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## USA: Religion as a basis of lawmaking?

On the non-establishment of Religion

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## USA: Religion as a basis of lawmaking?

### On the non-establishment of Religion

The question whether in a liberal democracy religion—that is, religious rationales—may serve as a basis of lawmaking should 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<sup>1</sup>—as have many others (Neuhaus, 1986; Greenawalt, 1988, 1995; Carter, 1993; Audi & Wolsterstorff, 1997; Weithman, 1997, 2002; Audi, 2000, 2001; Eberle, 2002; Cuneo, 2005). In my judgment, the answer is yes, and the most powerful defense of that answer is philosopher Christopher Eberle’s book *Religious Conviction in Liberal Politics* (2002).<sup>2</sup> My focus in this paper is on the second question, which, as a question 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 non-establishment of religion. According to the constitutional law of the United States, government—that is, lawmakers and other government officials—may neither prohibit the “free exercise” of religion

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1. I have changed my mind over the years. See Perry M.J., 1991, 1999a, 2003.

2. See also Eberle Christopher J, *Religious Reasons in Public: Let a Thousand Flowers Bloom, But Be Prepared to Prune* (unpublished ms. 2007).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 See Gaus Gerald F, *The Place of Religious Belief in Public Reason Liberalism* (unpublished ms. 2007).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, Eastern Division, December 2006, Washington) See also Habermas (2006); Nemoianu (2006): 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.

nor “establish” religion.<sup>3</sup> Does the non-establishment norm (as I like to call it) ban religion as a basis of lawmaking? More precisely, should the non-establishment norm be understood to ban laws for which the only discernible rationale—or, at least, the only discernible rationale other than an implausible secular rationale—is religious? (In the United States, an implausible secular rationale—by which I mean a secular rationale that rational, well-informed, and thoughtful fellow citizens could not affirm—is constitutionally inadequate.)

## **Does the non-establishment norm forbid government to affirm religious premises?**

The idea of an “established” church is familiar.<sup>4</sup> 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.<sup>5</sup> (The Church of England was much more strongly established in

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3. The First Amendment to the United States Constitution states, in relevant part: “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 in 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” (Greenawalt, 2005: 479). 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. 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. For Michael W. McConnell (1992: 685), “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 (Perry, 1999b).

4. If the idea is insufficiently familiar (McConnell, 2003: 2105). For a sketch of different kinds of religious establishment, from strong to weak, see Durham Jr., W. Cole, 1996, “Perspectives on Religious Liberty: A Comparative Framework”, in Van der Vyver J. D., Witte Jr. J., (eds.), *Religious Human Rights in Global Perspective: Legal Perspectives*, The Hague-Boston-London, Martinus Nijhoff Publishers, pp. 1-19.

5. Cf. Akhil Reed Amar, 2000, “Foreword: The Document and the Doctrine”, *Harvard Law Review*, 114, pp. 26, 119: “Let us recall the world the Founders aimed to repudiate, a

the past than it is today.<sup>6</sup>) In the United States, however, unlike in England, there may be no established church. The imperative that government not establish religion means that government may not 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, are sometimes referred to in the singular, as “the Christian church”.) More precisely, 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,<sup>7</sup> or more authentically American.<sup>8</sup> 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;<sup>9</sup> nor may it privilege a worship practice—a prayer, liturgical rite, or religious observance<sup>10</sup>—or a theological doctrine peculiar to any church.<sup>11</sup>

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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”.

6. See Saunders Cheryl (2000), “Comment: Religion and the State”, *Cardozo Law Review*, 21, pp. 1295, 1295-1296: Nonetheless, that England still has an established church remains controversial. See, Leech (2001); Longley Clifford, “Establishment—It’s Got to Go”, *The Tablet* [London], May 11, 2002, at 2; Weller (2005). Cf. “The Act of Settlement Debate”, *The Tablet*, Aug. 11, 2007, at 4; Hames Tim, “It would have been more honest to have called it the Dangerous Catholics Act”, *The Tablet*, Aug. 11, 2007, at 5 (the “it” in the title is the 1701 Act of Settlement).

7. More efficacious politically? Imagine: A machiavelian 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.).

8. 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).

9. 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 fullness 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.*

10. Cf. Douglas Laycock (1996: 812-813), 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”.

11. I don’t discuss here the non-establishment caselaw fashioned by the justices of the Supreme Court of the United States. It bears mention, however, that if Justice Clarence Thomas

Is it also the case that under the non-establishment norm, government may not affirm any religious (theological) premises? 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”).<sup>12</sup> Also in 1954, “Congress requested that all US 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”.<sup>13</sup> 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”.<sup>14</sup> Some states provided that their public schools should begin the day with Bible reading or prayer.<sup>15</sup> 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.<sup>16</sup> In at least some such instances, government was affirming one or more religious premises. Is the non-establishment 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 non-establishment norm forbids. But it bears emphasis that no sensible understanding of what the norm forbids denies either of these two propositions:

First, the non-establishment norm forbids government to affirm any religious premise whose affirmation by government would violate the central meaning of

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is right, that caselaw “is in hopeless disarray...”. *Rosenberger 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., Choper (1995); Van Alstyne William, 2005, “Ten Commandments, Nine Justices, and Five Versions of One Amendment—The First”, *Now What? William & Mary Bill of Rights Journal*, 14, p. 17. Akhil Amar has referred to “the many outlandish (and contradictory) things that have been said about [the non-establishment norm] in the United States Reports” (Amar, n. 8, 119).

12. For a history of the Pledge of Allegiance, which makes its first appearance in 1892, see Baer (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.* pp. 62-63.

13. *Id.* at 63.

14. 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”.

15. See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962); *School District of Abington Township v. Schempp* and *Murray v. Curlett*, 374 U.S. 203 (1963).

16. See, e.g., *Stone v. Graham*, 449 U.S. 39 (1980); *McCreary County v. American Civil Liberties Union of Kentucky*, 125 S.Ct. 2722 (2005); *Van Orden v. Perry*, 125 S.Ct. 2854 (2004).

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 non-establishment norm—government, in affirming such a premise, may not coerce anyone to affirm the premise or disadvantage anyone who refuses to do so.<sup>17</sup>

Given the central meaning of the non-establishment norm, the first proposition follows as night follows day. We don't need the non-establishment 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 else's religion or indeed any religion at all. That “negative” freedom—that freedom not to practice a religion one rejects—includes the freedom not to affirm a religious premise one rejects.

Now, imagine two different understandings of what, in the context at hand, the non-establishment 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. The more restrictive understanding would be compelling if there were no religious premise whose affirmation by government would not violate the central meaning of the non-establishment 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,<sup>18</sup> government is not treating any

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17. 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).

18. 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.



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 non-establishment 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 non-establishment norm.<sup>19</sup>

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 non-establishment norm. Would it violate the non-establishment 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 answer the question, 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? 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

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“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!”

Although we citizens of the United States of America don't recite the Declaration, the 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.’”

19. *Cf. ACLU of Ohio v. Capitol Square Review & Advisory Board*, 243 F.3d 289, 293 (6th Cir. 2001): “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”.

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 non-establishment norm forbids, having “under Christ” in the Pledge would violate the norm.<sup>20</sup>

But for government to affirm any religious premise (or premises) that is ecumenical (nonsectarian) as among the three great monotheistic faiths—Judaism, Christianity, and Islam—would not be for it to violate the non-establishment norm (according to the less restrictive understanding of the norm). However, for 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 non-establishment norm, even according to the less restrictive understanding of what the norm forbids.<sup>21</sup> Indeed, for government to affirm any religious premise that is sectarian as among the denominations within one of the three monotheistic faiths—for example, the Catholic premise that the pope is the Vicar of Christ on earth—would be for government to violate the non-establishment norm.

Why shouldn't we go further and embrace an understanding of the non-establishment norm according to which government may not affirm any religious premise whatsoever? Again, the central meaning of the non-establishment 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 First Amendment was designed to impose a secular political culture on the nation would have struck most 19<sup>th</sup>-Century judges as absurd”.<sup>22</sup> Consider, for example, this data: “Fully twenty-seven, or two-thirds, of [the] 1868 state constitutions contained an explicit reference to God in the preamble”. A typical such reference stated that “We, the people of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution.”

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20. According to the less restrictive understanding of what the non-establishment norm forbids, affirming one or another version of the Decalogue also violates the norm. See Finkelman Paul, 2005, “The Ten Commandments on the Courthouse Lawn and Elsewhere”, *Fordham Law Review*, 73, pp. 1477, 1480-1498.

21. 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).

22. *ACLU of Ohio v. Capitol Square Review & Advisory Board*, 243 F.3d 289, 297 (6th Cir. 2001).



In addition to these references to God in the preambles of state constitutions, thirty state constitutions in 1968, or more than three-fourths of the total, contained reference to God... Examples... include the use in constitutional texts of such phrases as “Almighty God”, “Supreme Being and Great Creator and Preserver of the Universe”, “Author of the universe”, “Author of all good government”, “Sovereign Ruler of the Universe”, “Divine Being”, “Great Legislator of the Universe”, and “Our Creator”.<sup>23</sup>

I can discern no good reason either for expecting the Supreme Court to accept and enforce an understanding of the non-establishment norm that is not historically grounded or for thinking that the Court should accept and enforce such an understanding.<sup>24</sup> It is surely at least a minor virtue of the understanding of the non-establishment 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, present as well as past, would greet, or would have greeted, as ridiculously extreme.<sup>25</sup>

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23. Steven G. Calabresi & Sarah E. Agudo, “Individual rights under State Constitutions when the Fourteenth Amendment was ratified in 1868: What rights are deeply rooted in American history and tradition?”

Northwestern Public Law Research Paper No. 08-06 *Texas Law Review*, Forthcoming <http://papers.ssrn.com/abstract=1114940> (2008), at 28-29.

24. I began the paragraph accompanying this note by asking why shouldn’t we go further and embrace an understanding of the non-establishment 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 “to propose the following change to the preamble to the Constitution (in brackets): We, 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 blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America” (Sekulow, 2006: 125). 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” (*ibid.*: 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.

25. As even those who reject the less restrictive understanding of the non-establishment 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 citizenry of the United States would rush to amend the Constitution to overrule the Court.

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.<sup>26</sup> 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 freedom of religious practice but does not include anything like a non-establishment norm; in particular, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, which is the principal international document concerning religious freedom, includes nothing like a non-establishment requirement.

Is it really the case that the more restrictive understanding of what the non-establishment norm forbids in this context yields 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. 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. 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

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Cf. Gey (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); Nieves Evelyn, “Judges Ban Pledge of Allegiance from Schools, Citing ‘Under God’”, *New York Times*, June 27; Fineman Howard, 2002, “One Nation, Under ... Who?”, *Newsweek*, July 8, p. 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 Shiffrin Steven H., 2003, “Liberalism and the Establishment Clause”, *Chicago-Kent Law Review*, 78, pp. 717, 727.

26. “[T]he 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 discomfoting. 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” (Smith, 1999: 164-165).

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”.<sup>27</sup>

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”.<sup>28</sup>

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 non-establishment 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.<sup>29</sup> 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 for the members of Congress who, in 1954, added “under God” to the Pledge.<sup>30</sup> For most Americans, the statements resonate, as indeed they were meant to, with an authentically and rich 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.<sup>31</sup>

There is no intellectually honest way for one who accepts the more restrictive understanding of the non-establishment 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.

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27. *Marsh v. Chambers*, 463 U.S. 783, 818 (1983) (dissenting).

28. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 31 (2004) (concurring in judgment).

29. See Neuhaus Richard John, 2004, “Nasty and Nice in Politics and Religion in the Public Square: A Survey of Religion and Public Life”, *First Things*, March, pp. 69-70.

30. No one with any doubt on this score should fail to read Steven Gey’s article (2003: 1873-1880) under note 26.

31. See under note 19. See Laycock Douglas, 2004, “Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes, Missing the Liberty”, *Harvard Law Review*, 118, p. 155.

## Does the non-establishment 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 non-establishment norm be understood to ban laws (and policies) for which the only discernible rationale (at least, other than an implausible secular rationale) is religious?<sup>32</sup> Two clarifications:

First, the laws at issue are mainly those that ban or otherwise impede conduct, because if the only discernible rationale for such a law is religious, the law is a kind of religious imposition on those whose conduct is banned or otherwise impeded.<sup>33</sup> As Kent Greenawalt has written, laws “that enforce a purely religious morality (...) 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...” (Greenawalt, 2005: 390-391).<sup>34</sup>

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 a premise—a claim—about the existence,<sup>35</sup> nature, activity, or will of God, such as the premise that same-sex unions are contrary to the will of God.

I argued in the preceding section that according to the most balanced understanding of what it forbids, the non-establishment 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 non-establishment norm.<sup>36</sup>

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32. Steve Shiffrin (1999) has addressed much the same question and, unless I misunderstand him, has given much the same answer I give here. See

33. Cf. Audi & Wolterstorff (1997: 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”.

34. See also Greenawalt (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”; Macedo (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”; Audi (1993): “If you are fully rational and I cannot convince you of my view by arguments framed in the concepts we share as rational beings, then even if mine is the majority view I should not coerce you”.

35. Or non-existence. Atheism is a religious position—a position on a religious question—for purposes of the non-establishment norm. Cf. Davis (2005).

36. Although under the non-establishment 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 universe is billions of years old.

It follows from that argument that the non-establishment 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 non-establishment norm), such as the premise that every human being has a God-given dignity and inviolability.<sup>37</sup> It also follows, however, that the non-establishment 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—if in the absence of 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 non-establishment ban I defend here is indifferent to whether a lawmaker who voted to enact a law actually did so, either wholly or partly, on the basis of 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 vote 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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37. 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”.



So the non-establishment 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”. 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. Is there a plausible secular rationale that could account for that policy—that is, a plausible secular rationale we can realistically assume the lawmakers accept, whether or not their support for the policy is actually based on that rationale? Or are the only rationales that could account for the policy implausible secular rationales and/or a rationale that depends on the premise that same-sex sexual conduct is contrary to the will of God? If the latter, then this becomes the determinative question: May government affirm the premise that same-sex sexual conduct is contrary to the will of God?

As I said at the beginning of this paper, 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.<sup>38</sup>

Some who give that answer may be inclined to think that the non-establishment 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 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. And, as it happens, the vast majority of religious believers 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 non-theological 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

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38. See footnotes 4 & 5 and accompanying text.



to the divine inspiration of the Bible".<sup>39</sup> The serious question, then, is not whether the non-establishment 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.

## Conclusion

Should the non-establishment norm be understood to ban laws for which the only discernible rationale—or, at least, the only discernible rationale other than an implausible secular rationale—is religious? The answer for which I have contended in this paper is: Yes, but only if the rationale depends on a religious premise that under the non-establishment norm government may not affirm.<sup>40</sup> If, therefore, the only discernible rationale for concluding that a ban on a moral practice serves a legitimate governmental interest is a religious rationale government may not affirm (e.g., “God will visit devastating pestilence and disease on the community if it tolerates the banned practice”), the ban does not serve—it should be deemed not to serve—a legitimate governmental interest.

Again, the constitutional law of the United States forbids government either to prohibit the “free exercise” of religion or to “establish” religion. The free exercise norm is the principal constitutional provision protecting religious freedom. Nonetheless, one of the basic functions of the non-establishment norm is to provide additional support for religious freedom, thereby making religious freedom even more secure. So it is fitting that the non-establishment norm, according to the understanding I have defended here, serves the cause of religious freedom—which includes, after all, not only the freedom to practice a religion one accepts but also the freedom not to practice a religion one rejects—by forbidding government to enact a ban that, in Kent Greenawalt’s words, “enforce[s] a purely religious morality [and thereby] unacceptably impose[s] religion on others”.<sup>41</sup>

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39. Douthat Ross, 2006, “Theocracy, Theocracy, Theocracy”, *First Things*, August/September 2006, pp. 23 & 28. (emphasis added).

40. Kent Greenawalt has articulated a position close to the one I defend here. See (Greenawalt, 2007: 476-491) under note 35. In Greenawalt K., *Religion and Constitution: vol. 2: Nonestablishment and Fairness*, Princeton University Press (to be published): “[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 (*op.cit.*) says about his position what I have said in this paper 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.

41. See n. 37 and accompanying text.

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## Résumé

*La principale question abordée dans ce texte ne doit pas être confondue avec une autre question vigoureusement contestée dans les États-Unis au cours des trente dernières années : est-il moralement légitime que la religion (ou que des motifs religieux) interfère dans la législation dans une démocratie libérale ? La principale question en cause ici porte sur la légitimité constitutionnelle, et non pas morale (politico-morale), de légitimité et, de plus, il s'agit de la légitimité constitutionnelle dans une démocratie libérale : les États-Unis. Comme d'autres démocraties libérales, les États-Unis sont attachés à la liberté de pratique religieuse. Mais contrairement à la plupart des autres démocraties libérales, les États-Unis possèdent une clause de non-établissement de toute religion d'État. Conformément à la loi constitutionnelle du gouvernement des États-Unis, les législateurs et autres fonctionnaires du gouvernement ne peuvent ni interdire le « libre exercice » de la religion, ni « établir » aucune religion. Est-ce que la norme de non-établissement (non-establishment) doit être comprise comme l'interdiction de lois (et politiques) dont la logique rende non plausible toute rationalité autre que séculière ?*

*Mots-clés : États-Unis, liberté de pratique religieuse, religion, loi.*

## Abstract

*The principal question at issue in my paper should not be confused with a different question that has been vigorously contested in the United States for the last thirty years or so: Is religion (religious rationales) a morally legitimate basis of lawmaking in a liberal democracy? The principal question at issue here is about constitutional legitimacy, not moral (political-moral) legitimacy; moreover, it is about constitutional legitimacy in a particular liberal democracy: the United States. 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 non-establishment of religion. According to the constitutional law of the United States government—that is, lawmakers and other government officials—may neither prohibit the “free exercise” of religion nor “establish” religion. Does the non-establishment norm ban religion as a basis of lawmaking? More precisely, should the non-establishment 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?*

*Key words:* United States, freedom of religious practice, religion, law.

## Resumen

*La principal cuestión que este artículo aborda no debe confundirse con otra, diferente, que ha sido vigorosamente combatida en los Estados Unidos durante poco más o menos los últimos treinta años: ¿Es la religión (las razones religiosas) un fundamento moralmente legítimo para legislar en una democracia liberal? La cuestión principal de la que trata este trabajo es aquella de la legitimidad constitucional, no moral (político-moral); además, se trata de la legitimidad constitucional en una democracia liberal en particular: la de los Estados Unidos. Como las demás democracias liberales, los Estados Unidos están comprometidos con el derecho a la libertad religiosa. A diferencia de la mayoría de las democracias liberales, empero, los Estados Unidos están también comprometidos con el no establecimiento de la religión. De acuerdo a la ley constitucional, el gobierno de los Estados Unidos —esto es, los legisladores y otros funcionarios del gobierno— no pueden prohibir el “libre ejercicio” de la religión, ni “establecer” una religión. ¿La norma del no establecimiento excluye a la religión como fundamento de la elaboración de leyes? De manera más precisa, ¿debería entenderse la norma de no establecimiento como la prohibición de leyes (y políticas) para las cuales el único fundamento perceptible —o, al menos, el único fundamento perceptible además de algún otro fundamento secular no plausible— es un fundamento religioso?*

*Palabras clave:* Estados Unidos, libertad de práctica religiosa, religión, legislación.

