. 819 (1995).

36. 533 U.S. 98 (2001).

37. *Id.* at 111–12 (emphasis omitted).

of the topic from the religious perspective is permissible—even within limited public forums. Hence, not only must the state *not* avoid the religious perspective, but the Free Speech Clause and the Free Exercise Clause demand that the state permit religious viewpoints. This is nothing less than a rejection of the principle of secularism and a modification of the *Lemon* test, which held that the primary effect of a ruling must be secular. Religious intolerance was thus dealt a significant, but hardly fatal, blow.

On the other hand, in *Employment Division v. Smith*,<sup>38</sup> the Court threw out the *Sherbert-Yoder* doctrine.<sup>39</sup> In *Smith*, the Court ruled that generally applicable laws are constitutional even if they burden religious exercise. *Smith*, in effect, established a principle of indifference towards unintentionally burdening religious practice. *Smith's* jurisprudence was upheld in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*<sup>40</sup> and in *City of Boerne v. Flores*.<sup>41</sup> Justice O'Connor's dissent in *Boerne* is especially compelling:

I continue to believe that *Smith* adopted an improper standard for deciding free exercise claims. In *Smith*, five Members of this Court—without briefing or argument on the issue—interpreted the Free Exercise Clause to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as the prohibition is generally applicable. Contrary to the Court's holding in that case, however, the Free Exercise Clause is not simply an antidiscrimination principle that protects only against those laws that single out religious practice for unfavorable treatment. Rather, the Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law. Before *Smith*, our free exercise cases were generally in keeping with this idea: where a law substantially burdened religiously motivated conduct—regardless whether it was specifically targeted at religion or applied generally—we required government to justify that law with a compelling state interest and to use means narrowly tailored to achieve that interest.

The Court's rejection of this principle in *Smith* is supported neither by precedent nor, as discussed below, by history. The decision has harmed religious liberty. For example, a Federal District Court, in reliance on *Smith*, ruled that the Free Exercise Clause was not implicated where Hmong natives objected on re-

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38. 494 U.S. 872 (1990).

39. The *Sherbert-Yoder* principle combined the reasoning in two cases: namely, *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). These cases established the principle that the government cannot burden religious exercise without a compelling interest that cannot be served by a less restrictive means.

40. 508 U.S. 520 (1993).

41. 521 U.S. 507 (1997).

ligious grounds to their son's autopsy, conducted pursuant to a generally applicable state law. The Court of Appeals for the Eighth Circuit held that application of a city's zoning laws to prevent a church from conducting services in an area zoned for commercial uses raised no free exercise concerns, even though the city permitted secular not-for-profit organizations in that area. . . . These cases demonstrate that lower courts applying *Smith* no longer find necessary a searching judicial inquiry into the possibility of reasonably accommodating religious practice.<sup>42</sup>

*Smith*'s principle of indifference to burdening religious practice unduly restricts the free exercise of religion and even hinders the ability of citizens to petition government for redress of those burdens.

In accordance with the hostility of *Smith* to religious exercise, the Court has continued to invoke the Establishment Clause in ways that hinder the free exercise of religious belief. For instance, the Court declared unconstitutional student-initiated, student-led prayers at football games in *Santa Fe Independent School District v. Doe*.<sup>43</sup> In his dissent, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, characterized this decision as bristling "with hostility to all things religious in public life."<sup>44</sup>

The Court thus comes to a fork in the road: it must either repudiate *Smith*'s principle of indifference towards unintentionally burdening religious exercise and *Everson*'s maximist interpretation of the Establishment Clause (which established the principle of neutrality between belief and unbelief) or continue burdening the Free Exercise Clause by its hostility towards religious practice. If the Court continues her current jurisprudence, logic dictates that she declare many sacred American traditions to be unconstitutional, e.g., legislative prayers, the legislated national motto "In God we trust," the Pledge of Allegiance's phrase "One nation under God," as well as "the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths . . . [and] the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'"<sup>45</sup> Indeed, belief in God is an indispensable part of American legal and political culture.<sup>46</sup> Hence, to purge that belief from American traditions would be

42. *Id.* at 546–47 (citations omitted).

43. 530 U.S. 290 (2000).

44. *Id.* at 318.

45. *Zorach v. Clauson*, 343 U.S. 306, 312–13 (1952).

46. As put by Chief Justice Burger, while writing for the Court in *Lynch v. Donnelly*, 465 U.S. 668, 674–76 (1984) (citations omitted):

There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789. Seldom in our opinions was this more affirmatively expressed than in Justice Douglas' opinion for the Court validating a program allowing release of public school students from classes to attend off-campus religious exercises. Rejecting a claim that the program violated the Establishment Clause, the Court asserted pointedly: "We are a religious people whose institutions presuppose a Supreme Being . . ." Our history is replete with official refer-

to betray traditions ongoing since the nation's founding; it would be to interfere with the right of religious believers to freely exercise their belief that some occasions require joining together in prayer and invoking God's intercession; and, it would be intolerant.

But if the Court were to repudiate *Everson's* principle of neutrality between belief and unbelief as well as *Smith's* principle of indifference towards unintentionally burdening religious exercise, she would be able to authorize religious accommodations except in cases of compelling state interest. She would be reaffirming the minimalist interpretation given to the Establishment Clause in *Lynch v. Donnelly*.<sup>47</sup> In this case, the Court argued that the city of Pawtucket need not exclude its crèche from its Christmas display, in part, because our history shows an accommodation of "all faiths and all forms of religious expressions [with] hostility toward none."<sup>48</sup>

The position that the Establishment Clause need not entail belief neutrality has also been argued by Rehnquist in his 1985 *Wallace v. Jaffree*<sup>49</sup> dissent; by Kennedy, joined by Rehnquist and Justices White and Scalia in their 1989 *Allegheny* dissent; and by Rehnquist, joined by Justices Scalia and Thomas, in their 2000 *Santa Fe* dissent. In *Wallace*, Rehnquist used historical records to argue the following:

None of the other Members of Congress who spoke during the August 15th debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require that the Government be absolutely neutral as between religion and irreligion. The evil to be aimed at, so far as those who spoke were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concerned about whether the Government might aid all religions evenhandedly.<sup>50</sup>

Furthermore, the dissent by Kennedy in *Allegheny* pointed out that the current interpretation of the Establishment Clause is at odds with the ongoing tradition, instituted by George Washington, for the president to proclaim

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ences to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders. . . .

. . . Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms. . . .

Other examples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We Trust," which Congress and the President mandated for our currency, and in the language "One nation under God," as part of the Pledge of Allegiance to the American flag. That pledge is recited by many thousands of public school children—and adults—every year.

47. 465 U.S. 668.

48. *Id.* at 677.

49. 472 U.S. at 91.

50. *Id.* at 99 (Rehnquist, J., dissenting).

national days of prayer.<sup>51</sup> Kennedy also argued that *Allegheny's* endorsement test is incompatible with the precedents set by *Lynch v. Donnelly*, *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970).<sup>52</sup> Finally, Kennedy argued that the Establishment Clause should be understood as forbidding government coercion, whether direct or indirect, in favor of religious participation or belief, and as forbidding the government to proselytize on the behalf of a particular religious faith.<sup>53</sup>

Following Rehnquist's and Kennedy's lead, Justice Thomas, in his *Elk Grove Unified School District v. Newdow*<sup>54</sup> concurring opinion, strengthened the historical criticism by noting that the First Amendment was passed at a time when at least six states had an established religion,<sup>55</sup> and most had a free exercise of religion clause.<sup>56</sup> Accordingly, the Establishment Clause was not passed to render government neutral between belief and unbelief, but rather to protect the colonial right of individual states to establish a state church from being usurped by the establishment of a national church. Hence, using the Establishment Clause to forbid government support of religious belief in God betrays history.

Moreover, Thomas argued that the proper interpretation of the Establishment Clause is not in terms of neutrality but in terms of "actual legal coercion."<sup>57</sup> This minimalist reading would enable the Establishment Clause, under the Fourteenth Amendment, to protect individuals from being required to believe in God, a right repeatedly upheld by the Court.<sup>58</sup> Thomas also points out that the forbidding of coercion would include barring "governmental preferences for particular religious faiths."<sup>59</sup>

If the Court were to adopt the minimalist reading, then it would be able to preserve the first three principles of the Establishment Clause identified in *Everson*, namely, the proscription of a national church, the proscription of coercively facilitating religion, and the proscription of favoritism be-

51. 492 U.S. at 671.

52. 492 U.S. at 669–70.

53. *Id.* at 659.

Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it, in fact, "establishes a [State] religion or religious faith, or tends to do so."

*Id.* (quoting *Lynch*, 465 U.S. at 678).

54. 542 U.S. 1, 50 (2004).

55. *Id.* (citing *McConnell*, *supra* n. 1, at 1437).

56. *McConnell*, *supra* n. 1, at 1455–58.

57. *Elk Grove*, 542 U.S. at 52.

58. *See id.* at 48–49 (Thomas cites these cases in favor of this claim that the government cannot require belief in God: *Empl. Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872, 877 (1990); *Allegheny*, 492 U.S. at 594; *Good News Club*, 533 U.S. at 126–27; *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981); *Torcaso*, 367 U.S. at 489.).

59. *Elk Grove*, 542 U.S. at 53 (quoting *Rosenberger*, 515 U.S. at 856 (Thomas, J., concurring)).

tween religious groups that believe in God. Preserving these three *Everson* principles would preserve the bulk of post-*Everson* rulings as good law, e.g., *School District of Abington Township, Pa. v. Schempp* and its proscription against daily Bible readings in public schools insofar as those readings mandated a school preference of one particular belief in God over others;<sup>60</sup> *Widmar v. Vincent* and its principle that religious student groups at state universities have the same right to funds as do secular student groups;<sup>61</sup> *Church of Lukumi Babalu Aye v. City of Hialeah*<sup>62</sup> and *Larson v. Valente*<sup>63</sup> and their ruling that law cannot disadvantage a particular religion; *Sherbert v. Verner* and its ruling that government must accommodate religious practice unless there is a compelling state interest to the contrary.<sup>64</sup> Additional caselaw that would be upheld includes *Lamb's Chapel v. Center Moriches Union Free School*;<sup>65</sup> *Rosenberger v. Rector and Visitors of University of Virginia*;<sup>66</sup> *Good News Club v. Milford Central School*;<sup>67</sup> *Agostini v. Felton*;<sup>68</sup> *Zobrest v. Catalina Foothills School District*;<sup>69</sup> *Witters v. Washington Department of Services for the Blind*;<sup>70</sup> and *Mueller v. Allen*.<sup>71</sup> The minimalist reading would also uphold *Everson v. Board of Education of School District of the City of Highland Park* and its ruling that parochial school busing is constitutional.<sup>72</sup>

Furthermore, adoption of the minimalist interpretation would better protect the free exercise rights of the religious believer in God. Indeed, the maximist/secularist reading has forbidden some public expressions of religious beliefs. For instance, *Wallace v. Jaffree* forbade silent meditation in schools;<sup>73</sup> *Lee v. Weisman* forbade invocations and benedictions at public school graduations;<sup>74</sup> *Santa Fe Independent School District v. Doe* forbade student-initiated, student-led prayers at football games;<sup>75</sup> and *County of Allegheny v. ACLU* forbade the Holy Name Society from displaying its crèche in the courthouse.<sup>76</sup> The minimalist interpretation would permit government to accommodate religious displays as well as prayers or daily inspirational readings in public schools as long as these expressions of religious belief in

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60. 374 U.S. 203 (1963).

61. 454 U.S. 263.

62. 508 U.S. 520 (1993).

63. 456 U.S. 228 (1982).

64. 374 U.S. 398.

65. 508 U.S. 384.

66. 515 U.S. 819.

67. 533 U.S. 98.

68. 522 U.S. 803.

69. 509 U.S. 1 (1993).

70. 493 U.S. 850 (1989).

71. 2005 WL 2877800 (Utah App. Nov. 3, 2005).

72. 123 Fed. Appx. 221 (6th Cir. 2005).

73. 472 U.S. 38.

74. 505 U.S. 577.

75. 530 U.S. 290.

76. 492 U.S. 573.

God were rotated in such a way that no particular belief in God received preferential treatment, or as long as these expressions were somehow mediated through private choice, e.g., if freely chosen by students adhering to nonsectarian school rules concerning respectful speech. If such were to occur, public schools would have the opportunity to teach the respect so necessary for tolerance in a pluralistic society.

The minimalist interpretation would also better enable government to promote the tolerance without which our pluralistic society cannot survive. Indeed, the neutrality principle between belief and unbelief has sidelined, to some degree, America's most influential teachers of tolerance, namely, the religions that believe in God. These religions are especially helpful in the promotion of tolerance for three reasons. First of all, it is the religious belief in God—considered as a proper name, or as a generic term for a supreme being, or as an impersonal cosmic enforcer of morality—that is responsible for motivating many, if not most, Americans to feel obligated to follow the Golden Rule and to treat others respectfully.<sup>77</sup> Consider, for instance, Christianity: “You shall love your neighbor as thyself”;<sup>78</sup> Judaism: “Love your neighbor as yourself: I am the Lord”<sup>79</sup> and, “The stranger who resides with you shall be to you as one of your citizens; you shall love him as yourself, for you were strangers in the land of Egypt: I the lord am your God”;<sup>80</sup> Islam: “The most righteous of men is the one who is glad that men should have what is pleasing to himself, and who dislikes for them what is . . . disagreeable”;<sup>81</sup> Hinduism: “One should never do that to another which one regards as injurious to one's own self”;<sup>82</sup> and, Buddhism: “Hurt not others in ways that you yourself would find hurtful.”<sup>83</sup> Although differences in the context and the formulations of the Golden Rule in these citations indicate that there are significant nuances present in these diverse religions, these differences do not vitiate two overwhelming similarities, namely, the obligation to treat others respectfully and the identification of that obligation as religious. The import of this religious obligation is to strengthen the argument that just as others should neither demean nor interfere with one's own

77. The personalist Golden Rule has an ancient heritage: It is found in the rule of universal brotherhood characteristic of Greco-Roman natural law. It is also found in the Enlightenment ethics of Kant that proscribes the inconsistency of treating persons purely as means to one's own end. See Immanuel Kant, *Grounding for the Metaphysics of Morals: On a Supposed Right to Lie Because of Philanthropic Concerns* n. 429 (James W. Ellington trans., 3d ed., Hackett Publ. Co. 1993). Our founding fathers were especially influenced by the Greco-Roman natural law tradition. See e.g. Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (U. of Kan. 1985).

78. *Matthew* 22:39 (New Am. Bible).

79. *Torah: The Five Books of Moses* 217 (2d ed., Jewish Publication Socy. of Am. 1962) (quoting *Leviticus* 19:18).

80. *Id.* at 218 (quoting *Leviticus* 19:33).

81. Jeffrey Wattles, *The Golden Rule* 192 n. 2 (Oxford U. Press 1996) (quoting *Sukhanan-i-Muhammad* no. 63).

82. *Id.* at 191 n. 1 (quoting *Mahabharata* bk. 13, ch. 113).

83. *Id.* at 192 n. 3 (quoting *Udana-Varga* 5.18).

religious exercises, one should neither demean nor interfere with the religious exercises of others. In this way, the religions of the Golden Rule provide incalculable support for the civic obligation to tolerate the religious practices of others. From this perspective, the evenhanded, noncoercive governmental support of religion would promote the respect so crucial for tolerance within pluralistic American society.

Secondly, revolutionary advances in biotechnology promise to identify human beings—not as free agents worthy of respect—but as animals that can be controlled by psychogenic drugs and valued primarily as the source of the embryonic stem cells that can make the wealthy invulnerable to illness and the frailties of old age. Such a commodification of human beings would vitiate the importance of respecting human dignity and promulgate an instrumental view of persons that would then become the bastion of disrespectful intolerance. Defeating this instrumental view of persons cannot be achieved simply through America's traditions and the Constitution, but only through the conviction that every human being is worthy of respect regardless of size, origin, and genetic value. Developing this conviction of personalist anthropology and morality is going to require the assistance of America's religious institutions.

Finally, the religious belief in God is the only belief that openly acknowledges a realm of human action beyond the purview of human review and the parameters of political communities. Accordingly, any state that refuses to accommodate the free exercise of religion is a state that claims political allegiances are the greatest and that religious practices are to be subordinated to the state's interests. Such a state fails to tolerate the religious belief that one's obligations to God are unsurpassable. By so doing, such a state teaches its citizens to be intolerant of religious believers. On the other hand, if a state accommodates the religious practices of diverse believers in God, it teaches tolerance.

#### CONCLUSION

The state's compelling interest in promoting tolerance requires identifying the proper ground of tolerance. This ground cannot be a lack of certitude, the impotence of coercion, nor human dignity considered apart from the common good: for tolerance is not an intellectual virtue but a moral virtue necessitated by the common good. Furthermore, although the common good suffices to ground tolerance, it is not a ground persuasive to strict secularists and ideologues. For despite their differences, both oppose religious toleration and liberty as being dangerous to the body politic. Only the belief in God suffices to counter this ground for intolerance. Hence, without governmental support for the belief in God and governmental accommodation of diverse religious practices, religious intolerance cannot be adequately countered.

Currently, government support for the belief in God is being hindered by the Supreme Court's maximist interpretation of the Establishment Clause (which mandates a hostile secularism), and by the adoption of *Smith's* principle of indifference towards unintentionally burdening religious practice. These interpretations of the First Amendment not only hinder the free exercise of religion, but they also are unnecessary since a minimalist interpretation of the Establishment Clause and a more rigorous interpretation of the Free Exercise Clause would harmonize with the bulk of the Court's precedents, while also permitting the evenhanded and non-coercive accommodation of religion. Moreover, if the Court does not alter her present course, she will not only be unable to promote the tolerance so necessary for a free and religiously diverse society, but she will find herself promoting intolerance and unraveling the tapestry so carefully and ingeniously woven by America's founders.