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I. INTRODUCTION

In 1689, John Locke published a revolutionary essay entitled *A Letter Concerning Toleration.* In the opening of this essay Locke made the following statement of purpose:

> I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will be always arising . . . .[1]

Locke argued that religious controversies are passionate, irresolvable,[2] and dangerous. He called, therefore, for removing religious is-

1 JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), *reprinted in* JOHN LOCKE: A LETTER CONCERNING TOLERATION IN FOCUS 17 (John Horton & Susan Mendus eds., 1991) [hereinafter TOLERATION IN FOCUS].

2 *See id.* at 24.

sues from the table of public discussion in order to avoid "all the bustles and wars, that have been . . . upon account of religion."[3] To those concerned that the potential consequences of removing religious issues from the table of public discussion would work against the religious cause he replied that such removal is not so detrimental, for two reasons. First, religious belief is based on inner conviction and hence cannot be coerced.[4] Second, the essence of true religion is the war everyone must wage "upon his own lusts and vices"[5] in the realm of private belief, and therefore, religious disputes are of little practical importance to the civil government.

In a recently published article on church and state, Stanley Fish correctly observes that "[t]he modern contours of the debate concerning the relationship between church and state were established in 1689 by Locke in *A Letter Concerning Toleration*, and discussion of the issue has not advanced one millimeter beyond Locke's treatment even though over three hundred years have passed."[6] Lockean positions are still dominant in the contemporary discourse over the relationship between religion and state, although Western scholars and politicians are in significant disagreement respecting the proper degree of separation between religion and state required to serve the Lockean goal. In this Essay I challenge many of the Lockean premises, as well as other standard arguments commonly utilized, and propose a model for regulating the relationship between religion and state that is based upon premises that significantly differ from Locke's.

In Part II, I engage in a conceptual clarification, and make the distinction between three specific facets of the relation between religion and state—freedom of religion, freedom from religion, and nonestablishment. I also describe four possible interpretations of nonestablishment, which I call strict, neutrality, non-coercion, and non-institutionalization.

> For every church is orthodox to itself; to others, erroneous or heretical. Whatsoever any church believes, it believes to be true; and the contrary thereupon it pronounces to be error. So that the controversy between these churches about the truth of their doctrines, and the purity of their worship, is on both sides equal; nor is there any judge, either at Constantinople, or elsewhere upon earth, by whose sentence it can be determined. The decision of that question belongs only to the Supreme Judge of all men . . . .

Id.

3 *Id.* at 52.

4 *See id.* at 18 ("[S]uch is the nature of the understanding, that it cannot be compelled to the belief of any thing by outward force.").

5 *Id.* at 14.

6 Stanley Fish, *Mission Impossible: Setting the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255 (1997).

In Part III, I evaluate various rationales for nonestablishment, aiming to demonstrate that of the four interpretations of nonestablishment only the last two interpretations—non-coercion and non-institutionalization—are practically required and morally justifiable. I begin with four standard arguments for nonestablishment—the need to avoid civil strife, the limited importance of religious disputes to the civil state, the concern that support to religion may offend nonbelievers, and the fear that support to religion qua religion may corrupt religion. Of these four rationales I reject the first three and only accept the fourth. I then argue that while the dangers to the purity of religion, posed by not separating religion and state, are no doubt very real, strict nonestablishment or even government neutrality toward religion are either unnecessary or unacceptable as a means of avoiding religious corruption. Such measures are unnecessary because another, less extreme, measure—namely non-institutionalization of religion—is sufficient to reduce the risk of religious excesses; they are unacceptable because the application of any of them would deny certain religions the ability to forward their lofty goals.

Having examined the traditional argumentation regarding nonestablishment, I proceed to explore a new path. The "avoiding offence" argument could not be sustained, as noted. Yet it does have one feature that I find appealing: it does not single-out religion as deserving special treatment; it is not aimed specifically against establishment of religion but rather against the establishment of any sectarian substantive position respecting the nature of the good life. This opens a new road to explore. The question to be answered is no longer why should the state not establish religion but rather why should the state not be involved in any substantive dispute respecting the nature of good life.

The liberal discourse offers several arguments for the alleged general prohibition on establishment of sectarian views, with "avoiding offence" being merely one of them. Many liberals consider autonomy as one of "several weighty arguments in support of neutrality."[7] Those committed to the value of autonomy and to its protection are required therefore to examine the political implications of this commitment. Stated differently, it is necessary to find out what the commitment to personal autonomy implies respecting the proper relationship between religion and the state.

7 BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11 (1980); *see also* David A.J. Richards, *Human Rights and Moral Ideals: An Essay on the Moral Theory of Liberalism*, 5 SOC. THEORY & PRAC. 461 (1980).

Fortunately, this area was thoroughly examined by Joseph Raz. In his book, *The Morality of Freedom*,[8] Raz analyzes the nature of personal autonomy and the conditions required for its achievement. Taking Raz's analysis as a starting point, I argue that a state committed to the protection and the promotion of individual autonomy is not required to include "strict" or even "neutrality" nonestablishment among its constitutional essentials. In other words, the value of autonomy should not prevent the state from shaping its positions and activity based on religious or other sectarian foundations. At the same time, I conclude that promoting autonomy requires—beyond the obvious exclusion of coercion—certain limitations on state endorsement of religion or other sectarian positions. More precisely, I argue that while a state committed to the ideal of personal autonomy may prefer religion—or a sectarian position—financially, symbolically, or through any other possible means, that state should avoid any form of intervention in favor of religion in general, or any specific religion, that makes it much harder for people to remain nonreligious or to avoid practicing a religion other than their own. A state committed to the ideal of autonomy should, therefore, include a non-coercion nonestablishment among its constitutional essentials.

The vast majority of Western nations accept the view that people should be granted freedom of religion. Yet, two major questions are disputed among the proponents of this right: *first*, should freedom of religion be understood as a branch of a broader human right, such as freedom of conscience, or a special and distinct freedom; *second*, should freedom of religion be understood as merely prohibiting the state from discriminating against religion, so that neutral, generally applicable laws are legitimate, or should it be construed broadly to require the state to exempt religion from laws, neutral on their face, that interfere with the observances of religion?

In Part IV, I take issue with these two questions. In response to the first, I argue that religion should be viewed as one type of comprehensive culture, and that one's membership in his cultural society should be viewed as a prerequisite for his ability to live autonomously. Freedom of religion should be, therefore, understood and justified primarily as a prerequisite for free choice that is required in order to accommodate the value of autonomy. In addition to this rationale, I mention and concur with two other rationales for freedom of religion: it should be understood as a way to recognize and respect human beings and the foundational components of their identity, and as a means to promote social utility. I argue, however, that none of these

8 JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

three rationales single out religion as deserving unique treatment in comparison to parallel human phenomena. Religion, understood as a comprehensive culture, involves conscientious acts. Freedom of religion should be understood, therefore, as a derivative of the right to culture and of the freedom of conscience.

Furthermore, I argue that reconstructing freedom of religion as a special case of the right to culture has several visible advantages. First, by viewing religion as encompassing culture we avoid the problematic task of defining religion. Second, this rationale resembles and complements the argument, proposed earlier for the non-coercion interpretation of nonestablishment, thus unifying the rationale for the two religious clauses. A third advantage of defining religion as a comprehensive culture and freedom of religion as a special case of the right to culture is that it conforms to the basic intuition behind few major freedom of religion cases and, if adopted, may lead to a better resolution of several others.

In response to the second question—respecting accommodation of religion—I argue that in order to meet the three rationales for protecting religion—promotion of autonomy, respect for cultural identities, and accommodation of conscientious constraints—freedom of religion must be interpreted broadly to require exemptions.

Part V begins with a short summary of the major arguments deriving from the comprehensive discussion contained in Parts III and IV. I then present the outline of my proposed model. I conclude with the assertion that, in my opinion, the model proposed in this Essay—which assumes the vital importance of religion in human life, including the public sphere, and at the same time does not neglect the commitment to human freedom—is not only constitutionally plausible but may also serve as a valuable tool for those who would like to reshape the American model for the relationship between religion and state in a manner more favorable to the cause of religion.

II. Developing Common Vocabulary

A. Three Fundamental Concepts

In the academic discourse respecting religion and state, and especially the legal constitutional discourse, a certain common vocabulary has developed. The three most fundamental concepts in that discourse are freedom of religion, freedom from religion, and nonestablishment.

By "freedom of religion" is meant the right to be free from restrictions or sanctions by the state pertaining to the practice of a religion. It includes the right to maintain certain opinions; to participate

in a religious community and in religious rituals; to teach the religion and its beliefs to others; and the right of religious groups to incorporate and to create institutions with authority regarding private matters affecting the group.

The principle of freedom from religion, on the other hand, shields nonreligious people or minority religious groups from being interfered with or coerced by majority religious groups. It also imposes an obligation on the state not to coerce—and to protect from private coercion[9]—anyone to hold particular religious beliefs or to participate in religious rituals.[10]

Nonestablishment of religion requires that the state abstain from using its power—whether it be the enforcement power, the taxation power, or the power to make official policy—to support a particular religion or its institutions or religion in general. A sliding scale, ranging from strong to weak, may be applied to this concept.

Each of the three concepts—freedom of religion, freedom from religion, and nonestablishment—requires separate discussion. Yet, in discussing these three components, I prefer to begin with nonestablishment, based on two considerations. First, nonestablishment is more controversial than freedom of and from religion. Several West European countries do not include nonestablishment as part of their

9 This argument—that the state must protect individuals and groups from coercion by private actors to be religious, and not only against its own coercion—is to introduce the notion of positive constitutional rights, i.e., that individuals have rights to certain affirmative governmental action and not only negative rights not to be treated in certain ways by the state. Positive constitutional rights are somewhat controversial and the United States Constitution for one is generally thought not to contain any. *See* Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (stating that the United States Constitution "is a charter of negative rather than positive liberties"); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 886 (1986) (noting that Judge Posner's position "finds support in the constitutional language, in Supreme Court decisions, and in the history of the Bill of Rights"). Many European Constitutions, however, as well as international covenants and treaties (such as the UN Covenant on Economic and Social Rights and the European Community's Charter of Fundamental Social Rights), include positive rights. *See* Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 525 (1992) (stating that the American approach contrasts markedly with "the attitudes of the post-World War II European constitution-makers who supplemented traditional negative liberties with certain affirmative social and economic rights or obligations"). The inclusion of positive duties advocated here is limited though, as it requires merely state protection against the actions of third parties but not against impersonal influences such as the limited availability of funds.

10 Some commentators argue that the right not to worship is already a part of the right to worship. In other words, according to this position it is impossible to divide freedom of and freedom from religion. For a detailed discussion, see *infra* text accompanying note 119.

constitutional essentials, and it is not included in any of the legal documents that comprise the international law of human rights.[11] It has been strongly argued that state action that would violate the nonestablishment norm does not necessarily violate any human right.[12] Second, as some scholars argue, conceptually, the idea of separation between religion and state is most closely related to the concept of nonestablishment since only nonestablishment requires "separation" between religion and state.[13] We thus address the heart of the problem when we discuss nonestablishment.

B. Four Interpretations of Nonestablishment

Locke himself believed that for the sake of achieving civil peace the government should only cease using its coercive powers to compel conformity with religious beliefs. He was willing to countenance governmental encouragement of the state religion. "While Locke opposed what would be called interference with free exercise, he thus approved what would be called an establishment under modern constitutional doctrine."[14] Many contemporary scholars, however, require a higher level of separation than what Locke himself required. They argue that to avoid civil strife, or other unwarranted results, not only freedom of and from religion should be guaranteed, but the state should also be prohibited from establishing religion. Yet, what should be regarded as prohibited establishment of religion? Here one may

11 Even in the United States, the Bill of Rights did not apply to the states until the post-Civil War adoption of the 14th Amendment, and at the time of its adoption, six of the 13 states maintained religious establishments. *See* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 25–62 (1986). It has also been argued that the First Amendment was enacted in part to protect state religious establishment from federal interference. *See* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 1–31 (1965).

12 *See* MICHAEL J. PERRY, RELIGION IN POLITICS, CONSTITUTIONAL AND MORAL PERSPECTIVES 16–17 (1997).

13 Indeed, in the United States, it is common to use the term "separation" even more narrowly, and to conflate separation merely with the strict interpretation of nonestablishment. *See* Michael M. McConnell, *You Can't Tell the Players in Church-State Disputes Without a Scorecard*, 10 HARV. J.L. & PUB. POL'Y 27 (1987) (offering a brief typology of First Amendment positions in an attempt to show that separationism is one among many interpretations of nonestablishment). However, because this work does not relate merely to the American discourse, I allow myself some leniency respecting the concept and use it, sometimes, the way it is used, for example, in my home country, Israel, to include all three concepts: freedom of, and from, religion, and nonestablishment. The point that I make in the text, however, is that if any of these three concepts does require separation, the first candidate is nonestablishment.

14 Michael M. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1433 (1990).

find at least four different answers. Several scholars believe that while the state may prefer religion financially, symbolically, or through any other possible means, the state should avoid intervention resulting in favoring religion in general, or any specific religion, to the extent that it makes it much harder for people to remain nonreligious or to avoid practicing a religion other than their own. Other scholars go one step further and would prohibit any state action aimed either to encourage or discourage religion. While advocating against state preference of religion, these scholars, nonetheless, would permit the state to acknowledge religion as long as it remains neutral and does not endorse any specific religion or religion in general. A third group of scholars require an even higher level of separation, insisting on the privatization of religion and the establishment of a civil public order where religion may not even be acknowledged. Finally, a few scholars argue that establishment is not defined by the degree of support the state provides to religion—no support at all including acknowledgment, equal support, or even preferred but noncoercive support—but rather equate "establishment" with "institutionalization." It prohibits the state from making religion part of the government. These four interpretations of nonestablishment, which I call non-coercion, neutrality, strict, and non-institutionalization, respectively, need further elaboration.

1. Strict Interpretation

One possible interpretation of nonestablishment requires full privatization of religion and the creation of a "wall of separation"[15] between religion and state. This reading obliges the state, for example, to "[b]anish public sponsorship of religious symbols from the public square,"[16] even in instances short of endorsement. It also proscribes the state to provide financial support to religious institutions and activities, even when the state uses neutral criteria and does not have any intention of advancing religion.[17] The prohibition against

15 The expression is borrowed from Justice Black's majority opinion in *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). Justice Black's opinion echoes Thomas Jefferson's words that the First Amendment "build[s] a wall of separation between church and state." Letter from Thomas Jefferson to the Baptists of Danbury, Connecticut (Jan. 1, 1802), *in* WRITINGS 510 (Merrill D. Peterson ed., 1984).

16 Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 207 (1992).

17 *See, e.g.*, Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 362 (1996) ("The state may help museums display artifacts, and hospitals deliver health care, but may not help religious organizations minister to souls, even if the ministry is commingled with activity

establishing religion should be read, according to this interpretation, as a requirement to establish a "secular public moral order."[18]

2. Neutrality Interpretation

A second interpretation of nonestablishment holds that a state must remain neutral respecting religion.[19] Douglas Laycock—one of the leading constitutional scholars who endorse the neutrality interpretation—has correctly observed that "people with a vast range of views on church and state have all claimed to be neutral."[20] Laycock therefore suggests a distinction between two interpretations of neutrality: "formal" and "substantive" neutrality.

Formal neutrality, as introduced by Philip Kurland, requires that

> [t]he [Free Exercise and Nonestablishment C]lauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.[21]

The substantive neutrality reading—which is Laycock's preferred understanding of the religious clauses—requires the state "to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobserv-

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of secular value."). Lupu himself merely presents this interpretation as one of two options to accomplish the goal of nonestablishment. He holds, however, that the neutrality interpretation is preferred. *See id.*

18 Sullivan, *supra* note 16, at 198.

19 Under this interpretation, the nonestablishment norm collapses into an antidiscrimination provision. *See* PERRY, *supra* note 12, at 15 (stating that "the nonestablishment norm is an antidiscrimination provision").

20 Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 994 (1990). Laycock illustrates this phenomena with reference to *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), in which Justice Brennan and Justice Scalia fundamentally disagreed on almost every issue in the case, but they both claimed to be neutral. *Compare id.* at 12–14 (Brennan, J.) *with id.* at 39–41 (Scalia, J., dissenting). Laycock believes that the disagreement and ambiguity regarding both the exact meaning and practical applications of neutrality is partially due to the fact that "[m]ost of us think of ourselves as fairminded, and so we tend to assume that our instinctive preferences are fair and therefore neutral." Laycock, *supra*, at 994.

21 Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961).

ance."[22] This practically requires that "religion is to be left as wholly to private choice as anything can be."[23]

Laycock believes that, although formal and substantive neutrality can sometimes produce the same result, they often diverge. "[S]ometimes we can minimize encouragement or discouragement to religion by ignoring the religious aspects of some behavior and treating it just like some analogous secular behavior."[24] However, he avers, "[g]overnment routinely encourages and discourages all sorts of private behavior. Under substantive neutrality, these encouragements and discouragements are not to be applied to religion. Thus, a standard of minimizing both encouragement and discouragement will often require that religion be singled out for special treatment."[25]

Notwithstanding the conceptual distinction between the two interpretations of neutrality—which Laycock described so clearly—it seems, at least in the modern state, that they bear merely insignificant practical results. Let us take as an example the case of financial aid in private education. Formal neutrality reading of the nonestablishment norm, when applied to that case, would permit the state to support religious schools as long as the aid goes to all schools and not to religious schools alone. But it seems quite clear that substantive neutrality would require the same result.[26] Indeed, this assertion is highly debated in the literature, but it is hard to escape Michael McConnell's stark presentation on that point. McConnell asserts that

> [w]ithout aid to private schools . . . the only way that parents can escape state "standardization" is by forfeiting their entitlement to a free education for their children—that is, by paying twice: once for

22 Laycock, *supra* note 20, at 1001.

23 *Id.* at 1002. A parallel position was adopted by the United States Supreme Court in *Rosenberger v. Rectors of the University of Virginia*, 515 U.S. 819 (1995). In *Rosenberger*, a university student organization, which published a newspaper with Christian editorial viewpoint, brought action against the university's denial of funds. The Court stated that "[t]he [Establishment] Clause does not compel the exclusion of religious groups from government benefit programs that are generally available to a broad class of participants." *Id.* at 861 (Thomas, J., concurring). The Court found that the program at stake was neutral toward religion. There is no suggestion, stated Justice Kennedy, that "the University created it to advance religion or adopt some ingenious device with the purpose of aiding a religious cause." *Id.* at 840. Thus, concluded the Court, provision of funding would not violate the Establishment Clause. *See id.*

24 Laycock, *supra* note 20, at 1003.

25 *Id.*

26 Laycock seems to reject this conclusion. *See* Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 377 (1992) ("If the church-sponsored education and social services are indistinguishable from the church itself, then the tax support violates the Establishment Clause.").

> everyone else's schools (through property taxes) and once for their own. By taxing everyone, but subsidizing only those who use secular schools, the government creates a powerful disincentive for parents to exercise their constitutionally protected option to send their children to parochial schools.[27]

McConnell's argument should not be confined merely to the case of private education but is rather applicable to many other areas as well. As Aharon Lichtenstein has observed,

> So long as democratic theory and practice were dominated by the laissez-faire approach of classical Liberalism, the effects of disestablishment were relatively minor. The church lost its privileged position, but the field was left fully open for its operation as a purely voluntary force. . . . [T]he . . . abandonment of laissez-faire has changed the situation drastically. The erosion of the private sector attendant upon the intrusion of the state into all walks of life has directly and materially affected church-state relations.[28]

McConnell is correct, therefore, to argue that "the welfare-regulatory state requires a substantive policy towards religion that will preserve the conditions of religious freedom without hobbling the activist state."[29]

The practical implication of the above argument is that, in most cases, we deal with a zero-sum game. Laycock is clearly right while claiming that "substantive neutrality requires a baseline from which to measure encouragement and disencouragement."[30] In most cases, however, for a welfare state not to encourage or discourage religious belief or disbelief, for a state to leave religion as a completely private choice, is to include religion among other sponsored activities. The "baseline" in most cases is that "no support" equals discouragement, and therefore, substantive neutrality, in most cases, requires support.

3. Non-Coercion Interpretation

According to a third interpretation of nonestablishment, a state may single out religion in general or any religious denomination as more valuable than other options. A state should not, however, take action, or enact policy or law, that has the intention or effect of coerc-

27 Michael M. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 132 (1992).

28 Aharon Lichtenstein, *Religion and State: The Case for Interaction*, 15 JUDAISM 387, 396 (1966).

29 McConnell, *supra* note 27, at 137.

30 Laycock, *supra* note 20, at 1005.

ing people to accept any specific religion or religion in general.[31] But what exactly is considered coercion? It is possible to think of two interpretations of coercion, narrow and broad. The concept of coercion, as explained by Locke, is traditionally based on the distinction between persuasion and force.[32] The narrow interpretation of non-coercion would recognize coercion only when a person is compelled by force or threat to do something that he would not otherwise do.[33] The broad interpretation of non-coercion does not distinguish between persuasion and force, or between direct and indirect coercion.[34] Both are considered coercion. Any state intervention resulting in favoring religion in general or any specific religion, and that makes it much harder for people to remain nonreligious or to avoid practicing a religion other than theirs, is prohibited.

A United States Supreme Court case, which examined the constitutionality of indirect coercion, may illuminate the point. In this case,[35] the Supreme Court examined the validity of including clergy who offer prayers as part of an official public school graduation ceremony. The Court found that

> the school district's supervision and control of a high school graduation ceremony places public pressure . . . on attending students to stand as a group or, at least maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.[36]

The Court found the involvement of indirect coercion sufficient to invalidate the ceremony. As Justice Kennedy put it, "To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means."[37]

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31 The non-coercion standard was introduced in academic circles in the United States already in the early 1960s. *See* Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 330 (1963).

32 *See* Locke, *supra* note 1, at 18–19; *see also* McConnell, *supra* note 27, at 159.

33 This was the position of Justice Scalia in *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting). Scalia interpreted coercion narrowly, willing to recognize coercion only if imposed "by force of law and threat of penalty." *Id.* at 640.

34 *See* Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in the judgment and dissenting in part).

35 *Lee*, 505 U.S. at 577.

36 *Id.* at 593.

37 *Id.* at 594.

4. Non-Institutionalization Interpretation

At the risk of oversimplification, it is possible to describe the above three variations of the nonestablishment principle as different points on a scale measuring the degree of government favoritism toward religion. As Kathleen Sullivan summarized it, the dispute is whether the state should merely avoid coercion (as the non-coercion definition implies), endorsement (as the neutrality definition requires), or even acknowledgment of religion (as the strict version suggests).[38] A fourth interpretation of nonestablishment does not fit on this scale, which measures the degree of support the state provides to religion—no support at all, equal support, or even preferred but non-coercive support—but rather equates "establishment" with "institutionalization." It prohibits the state from making religion part of the government. For example, religious institutions would not be able to become part of the state's administration or judiciary.

Understanding establishment as institutionalization of religion is not totally incommensurable with the three other interpretations of nonestablishment. It can be viewed as a method of supporting religion and as such be evaluated by the three other versions of nonestablishment based on their understanding of how much—if at all—support is permitted. The point, however, is that this reading of the nonestablishment norm would prohibit institutionalization of religion even if institutionalization of religion is not considered prohibited support to religion under any of the other three interpretations.[39] Conversely, "[e]ven if a particular governmental use, symbol, or action appears [for example] to 'endorse' or favor a particular religious group, [in violation of the requirements of the neutrality interpretation,] that fact will not, alone, violate anti-establishment principles ab-

38 *See* Sullivan, *supra* note 16, at 202. Obviously, the classification of a given case may be itself debatable. For example, the display of a free standing crèche on governmental property, whose constitutionality was examined in *Allegheny*, may be viewed as a mere acknowledgement of religion, as Justice Kennedy interpreted—joined by Rehnquist, White, and Scalia—or as endorsing a patently Christian message, as Justice Blackmun interpreted. *Compare Allegheny*, 492 U.S. at 578 (Blackmun, J.), *with id.* at 655 (Kennedy, J., concurring in the judgment and dissenting in part).

39 In some cases the requirements of the non-institutionalization interpretation will overlap the requirements of other interpretations. In general, institutionalization of religion will always be prohibited by the strict interpretation, and probably, in most cases, also by the neutrality interpretation. However, as long as it does not give religious institutions the coercive power of the state, institutionalization will be permissible under the non-coercion interpretation.

sent a further finding of dangerous church-state alliance,"[40] in violation of the requirement of the non-institutionalization interpretation.

III. WHY NONESTABLISHMENT?

As I just mentioned, the concept of nonestablishment is open to four interpretations: strict, neutrality, non-coercion, and non-institutionalization. In the following Part, I will evaluate these four interpretations, aiming to demonstrate that only the last two interpretations—non-coercion and non-institutionalization—are practically required and morally justifiable. Yet, before I start engaging in a substantive discussion, one methodological note is due.

Two explanations may underlie the dispute about the proper scope and nature of the nonestablishment norm. One possibility is that all four interpretations, or some of them, agree on the basic goal or worldview behind the nonestablishment norm, but disagree about the means required to achieve that goal. A second possibility is that the dispute is about the goal itself. For example, when Kathleen Sullivan asserts that the goal of the nonestablishment norm is to put an end to "the war of all sects against all"[41] and thus the nonestablishment norm should be interpreted in the strict way, one can object either to her statement of the goal or may agree with her goal, but differ as to the means of achieving it. Of course, one can also disagree with both the end and the means. My evaluation of the suggested interpretations of nonestablishment will be directed in both directions. I shall discuss each of the four interpretations of nonestablishment, trying to determine whether any of the various purposes that have been suggested for this norm can potentially support this particular reading of the norm.

A. Nonestablishment Is Required to Avoid Civil Strife

As was mentioned above, the standard Lockean rationale for nonestablishment is the avoidance of civil strife. The "civil strife" argument, while willing to admit that religion may represent one among many valuable options, holds, nonetheless, that religion should be excluded from the list of potential beneficiaries of state support because supporting religion may pose a disproportionate threat to the existence of competing options. That claim is phrased in two complemen-

40 Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 972 (1995).

41 Kathleen M. Sullivan, *supra* note 16, at 206 (1992).

tary ways, empirical and conceptual. The empirical claim is that throughout history religious groups who gained a dominant position acted intolerantly and coerced non-adherents to comply with their tenets. History does not have to repeat itself. However, the argument goes, inherent conceptual characteristics of religion justify a strong presumption that history will repeat itself so long as those characteristics still exist.

An easy way to reject the above argument is to cite contrary experience. American history, for example, does not support that argument. As Michael McConnell has observed, "Religious differences in this country have never generated the civil discord experienced in political conflicts over such issues as the Vietnam War, racial segregation, the Red Scare, unionization, or slavery."[42] We could also argue along with Lawrence Solum that "[c]onditions in modern democracies may be so far from the conditions that gave rise to the religious wars of the sixteenth century that we no longer need worry about religious divisiveness as a source of substantial social conflict."[43] But, it is also possible to approach the conceptual claim directly.

The conceptual claim is that toleration and religion can not get along together; that accepting any religion as the true religion prevents an individual from tolerating other religious or non-religious teachings. It is most likely then that religious groups will take coercive measures once they gain enough power to do so. It is further argued that in order to prevent this from happening, we must draw a clear and strict line between religion and state power. All sorts of state support to religion should therefore be prohibited.

This argument is still offered by leading constitutional scholars in support of the strict interpretation of the nonestablishment norm. Kathleen Sullivan, for example, is willing to concede that liberal democracy is a "belief system comparable to a religious faith."[44] She, nonetheless, justifies a different treatment for those two types of faith: religious faith and the "culture of liberal democracy," based on the proposition that "[n]umerous self-limiting features ought to keep at bay any concern that liberal democracy could be *a totalistic orthodoxy as threatening as any papal edict.*"[45] According to Sullivan, any interpretation of the nonestablishment norm other than the strict will fall short of "ending the war of all sects against all"[46] that the nonestablishment

42 Michael W. McConnell, *Political and Religious Disestablishment*, 1986 BYU L. REV. 405, 413.

43 Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083, 1096 (1990).

44 Sullivan, *supra* note 16, at 200.

45 *Id.* at 201 (emphasis added).

46 *Id.* at 197.

clause intended to end, because *religion*, as opposed to other types of faiths, is inherently *intolerant*.

What, according to the adherents of Sullivan's view, are the characteristics of religion that cause its participants to be intolerant? Some account for the intolerance on the basis that religion claims to possess the absolute truth. As possessor of the absolute truth it cannot tolerate other positions which deny or contradict that truth. Stated another way, the intolerance of other views stems from the acceptance of the following syllogism:

1. Divine revelation is superior to other sources of knowledge such as experience and reason.
2. Religion received its truth through divine revelation. Therefore:
3. Religion possesses the absolute truth and cannot be refuted by experience or reason.

The foregoing reasoning is far from self-evident; perhaps it was true of religion in past centuries; however, it hardly characterizes the view of numerous religious leaders today. Many religious denominations in the contemporary western world no longer comply with this paradigmatic description of religion. For example, while this description may still fit, to some degree, orthodox interpretations of Christianity and Judaism, it does not fit liberal interpretations of these two religions. The "liberal" Jewish and Christian denominations are much more skeptical about revelation. As Michael Perry has observed, "Many religious believers understand that human beings are quite capable . . . of deceiving themselves, about what God has revealed."[47] These religious people attach much more importance to human reason and experience in finding God's message. For them "an argument about the requirements of human well-being . . . that is grounded on a claim about what has been revealed is highly suspect if there is no secular route to the religious argument's conclusion."[48] As a result of abandoning the track of verified revelation, and entering the world of secular reasoning, liberal religious people no longer claim to have the ultimate truth.[49] There is no reason, therefore, to

47 PERRY, *supra* note 12, at 74.

48 *Id.*

49 Consider for example the following two quotations, one by a reform Jew and the other by a Liberal Christian theologian:

> Traditional Judaism . . . relied heavily on what God "told" them. . . . Theologians term what God "said" to humankind God's revelation. That is, to begin with, God has a truth we do not have. But, what is hidden from us, God then makes known to us; God reveals it to us. For traditional Judaism, God's

suspect these religious people of being more intolerant than people adhering to other schools of morality. Consequently, the above rationale falls short of justifying the exclusion of at least these people from the list of state-supported options.

But, even orthodox believers who still claim to possess the ultimate truth are not necessarily bound to be intolerant. The concept of toleration is paradoxical.[50] Being tolerant means that we agree to coexist peacefully with something or someone that we resist or do not fully accept. The idea of tolerance is based on the assumption that the tolerated position is a deviation from the truth. One does not speak about tolerance of that which one considers to be true or correct.[51] Consequently, a relativist or skeptic, who does not accept the idea of a single, verifiable truth, cannot be said to be tolerant. It is no wonder then that the historic birth of the idea of toleration was in a religious culture, which assumed to have objective truth.

A firm conviction that your position is right and other positions are wrong is a requisite for toleration.[52] Jewish and Christian Orthodox religious believers meet this requirement. The question is whether they can also fulfill the other requirement of toleration. Can they avoid translating their firm conviction of being right into coercive actions against those they believe to err? It seems that they can. Reasons for toleration can roughly be classified into two types: *moral*

> revelation is the Torah . . . . [L]iberal Jews have a different view of revelation. We place very much more weight than our tradition did on the human role in creating religion. We are also much less certain about exactly what God has revealed to us. Thus, we also have a more positive appreciation of changes in religious ideas.

EUGENE B. BOROWITZ, LIBERAL JUDAISM 5 (1984).

> God is unchanging, but the demands of the New Testament are different from those of the Old, and while no other revelation supplements the New, it is evident from the case of slavery alone that it has taken time to ascertain what the demands of the New really are . . . . In new conditions, with new insights, an old rule need not be preserved in order to honor a past discipline.

John T. Noonan, Jr., *Development in Moral Doctrine*, 54 THEOLOGICAL STUD. 662, 676–77 (1993).

50 *See generally* PRESTON T. KING, TOLERATION 29 (1976); D.D. Raphael, *The Intolerable*, *in* JUSTIFYING TOLERANCE: CONCEPTUAL AND HISTORICAL PERSPECTIVES 140 (S. Mendus ed., 1988); Avi Sagi, *haDat haYehudit: Sovlanut veEfsharut haPluralizm [The Jewish Religion: Toleration and the Possibility of Pluralism]*, 44 IYYUN 175, 176–77 (1995).

51 *See* Jeremy Waldron, *Locke: Toleration and the Rationality of Persecution*, *in* TOLERATION IN FOCUS, *supra* note 1, at 100.

52 The argument is not that a skeptic is sure to repress rival views. On the contrary, a skeptic will probably let his rivals be. But, such behavior based on a skeptical worldview would not be defined as toleration.

and *utilitarian.* Toleration in a religious context is more likely to be based on utilitarian reasons than on moral. However, there are also roots in religious literature for a moral rationale. Let me describe one plausible argument of each type.

One utilitarian argument against religious coercion and in favor of tolerance is based on the position that religion depends, at least to a certain extent, upon inner conviction, and that this inner conviction lies beyond external control. The argument, in other words, is that there is no way to compel religious action—that to the extent one is forced to conduct oneself religiously, one's conduct can no longer be characterized religious.[53] Coercion is therefore useless.

The moral argument is based on a position that respects autonomy. Tolerance is required in order to accommodate the importance attached to respecting the autonomy of human beings as choosing persons, who should not be denied this central prerogative even at the cost of letting them avoid the truth. These two ideas, the correlation between deliberate action and religious value, and the central value of autonomy, do exist in both Christian and Jewish religious literature.[54]

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53 *See, e.g.*, JOHN LOCKE, THE SECOND TREATISE OF CIVIL STATE AND A LETTER CONCERNING TOLERATION 127 (J.W. Gough ed., 1946) ("[T]rue and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God. And such is the nature of the understanding, that it cannot be compelled to the belief of anything by outward force."); John Milton, *A Treatise of Civil Power in Ecclesiastical Causes, in* JOHN MILTON: SELECTED PROSE 296, 311 (C.A. Patrides ed., 1985) (1659) (stating that to force a ritual performance is "to compell hypocrisie, not to advance religion").

In the Jewish sources a limited version of such position is attributed to R. Me'ir Simaha of Dvinsk who has concluded that coercion is valid only when it brings about an internal change in the mind and heart of the person coerced, so that he assents to do what he was ostensibly forced to do. *See* 1 MEIR SIMHAH KAHAN, OR SAME'ACH 54–97 (1965). Among Jewish contemporary authorities that took this line is SHAUL YISRAELI, AMUD HAYEMINI 95–96 (1966).

> The rule of coercion is applicable only as regards someone who wishes to fulfill the commands of the Torah. . . . But as regards those of our generation, whose non-observance derives from a lack of faith in Torah and its commands . . . the rule that a court (or its appointed delegate) should coerce them by physical means does not exist . . . for even if we subdue them physically, they will not be convinced of the truth of the mitsvah and will not agree to its observance willingly. Thus the purpose of coercion is not achieved . . . where this is certain, we are forbidden to touch a hair on their head.

Id.

54 The linkage between religion and voluntarism was first introduced in Christian theology by Sebastian Castalion. For an analysis of his position, see KING, *supra* note 50, at 78–80. In Jewish theology the idea was introduced by Moses Mendelsshon, in his book JERUSALEM, OR, ON RELIGIOUS POWER AND JUDAISM (Allen Arkush trans.,

The real question is whether these arguments will be influential enough to persuade religious authorities to avoid coercion, if they have the power to coerce. It would appear that there is a strong presumption that, in the Western world, these moral and utilitarian arguments will have significant influence on religious people who have long lived in a tolerant culture.[55] Such prediction is definitely no less probable than Sullivan's concern.[56]

In this Subsection, I argue, along with several contemporary writers, that while it is hard to reject the historic truth of Locke's assessment, religious rivalry seems today an odd choice as a threat to civil peace in the Western world where the overwhelming majority of religious denominations accept the principle of tolerance and where "legal guarantees of individual freedom of conscience have provided ample protection for a wide range of religious groups."[57] Hence, anyone who would advocate prohibiting the state not only from compelling conformity with religious beliefs, but also from endorsing religion in less extreme ways, needs to support his position with arguments other than fear of civil strife.

B. Religion Is of Little Importance to the Civil State

As mentioned above, Locke argued that religious disputes are of little practical importance to the civil government. Some scholars utilize this argument to support the neutrality interpretation of nonestablishment. The state, they argue, may decide political matters because it must; yet it does not have to, and therefore should not, decide religious matters.[58]

1983) (1783). For an analysis of his position, see YAAKOV KATS, BEIN YEHUDIM LEGOYIM ch. 14 (1976) (in Hebrew). Limited versions of this position can be found also in rabbinical literature. *See* Sagi, *supra* note 50, at 186–94.

55 Two contemporary leading Jewish authorities that took such position are Rabbi Joseph Ber Soloveichik and Rabbi Abraham Isaac Kook. *See, e.g.*, Shalom Carmy, *Pluralism and the Category of the Ethical*, 30 TRADITION 145 (1996); Tamar Ross, *Between Metaphysical and Liberal Pluralism: A Second Look at Rabbi A.I. Kook's Espousal of Toleration*, 21 ASS'N FOR JEWISH STUD. REV. 61 (1996).

56 One may ask, if both you and Sullivan are guessing, why should one believe this argument and not that of Sullivan? Such a question misses the point, however. The proponents of excluding religion from the list of state supported values and activities bear the burden of proof. *They* have to establish more than probable cause. If their position is not more persuasive than mine, if neither contemporary history nor conceptual claims can support their position, I rest my case.

57 *Liberalism*, *in* THE OXFORD COMPANION TO PHILOSOPHY 484 (Ted Honderich ed., 1995).

58 It is worthwhile to emphasize that such an attempt to distinguish religion from politics is a modern secular reflection on the well-rooted Christian dichotomy be-

One of the commentators who distinguish between political and religious or non-political matters based on the respective importance of these issues to the state is Douglas Laycock. One of the propositions that Laycock considers a sufficient justification of substantive neutrality is that

> beliefs at the heart of religion—beliefs about theology, liturgy, and church governance—are of little importance to the civil state. Failure to achieve religious uniformity had not led to failure of the state .... [E]xperience had revealed that people of quite different religious beliefs could be loyal citizens or subjects.[59]

It is not accidental that while discussing religious matters, the paradigmatic examples Laycock brings are rituals or theological disputes. It is very easy to admit the relatively small relevance of theology, liturgy, or rituals to the maintenance of the state, and it is therefore an easy task to justify the exclusion of disputes over these issues from the political arena. However, rituals or theology do not exhaust the essence of religion. Let us replace the word rituals with the word *conduct*, and the word theology with the word *belief*. Almost every major religion has—in addition to theology and rituals—strong *beliefs* about the morally proper human *conduct* in many areas of life.

Religion, to pick one example, may have an opinion about what sexual conduct is acceptable and valuable. Orthodox Judaism and Christianity would deem homosexual conduct immoral. They would at least expect the state to avoid any measures supportive of homosexuality. They would require the state not to recognize same sex marriages and to deny homosexual couples benefits such as tax deductions reserved to heterosexual and monogamous couples. Marriage—contends Robert George, and I concur—"is an important value which society and state have an obligation to help make available to people .... [W]hat follows from this ... is society's obligation to 'get it right' .... This is an area in which ... [t]he conflict of

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tween the two. Within Christianity, the political consequence of this position is the famous doctrine—dating from the patristic period and given modern formulation in Leo XIII's Immortable Dei—of "two powers" which rule separate realms independently but which, in theory at least, sustain and assist each other, so that their relations are governed by perfect concord. *See* GERALD E. CASPARY, POLITICS AND EXEGESIS: ORIGEN AND THE TWO SWORDS (1979); MARSILIUS OF PADUA, DEFENSOR PACIS (Alan Gewirth trans., Cambridge Univ. Press 1980) (1342); THE CHURCH SPEAKS TO THE MODERN WORLD: THE SOCIAL TEACHINGS OF LEO XIII, at 167–68 (Etienne H. Gilson ed., 1954).

59 Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317 (1996).

comprehensive views is unavoidable."[60] Religion presents clear positions in this particular issue, as well as in many other issues that are discussed in the political arena. Would proponents of state neutrality prohibit a state from taking a position respecting these issues based on religious belief? Indeed, there is a huge amount of literature dealing with the admissibility of religious arguments in moral disputes, which, unfortunately, is beyond the scope of this paper.[61] The limited point attempted here is that if there is any difference between "religion" and "politics," it is not—as some commentators hint—over the issues they discuss.[62] Let us make no mistake: ultimately, we are not only confronted with the problem of religion and state but with the broader question of morality and state. Once we consider moral neutrality as either undesirable or unattainable, we must find very good reasons to exclude religion as a potential source for political decisions.[63]

60 Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2501 (1997).

61 This question is composed of two sub-questions: one examines whether religious arguments may serve as the foundation for political decisions; a second addresses the more far-reaching matter of whether religious arguments should be presented in public political debate. For recent works dealing with these question, see KENT GREENAWALT, PRIVATE CONSCIENCE AND PUBLIC REASONS (1995) (stating that legislators should not present religious arguments in public political debate); PERRY, *supra* note 12, chs. 2–3 (stating that citizens and even legislators and other public officials may present, in public political debate, religious arguments about the morality of human conduct, but that they should not rely on such arguments in making a political choice, unless, in their view a persuasive secular argument reaches the same conclusion).

62 *See* MAIMONIDES, TESHUVOT HA-RAMBAM 715 (J. Blau ed., 1960) (stating that, from a Jewish point of view, all human activity is subsumed under "the fear of God," and every human act ultimately results in either a Mitzvah or a transgression); David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067, 1091 (1991) ("[G]iven religion's comprehensiveness, everything is, in a sense, religious. A conception of religion that seeks to "privatize" it is itself a non-neutral interpretation of religion at variance with historic forms of Christianity, Judaism, and Islam."); *see also* Frederick M. Gedicks, *Some Political Implications of Religious Belief*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419, 427–39 (1990) (arguing that religion is by its nature holistic and compelling, and therefore has political and public implications).

63 Andrew Koppelman accuses me of changing the subject. The state, he argues "can be vigorous in legislating morality while taking no position on religion as such." Letter from Andrew Koppelman to Gidon Sapir (Apr. 1, 1998) (on file with author). Koppelman's comment seems to support rather than refute my point. In his book, *Life's Dominion*, Ronald Dworkin suggests a philosophical-jurisprudential defense of *Roe v. Wade* and its pro-choice progeny. *See* RONALD DWORKIN, LIFE'S DOMINION (1993). He argues that any restriction on abortion prior to viability can be only religious, and hence prohibited by the Establishment Clause. Similarly, Michael Perry

In conclusion, religion has—in addition to theological doctrines—strong pronouncements on morally proper human conduct in many areas of life. Some religions actually have a clear position not only in moral disputes but also in all aspects of human life. Thus, Locke's attempt to distinguish "the business of civil government from that of religion" based on the distinction between public things—things of this world—and private things—things of the world to come, cannot work.[64] If there is any good reason for denying religious authority an official role in deciding issues of public life or administering government, it cannot be that religion does not or should not have a position respecting these matters.

C. Support of Religion Qua Religion May Corrupt Religion

Locke was a devout Christian. His call, as well as that of other Christian thinkers of his age, to separate religion and state was undoubtedly also motivated by the wish to purify religion. Christianity, which, in the first centuries after its inception, attempted to disseminate a message of spirituality and grace, turned during the Middle Ages into a powerful political institution accused, at times even by its own adherents, of injustice and corruption. The disgust at the corruption of the Church played, according to Quentin Skinner, a key role in helping to foster the wide influence of the Reformation.[65] While Martin Luther directed his attack on the prevailing assumption that "the clergy constitute a separate class with special jurisdictions and

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argues that no secular argument that homosexual sexual conduct is immoral is persuasive. *See* PERRY, *supra* note 12, at 85–96. Under Perry's interpretation of the Establishment Clause, it would be unconstitutional for the United States government to make a political choice against homosexuality. Both Dworkin and Perry do not argue against moralistic legislation as such. What I am trying to understand is why secular arguments could have been appropriate to decide the fierce debate over these two moral issues, but religious arguments are not.

64 The argument that neutrality is unacceptable because it does not permit the goals of religion to be achieved is very strong when advocated respecting comprehensive religions like Judaism or Islam. The public/private split of neutrality clearly does not work when faced with a comprehensive religion whose claims touch all areas of life. However, in my understanding, this argument is compelling also with respect to a non-comprehensive religion such as Christianity which, as I emphasize in the text, has strong pronouncements on morally proper human conduct in many areas of life. In fact, even Locke himself admitted a certain overlap between the religious and secular realms. Moral actions, he contended, belong "to the jurisdiction both of the . . . magistrate and conscience." LOCKE, *supra* note 1, at 42.

65 *See* 2 QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT 27–34 (1978).

privileges,"[66] others prescribed the separation of religion and politics, thereby insulating religion from the corruptive influence of political power struggles, as the cure for corruption. Indeed, contemporary thinkers exploit this argument to explain why neutrality nonestablishment is desirable.[67]

In principle, the general fear that state engagement with religion might result in a loss to religion is well founded. In the words of Rabbi Aharon Lichtenstein, establishment of religion confronts religion with the danger of two-edged Erastianism.

> There is, first, the external threat. The state may seek to impose its authority and values upon religion in order to advance its own secular, perhaps even anti-religious ends. . . . [E]rastianism poses, secondly, an internal threat, the danger that the spiritual quintessence of religion will be diluted, if not perverted, by its official status. . . . [Q]uite apart from the threat of overt or covert state interference, an established religion lives under a Damocles' sword of worldliness, the perennial possibility that its public investiture will corrode the fiber of its principles and purpose, that it will fall prey to spiritual pride writ large.[68]

The dangers posed by the interrelation of religion and state are no doubt very real; however, the practical inferences which the neutrality reading of nonestablishment draws from these points seems unwarranted. It is true that in order to prevent the state from using religion to enhance its secular needs and in order to preserve the spirituality of religion, we must indeed seek to find ways to keep religion away from state influence. However, prohibiting the state to take a noncoercive position based on religious conviction, or provide other sorts of preferred support to religion, seems, on its face, a too extreme way to reach this goal.

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66 *Id.* at 13.

67 Douglas Laycock argues that "[g]overnment-sponsored religion is theologically and liturgically thin." Laycock, *supra* note 26, at 380. He warns that "[i]n tolerant communities, efforts to be all-inclusive inevitably lead . . . to a secular incarnation with plastic reindeer, to Christmas and Chanukah mushed together as the Winter Holidays." *Id.* Michael Perry, another advocate of substantive neutrality, declares that "one way for state to corrupt religion—to co-opt it, to drain it of its prophetic potential—is to seduce religion to get in bed with government." PERRY, *supra* note 12, at 18; *see also* McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) (stating that "both religion and state can best work to achieve their lofty aims if each is left free from the other within its respective sphere"); Derek H. Davis, *Assessing the Proposed Religious Equality Amendment*, 37 J. CHURCH & ST. 493, 508 (1995) ("Church-state separation is the great protector of true faith, not its inhibitor.").

68 Lichtenstein, *supra* note 28, at 394.

It seems that the history of perverse and corrupt religious establishment in medieval Europe was not the result of state deviation from a position of neutrality, but rather the institutionalization and bureaucratization of religion. Religious functions became corrupt because established religion as such gained political prerogatives, including coercive powers, functioned as an arm of the political state, and at times created its own political state.[69] What is required, then, to avoid corruption of religion is not substantive neutrality but rather non-institutionalization of religion.[70] While the state may support religions and religious activity, if the majority of its citizens so wish, such support should not involve institutionalization of religion. The religious ministry should remain financially and politically independent of the state. This safeguard would reduce the risk that religions will lose their spiritual and actual autonomy but would not deny religions the ability to forward their lofty goals.

But even if the argument just mentioned is incorrect—if governmental preferential treatment of religion does endanger the spirituality of religion even when religion remains independent of the state—substantive neutrality is not automatically justified. The "corruptive effect" rationale is unique in a way. Contrary to other rationales for nonestablishment, its primary concern is not the well-being of the nonbeliever or the secular state, but rather the success of religion in fulfilling its own lofty aims. But if concern for the fulfillment of the goals of religion is the drive behind this rationale, we should take a closer look at the goals of religions before deciding for religions what is best for them. We should define those goals and examine what are, according to the religions' views, the conditions for their fulfillment. A religion may aim to enhance the spiritual integrity of individuals, and require as sufficient conditions for fulfilling this end the existence of spiritual clerical leadership and the freedom of those inspired by the clergy to observe the religious rules. Such religion may find substantive neutrality quite appealing.

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69 *See, e.g.*, UTA-RENATE BLUMENTHAL, THE INVESTITURE CONTROVERSY: CHURCH AND MONARCHY FROM THE NINTH TO THE TWELFTH CENTURY (1988); RICHARD W. SOUTHERN, WESTERN SOCIETY AND THE CHURCH IN THE MIDDLE AGES (1970); GERD TELLENBACH, THE WESTERN CHURCH FROM THE TENTH TO THE EARLY TWELFTH CENTURY (1993).

70 Laura Underkuffler-Freund argues, in her inquiry into the historical meaning of the American nonestablishment norm, that the inclusion of this norm in the United States Constitution was mainly motivated by one major concern—"the danger of institutional merger of church and state." Underkuffler-Freund, *supra* note 40, at 942.

Some religions, however, pursue more ambitious goals or consider several more conditions necessary to fulfill the goal just mentioned. For example, as I explain in more length elsewhere,[71] the Jewish religion considers the Jewish people as having a collective destiny—besides the goals of its individuals—which can be fulfilled only through the creation of a spiritual society committed to this collective goal. Furthermore, a spiritual society is considered by the Jewish religion also as an indispensable condition for the fulfillment of the individual Jew. Thus, the Jewish religion cannot be satisfied with substantive neutrality in a state that no longer serves as a mere "night guard" for its citizens. Such prescription would avert some diseases but kill the patient. It would isolate the Jewish religion from the corruptive influence of power and politics, but it would also prevent this religion from fulfilling its goals. The Jewish religion and similar ones, while required to be alert to the danger of corruption, cannot accept the level of separation between religion and politics that the neutrality interpretation implies.

In conclusion, while the dangers posed by not separating religion and state are no doubt very real, government neutrality toward religion is either unnecessary or unacceptable as a means of avoiding religious corruption. Mandatory neutrality is unnecessary because other, less extreme measures are sufficient to reduce the risk of religion's excesses; it is unacceptable because it would deny certain religions the ability to forward their lofty goals. The other measure that may and should be taken to meet this threat is non-institutionalization of religion. While the state may support religions and religious activity if the majority of its citizens so desire, such support should not involve institutionalization of religion.

The American reader, who is not familiar with legal systems that allow the state to deviate from neutrality, may find it hard to distinguish between state preferential treatment of religion and state institutionalization of religion. For such an audience a clear illustration may be of help. We will describe therefore two legal systems—the Israeli and the German—that both give preferential treatment for religion but differ as to the issue of institutionalization.

The state of Israel institutionalizes religion in the course of giving it preferred treatment. Several Jewish-Orthodox institutions are not only funded by the government in Israel but also accorded governmental status. They include mainly the chief rabbis and chief

71 *See* Gidon Sapir, *Can an Orthodox Jew Participate in Anything but a Jewish Law State?*, 20 SHOFAR, AN INTERDISC. J. JEWISH STUD. (forthcoming winter 2002).

rabbinical council,[72] local chief rabbis, local religious councils,[73] and rabbinical courts.[74] Indeed, as Liebman and Don-Yehiya observe, "the rabbinate insists de jure on its autonomy in relation to the state; it denies that the judicial system or . . . the Knesset has the moral right to impose its authority upon it."[75] The fact, however, is somewhat different. The rabbis and all other religious functionaries are state employees, and the rabbis—both chief and local—owe their nomination to politicians. Under these circumstances, it is unlikely that they will function *de facto* in total independence. Also, as these institutions are part of state administration, they tend to develop bureaucratic diseases similar to—and even greater than—other governmental agencies. In the course of events, such institutions have lost not only the respect of nonobservant Jews but also their spiritual authority over observant Jews.[76]

The German model is different. Article 137(6) of the Weimar Constitution, incorporated by Article 140 of the Basic Law,[77] provides that "religious bodies that are corporate bodies under public law shall

72 *See* Chief Rabbinate of Israel Law, 1980, 35 L.S.I. 97, (1980), regulates the functions of the Council, its composition, the election process of the council and of the two Chief Rabbis—one Ashkenazi and one Sefaradi. The formal authority of the chief rabbis and the council is limited; they do, however, partially control several issues such as licensing of marriages and divorces, *kashrut* (conformity with dietary law) and authorization of judges of the religious courts.

73 The religious councils are administrative bodies in each locality that provide religious services and distribute public funding for their maintenance. *See* Jewish Religious Services Law, 1971, 25 L.S.I. 125, (1971).

74 The Rabbinical Courts are an integral part of the state's judicial system, supported by state funds, and retain exclusive jurisdiction over matters of marriages and divorces. *See* Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, 7 L.S.I. 139, (1953), provides that "matters of marriage and divorce of Jews in Israel, being nationals or residents of the state, shall be under the exclusive jurisdiction of rabbinical courts" and that "marriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law." Similar arrangements apply to other religious communities, including Moslem, Christian, and Druze. For more details about the jurisdiction of the various religious courts in Israel, see SHIMON SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY 106 (1994), and Andrew Treitel, *Conflicting Traditions: Muslim Shari'a Courts and Marriage Age Regulation in Israel*, 26 COLUM. HUM. RTS. L. REV. 402, 411–21 (1995).

75 CHARLES LIEBMAN & ELIEZER DON-YEHIYA, RELIGION AND POLITICS IN ISRAEL 20 (1984).

76 The most vehement critic of entangling religion and state in Israel on the ground that it corrupts religion was an orthodox scholar, Yeshayahu Leibowitz. *See* YESHAYAHU LEIBOWITZ, JUDAISM, HUMAN VALUES, AND THE JEWISH STATE 158–84 (1992).

77 Basic Law for the Federal Republic of Germany (1949), *translated in* PETER H. MERKL, THE ORIGIN OF THE WEST GERMAN REPUBLIC 213 (1963).

be entitled to levy taxes in accordance with Land law."[78] This, in other words, means that religious organizations are given the power to impose taxes on their own members for religious purposes. Article 137(1) of the Weimar Constitution declares, however, that "there shall be no state church."[79] As the leading commentator of the period of the adoption of this provision concluded, Article 137(1) was directed against "administration of internal church affairs by any governmental body or by any entity within the church erected or staffed by the state" (i.e., "against any institutional connection between church and state").[80]

D. Support to Religion May Offend Nonbelievers

The next argument for nonestablishment is that establishment of religion offends those who hold different positions and thus should be avoided. Although this argument is not applicable to the strict interpretation, some writers raise it to justify the neutrality or the noncoercion interpretation, arguing that when the state takes sides with a certain religion or religion in general it offends people committed to other views respecting the nature of the good life.

I reject this argument for, as so many have pointed out, its central claim rests on a *non sequitur.* As Gerald Dworkin has observed,

> [T]here is a gap between a premise which requires the state to show equal concern and respect for all its citizens and a conclusion which rules out as legitimate grounds for coercion the fact that a majority believes that conduct is immoral, wicked, or wrong. That gap has yet to be closed.[81]

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78 DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 412 (1994).

79 *Id.* at 411.

80 GERHARD ANSCHUTZ, DIE VERFASSUNG DES DEUTSCHEN REICHS 631 (4th ed. 1933), *translated in* CURRIE, *supra* note 78, at 249–50.

81 Gerald R. Dworkin, *Equal Respect and the Enforcement of Morality*, 7 SOC. PHIL. & POL'Y 180, 193 (1990). I find it very hard to see how this gap can be closed, given the strong counter-argument, made most eloquently by John Finnis. Finnis argues that morals legislation

> may manifest, not contempt, but rather a sense of the equal worth and human dignity of those people, whose conduct is outlawed precisely on the ground that it expresses a serious misconception of, and actually degrades, human worth and dignity, and thus degrades their own personal worth and dignity, along with that of others who may be induced to share in or emulate their degradation.

John Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433, 437 (1987).

While the "respect for people" argument cannot be sustained, I still find this argument more appealing than other arguments for nonestablishment for something that it does not do: it does not single out religion as deserving special treatment. The "respect for people" argument is not aimed specifically against establishment of religion but rather against the establishment of any sectarian substantive position respecting the nature of the good life. "Respect for people" does not entail nonestablishment of sectarian positions, but it opens, nonetheless, a new road to explore. The question to be answered is no longer why should the state not establish religion but rather why should the state not be involved in any substantive dispute respecting the nature of good life.

E. Nonestablishment as a Means to Promote Autonomy

1. Introduction—Political Liberalism v. Perfectionist Liberalism

The past twenty-five years or so have seen the rise of a school within the liberal tradition that came to be known as Political Liberalism.[82] This group of thinkers takes the position that the best and only justifiable interpretation of liberalism is one that both takes the lack of consensus on moral ideals to be the fundamental problem of political theory and offers a particular solution to this problem. The solution, according to John Rawls, a leading scholar among political liberals, is that the state should not take sides in the moral controversies that arise from comprehensive moral doctrines: "Which moral judgments are true, all things considered, is not a matter for Political Liberalism . . . ."[83] But how can the state ensure that its actions do not privilege or presuppose the superiority of any of the competing moral ideals affirmed by its citizens? Here, Rawls suggests what he calls the "overlapping consensus,"[84] a set of political arrangements that different people can be persuaded to endorse for different reasons, reflecting the various comprehensive moral interpretations they espouse. These principles, according to Rawls, are the ones that would be

82 For works that can be said to fall within the camp of Political Liberalism, see ACKERMAN, *supra* note 7, at 11, BRIAN BARRY, JUSTICE AS IMPARTIALITY (1995), CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY 43 (1987) ("The ideal of neutrality can best be understood as a response to the variety of interpretations of the good life."), JOHN RAWLS, POLITICAL LIBERALISM, at xix (1993) (stating that "[p]olitical liberalism . . . has to be impartial . . . among the points of view of reasonable comprehensive doctrines"), and Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215, 237–40 (1987).

83 RAWLS, *supra* note 82, at xx.

84 *Id.* at 134.

agreed to by all persons situated under a "veil of ignorance" regarding their race and class, religion and gender, aims and attachments.[85]

Since its inception, Political Liberalism has come under strong attack from three major directions. One group of critics, which includes Republicans[86] and Communitarians,[87] has waged its antiliberal campaign at the normative level, claiming that liberal neutrality is a shallow political ideal. This group holds that "the ends of the state should be richer and more extensive; in particular, the state should promote the primacy of public [or "communal"] over private life and inculcate civic virtue among its citizens."[88] A second group argues that the liberal state is not neutral at all. Liberalism, according to this critique, fails to meet its ambition to occupy the high ground above sectarian battles, and is instead "just a sectarian view on the same level as . . . other views that it purports to be neutral about."[89]

A third group, from within the liberal tradition itself, suggests that Political Liberalism betrays the basic normative foundations of liberalism. Liberalism, according to this view, should indeed drop its pretension of being a neutral system and admit that it comprises a particular tradition and set of commitments. Liberalism should be understood "less as the response to moral pluralism than as its sponsor, protector, and cause."[90] This group of liberals suggests another interpretation of liberalism, which is labeled Perfectionist[91] Liberalism,[92] and "takes its central task to be that of specifying how the state

85 *See* JOHN RAWLS, A THEORY OF JUSTICE 11–12 (1971).

86 *See* Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Frank I. Michelman, *The Supreme Court, 1985 Term—Forward: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

87 *See* ALASDAIR C. MACINTYRE, AFTER VIRTUE (2d ed. 1984) [hereinafter MACINTYRE, AFTER VIRTUE]; ALASDAIR C. MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765 (1994) (book review).

88 Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350, 1352 (1991). Gardbaum himself is not a Communitarian but rather a Perfectionist Liberal.

89 Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 764 (1993).

90 Stephen A. Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN. L. REV. 385, 389 (1996).

91 I take "perfectionism" to be defined as the general claim that the state is "duty bound to promote the good life." RAZ, *supra* note 8, at 426.

92 For works that can be said to fall within the ranks of Perfectionist Liberalism, see WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE (1991), and RAZ, *supra* note 8.

may fulfill its general duty of enhancing the moral lives of its citizens, while respecting certain values that are constitutive of liberal political practices, such as tolerance, individual freedom, and equality."[93] The foregoing account of liberalism is the political philosophy to which I subscribe, and the one that will serve as the philosophical ground for the following argument in support of nonestablishment.

2. The Value of Autonomy and the Necessity of Neutrality

Many Perfectionist Liberal thinkers take the position that "individual autonomy is the distinctive liberal moral ideal that the state has a duty to promote."[94] Through intuition, we know the great importance and value of autonomy. Indeed, it is a central component of liberalism. Our intuition is confirmed by the fact that at the eve of the twenty-first century, it is almost unanimously accepted in Western states and among Western thinkers, especially liberal ones, that certain "basic liberties"—such as the freedoms of speech and expression, association and movement, occupation and lifestyles—should be respected and defended by the state.[95] The need to defend these freedoms is treated, and rightly so, almost as an axiom. Nevertheless, it is still necessary to keep in mind why these liberties should be respected. This writer agrees with the authority who declares that "the content of the system of basic liberties . . . embod[ies] the conditions necessary in a given historical circumstance for the growth and exercise of powers of autonomous thought and action."[96] In other words, these basic liberties should be conceived as and respected for "framing the necessary condition of autonomous agency."[97] Thus, the high value that is intuitively attributed to the ideal of autonomy is firmly supported by the understanding that this ideal is the ultimate goal behind the entire body of basic liberties.

Those committed to the value of autonomy and its protection are required, therefore, to examine the political implications of this commitment. Stated differently, it is necessary to find out what the commitment to personal autonomy implies respecting the proper relationship between religion and the state.

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93 Gardbaum, *supra* note 90, at 389.

94 *Id.* at 386. Gerald Dworkin and Joseph Raz are among the liberals who have urged the promotion of autonomy. *See* GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 29–33 (1988); RAZ, *supra* note 8, at 133, 424–29.

95 *See* RAWLS, *supra* note 85, at 201–05.

96 JOHN GRAY, LIBERALISM 61 (1986).

97 *Id.* at 60.

One possible response could be that a necessary condition of promoting second order autonomy is state neutrality between competing substantive ways of life.[98] Singling out a specific religious denomination—or religion in general, or any other first order value—as more valuable than other ways of life may lead individuals to adopt that way of life out of deference to the state's authority, which is counter-productive from the perspective of autonomy. Thus, it could be argued, a state committed to the value of autonomy should refrain from supporting a specific religion or denomination. I believe this requirement of first order neutrality to be misguided both theoretically and practically.

3. Rejection—Promoting Autonomy Does Not Require Strict Nonestablishment

George Sher is among those who believe that neutrality is not required to promote autonomy. He is willing to concede that noncoercive methods of inducement "do not at first lead someone to choose something for the right reasons," and thus the choices that stem more immediately from these types of inducement "are not autonomous in the relevant sense."[99] He contends, however, that using those methods may nonetheless in the long run put agents in a position to appreciate the value of the activities they have chosen "from the inside."[100] This, in other words, means that inducing people to live in a certain way the state considers valuable does not deny them the ability to choose this way of life autonomously.

Sher's argument is sound. He could, however, have made a stronger argument had he abandoned his concession—that non-coercive methods of inducement do not at first support choosing for the right reasons—which is not necessary. It is far from clear that a state using the above-mentioned means of influence curtails its citizens' ability to choose autonomously even in the short run. Modern Western societies are much less single-minded than traditional societies of the past, but it would nonetheless be naive to believe that in modern states people can make their decisions in total isolation. Children are still influenced by their parents and teachers, and adults are heavily influenced by views prevailing in the society in which they live. The likelihood that people will "rebel" against those prevailing views is very low. The fact is that very few nonconformists live among us. Does this mean that people in the Western world are deprived of the ability to

98 *See* Gardbaum, *supra* note 90, at 400.

99 GEORGE SHER, BEYOND NEUTRALITY 64 (1997).

100 *Id.*

choose autonomously? If we do not want autonomy to be rendered an unattainable ideal, we must respond to this question in the negative. If so, one who considers state influence hostile to autonomy must explain what makes such influence different from other sorts of influence and inducement that exist in our society.

Now, one may argue that state influence is distinguishable from that of all other sources. The state, the argument could proceed, retains a superior influential position—it is by far more authoritative and powerful than any private body—and thus its influence will most likely tilt the scales—non-autonomously—between competing options. The thrust of this argument is that if we want to preserve a genuine ability of autonomous choice, the state should be prohibited from playing a role in the balance of influence. I think that this argument is exaggerated. The U.S. government has been campaigning for years against consumption of illegal drugs to no avail, and even criminal penalties haven't helped much. This example—among many others—illustrates that one should not overstate the influential power of the state.

4. Rejection—Promoting Autonomy Requires Deviation from Strict Nonestablishment

The argument, so far, following Sher, was that a state *may* deviate from strict neutrality without betraying its obligation to promote autonomy. Perfectionist Liberals who cherish autonomy further argue that a state, obligated to promote autonomy, *must* deviate from strict neutrality.

In his book, *The Morality of Freedom*, Raz analyzes the nature of personal autonomy and the conditions required for its achievement. Raz insists that in order to be able to maintain autonomy, an individual must have—among other conditions—"options which enable him to sustain throughout his life activities which, taken together, exercise all the capacities human beings have an innate drive to exercise, as well as to decline to develop any of them."[101] In other words, autonomy requires that "many morally acceptable options be available to a person."[102] A state committed to the value of autonomy must, therefore, seek to provide its citizens with an adequate—genuine rather than formal—range of options.[103] On its face, however, it seems that while doing so, the state cannot remain neutral in the strictest sense.

101 RAZ, *supra* note 8, at 374–75.

102 *Id.* at 378.

103 There is a gap between arguing that autonomy requires a range of options and the conclusion that states should provide such a range. Raz, who is a Perfectionist

It must, for example, subsidize a range of activities that will otherwise be unavailable to the citizens. It must also make sure that its citizens are exposed to this package of options so that they will be aware of them and give them due consideration. While doing so, a state clearly abandons its neutral position.

Now, one may try to distinguish between state activity aimed at promoting a way of life, and activity aimed at promoting second order autonomy, claiming that only the first kind interferes with the principle of strict neutrality. The argument, in short, is that as long as the state does not promote a specific value or activity with the *intention* of persuading people to adopt this value or activity, but rather makes it available to the general public so people will have the ability to live autonomously, the state's activity does not interfere with the principle of neutrality.

This argument is actually an extension of the more general observation according to which neutrality can not be defined in terms of effect, but only in terms of intention. If we consider any state activity that results in a promotion of a certain interpretation of the good to transgress neutrality, then neutrality is doomed from the start, because every state activity is bound to conform to many interpretations of the good while failing to conform to many others. To save neutrality as a practical concept we must therefore construe it as a property of the justifications of laws, policies, or institutions rather than their effects. In short what we deal with is neutrality of *reasons* as opposed to neutrality of *effect*.[104]

The attempt to redefine neutrality in terms of the reason or justification, however, as opposed to its effect or consequences, cannot succeed easily. First, it is hard to suggest a practical test to select the actual reason behind a state decision to promote a certain way of life. One may try to bypass this practical problem by offering one of several possible exclusionary rules such as that a state activity would be considered illegitimate only if there is no reasonable neutral argument in

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Liberal, fills the gap by claiming that states have an obligation to promote the good. *See id.*

104 *See* CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY 44 (1987); Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 ETHICS 884 (1989) (defining these two interpretations of neutrality as consequential versus justificatory neutrality); John Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 262 (1988); Jeremy Waldron, *Autonomy and Perfectionism in Raz's Morality of Freedom*, 62 S. CAL. L. REV. 1097, 1133 [hereinafter Waldron, *Autonomy and Perfectionism*]; Jeremy Waldron, *Legislation and Moral Neutrality*, *in* LIBERAL NEUTRALITY 61, 66–68 (Robert E. Goodin & Andrew Reeve eds., 1989).

its support.[105] But, again practically speaking, does this not mean that almost every state activity would pass the test?

More fundamental than the practical objection is the following: As outlined above, a state has an "obligation to create an environment providing individuals with an adequate range of options and the opportunities to choose them."[106] A state that promotes a certain way of life in an attempt to fulfill that duty does not deviate from the principle of neutrality among first order preferences. But, obviously, no state can promote all possible options. Which options should it therefore promote? Raz admits that "it is in deciding which options to encourage . . . that perfectionist considerations dominate."[107] That, in other words, means that at the end of the day, a state will be forced to prefer some ways of life to others based on the opinion that they are more valuable.[108] But is it not correct that by doing so the state will intentionally induce its citizens—even if not coercively—to adopt one of these ways and not others?

Stated another way, Raz admits that the state makes a perfectionist value judgment in deciding which options to support and which not. Indeed, once the selection of the group of options that deserve support is over, the state keeps its neutrality respecting the variety of selected options; however, for people whose endorsed options were not selected, this neutrality makes no difference.

Describing the state selection process as the creation of a pool of options and nothing else is misleading for another, stronger reason. States actually make value judgments in many cases of direct competition between several options as well. For example, when a state supports the value of monogamous marriages by attaching some benefits to that status, it actually gives monogamy legal preference over polygamy. If the state distinguishes also between different types of couples and gives the legal status only to heterosexual couples, it makes a judgment about the value of heterosexual and homosexual relations. As Jeremy Waldron correctly observes, "The decision to favor one type of relationship with a legal framework but not another artificially distorts

105 *See* SHER, *supra* note 99, at 25–27.

106 RAZ, *supra* note 8, at 418.

107 *Id.*

108 As a matter of fact, Raz holds that the perfectionist selection should be made independently from and prior to the selection forced by the problem of limited resources. He holds that a state should first distinguish between valuable options that may get support and morally repugnant options that should not be supported because "the availability of such options is not a requirement of respect for autonomy." *Id.* at 381. Only then should the state select the more valuable option among the valuable options.

people's estimate of which sort of relationship is morally preferable."[109] If state preference of options is a threat to autonomy, then preferring monogamous, heterosexual relations is problematic.

Waldron's claim—even Raz admits—is irrefutable. Raz only responds that Waldron's claim as it stands has a breath-taking generality because if valid, it amounts to the rejection of all authority, and if so, there is no comfort to the political liberal in this argument. Raz admits, however, that a narrower argument is needed showing that certain issues are better left to individuals.[110] Nevertheless, nowhere in his writings has Raz successfully provided an argument that clearly defines which issues should be left to individuals or explained why.[111]

F. What the Commitment to Personal Autonomy Does Imply

A state committed to the protection and promotion of individual autonomy is not required to include "strict" or even "neutrality" nonestablishment among its constitutional essentials. Stated another way, the value of autonomy should not prevent the state from shaping its positions and activity based on religious or other sectarian foundations. This does not necessarily mean that all sorts of state support would be consistent with the good of autonomous choice.

The state's monopoly of the legitimate use of violence is, undoubtedly, its distinctive attribute.[112] The classical liberal position in

109 Waldron, *Autonomy and Perfectionism*, *supra* note 104, at 1151.

110 *See* Joseph Raz, *Facing Up: A Reply*, 62 S. CAL. L. REV. 1153, 1234 (1989).

111 Gardbaum has correctly observed that the United States Supreme Court has recognized the distinction between some choices based on how fundamental they are as a central part of its privacy jurisprudence. *See* Gardbaum, *supra* note 90, at 399. He cites cases such as *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (privileging "decisions so fundamentally affecting a person as the decision whether to bear or beget a child"), *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925) (protecting the right of parents "to direct the upbringing and education of children under their control"), and *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (defining liberty to include the right to choose an occupation to "acquire useful knowledge," to marry, and to raise children). Gardbaum is, however, twice mistaken. First, the Court entrenched several issues which it deemed to involve 'fundamental choice,' but it did it so arbitrarily, so that one really wonders whether we do not have here another type of authoritative decision making. For example, in *Bowers v. Hardwick*, 478 U.S. 183 (1986), the Court rejected the fundamental choice argument when applied to sexual orientation. *See id.* at 191 (holding that a law criminalizing homosexual sodomy does not violate the right to privacy created by the due process clause of the 14th Amendment). It is unclear what makes this choice, according to the Court, less fundamental then the other choices which were recognized. Second, whereas our question is which choices the state should not authoritatively influence, all of the cited cases discussed prohibitions on state coercion.

112 *See* MAX WEBER, ECONOMY AND SOCIETY 56, 65 (1968).

regard to coercion is, however, that any state usage of force or threat will have to pass the scrutiny of the Millian "harm principle," according to which, as long as an activity does not harm others, each agent should be free to decide whether to engage in it without fear of legal, economic, or organized social sanctions.[113] If autonomy is essential, can the harm principle be justified in terms of defending autonomy?

Joseph Raz holds that it can. According to Raz, autonomy is valuable as a necessary condition for personal prosperity. He argues, first, in line with the liberal tradition, that "my choice of goals defines what conditions have to be met for me to prosper."[114] For example, by deciding to become a novelist, I redefine the conditions of my well-being. If this assertion is correct it can be logically deduced that my well-being will be advanced by successful pursuit of my goals. "[I]f I am a good novelist I will have a better life than if I become a lousy one, or fail to write any novels at all."[115] Hence, it can be easily admitted that a person's "willing engagement in his activities and pursuits is an essential ingredient of his prosperity."[116]

While allowing a person to pursue his goals would increase this person's chances of improving his well-being, using force to prevent him from pursuing his goals would deny him the chance to improve his well-being. Autonomy is essential in improving the individual's well-being, and therefore almost any kind of force or threat should be ruled out.[117]

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113 JOHN STUART MILL, ON LIBERTY 13 (1956).

114 Raz, *supra* note 110, at 1215.

115 *Id.* at 1215.

116 RAZ, *supra* note 8, at 308.

117 There is, however, one weakness in Raz's reasoning: Raz's endorsement of autonomy is not unconditional. Autonomy is valuable, Raz claims, "only if exercised in pursuit of the good." *Id.* at 381. Although Raz recognizes different goods, he also considers some options morally repugnant. The satisfaction of such goals, Raz apparently admits, does not contribute to one's well-being. Since autonomy, according to Raz, is valuable to the extent that it contributes to human well-being, it follows that autonomy is not valuable when exercised in pursuit of morally repugnant goals.

Raz's perfectionist understanding of autonomy as valuable only when exercised in the pursuit of what is morally good may lead to a rather disappointing—at least from the point of view of many liberals—conclusion. Raz states that "The contribution of autonomy to a person's life explains why coercion is the evil it is." *Id.* at 377. If, however, the autonomous pursuit of repugnant goals does not endow it with any value, as Raz contends, then such pursuit cannot be defended from coercive interference on the grounds of being an autonomous choice. One may conclude, therefore, that the state may legitimately coerce people not to pursue such goals. Such a suggestion opens the door to substantial morals legislation that goes far beyond the boundaries set forth by the traditional liberal "harm principle."

I believe, however, that promoting autonomy requires certain limitations on state endorsement of religion or other sectarian positions, beyond the obvious exclusion of coercion. More precisely, I believe that while a state committed to the ideal of personal autonomy may prefer religion—or a sectarian position—financially, symbolically, or through any other possible means, that state should avoid any form of intervention in favor of religion in general, or any specific religion, that makes it much harder for people to remain nonreligious or to avoid practicing a religion other than their own.

The argument, in short, is that while the value of autonomy does not prohibit a society from promoting—through its public institutions—the culture and morality of the majority, it does require the society to create minimal conditions for dissenting groups to survive. The minimal conditions include more than a prohibition on direct coercion.

Autonomy is a matter of degree. In some extreme cases individuals are completely non-autonomous.[118] Most cases, however, are less extreme. For example, imagine two high school graduates, who are similarly capable, in terms of talent, of pursuing an academic track towards any occupation they may choose. One, however, comes from a wealthy family and the other is a poor orphan with several younger siblings to care for. It would not be correct to describe these two as

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This is a conclusion that Raz is not willing to accept. To reject it, he argues that although no direct harm is caused to one's autonomy when an individual is coerced to avoid a certain repugnant option; nonetheless, overall, coercive interference violates the autonomy of its victim.

> First, it violates the condition of independence and expresses a relation of domination and an attitude of disrespect for the coerced individual. Second . . . there is no practical way of ensuring that the coercion will restrict the victims' choice of repugnant options but will not interfere with their other choices.

Id. at 419.

Robert George does not find this argument persuasive. He argues that both of Raz's concerns are not inherent in morals laws. "Immoral conduct can be banned without thereby expressing contempt for someone who might otherwise fall into it," and "the good of just punishment . . . need not, should not, and typically does not, remove all choice." ROBERT P. GEORGE, MAKING MEN MORAL 186–87 (1993).

118 As Raz correctly observes, there are cases where individuals enjoy a formal freedom to pursue a goal of their choice, but they would be nonetheless considered completely non-autonomous. For example, "autonomy cannot be achieved by a person whose every action and thought must be bent to the task of survival, a person who will die if ever he puts a foot wrong" nor can it be obtained "by a person who is constantly fighting for moral survival" such as a person who needs to commit murder for each option he rejects. RAZ, *supra* note 8, at 379–80.

having the same degree of autonomy given the differences in their financial situations and moral obligations.

Earlier it was argued that a state committed to the ideal of autonomy should take certain measures to provide its constituencies the basic conditions of autonomy. Nowhere was it argued, however, that such government is required to take every possible measure to equalize the level of autonomy of its individual citizens or residents. Nor did we rule out state preference of options—which is involved, for example, in deciding how the state should distribute its limited resources—although we admitted that preference in this area lowers the level of personal autonomy. Ruling out indirect coercion means, however, that a government committed to autonomy is required not to take measures that would severely distort the conditions of autonomy even if the means used are short of direct coercion.

This rationale applies to a variety of state actions, and sometimes even to state discourse. For example, if a state launches a campaign with the motto "religion belongs to the past, modern people use their minds instead," it does not compel secularism, but it creates an atmosphere so hostile to religion that it may leave religious people, who would like to preserve their dignity, with two choices: become secular and betray their beliefs or stick to their beliefs and lose their dignity or personal status in the community.[119] Similarly, if a state launches a campaign with the motto "secularism leads to loss of values and hence to crime" it does not compel religiosity, but it creates an atmosphere so hostile to secularism that the secularist has two choices: either accept religion contrary to one's belief or remain secular and lose one's dignity or status. In a state that cherishes autonomy, such campaigns should be ruled out because they distort the conditions of autonomy beyond an acceptable degree.

G. Three Common Arguments Against the Non-Coercion Interpretation

Three arguments are commonly raised against the non-coercion interpretation that I just endorsed, none of which is, in my opinion, persuasive. One common argument against the non-coercion interpretation is analytical. The argument is it is impossible to divide free-

119 As Kent Greenawalt correctly argues, "condemnation of the views of a minority, say by a public display that portrays a faith as primitive or degrading, will send the forbidden (exclusionary) message even more directly than the more benign endorsement of the majority's position." Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 826 (1998).

dom *of* and freedom *from* religion.[120] In other words, according to this position, the right *not to* worship is already a part of the right *to* worship, which is protected by the Free Exercise Clause. Thus, some constitutional scholars argue, accepting the non-coercion interpretation would render the Nonestablishment Clause a mere redundancy of the Free Exercise Clause.

It is my opinion that this argument is correct only if one interprets nonestablishment only to prohibit direct coercion. In such a case, nonestablishment and freedom from religion are indeed two names for one and the same concept: if the Free Exercise Clause addresses both freedom of and from religion, it leaves the Nonestablishment Clause purposeless. Yet this is not the case if the broad interpretation of coercion, to which I subscribe, is adopted: such interpretation can provide the Nonestablishment Clause with a particular purpose, not covered by the Free Exercise Clause.

As explained earlier, freedom from religion requires the state not to force—and to protect from private force—an individual to maintain particular beliefs or to participate in religious rituals against his will. Yet, the prohibition on force, mandated by freedom from religion, is not necessarily extended to indirect coercion. Thus, even if free exercise should be understood to include both freedom of and from religion, the Nonestablishment Clause under the broad non-coercion interpretation could be interpreted as going one step further than the Free Exercise Clause by protecting nonbelievers or members of minority religions not only from direct, but also from indirect coercion.

A second argument against the non-coercion interpretation is a version of the general "slippery slope"[121] argument. Douglas Laycock, who presents this argument, fears, or is at least sensitive to religious

120 *See, e.g.*, Suzanna Sherry, Lee v. Weisman*: Paradox Redux*, 1992 SUP. CT. REV. 123, 139; Sullivan, *supra* note 16, at 197. It should be noted, however, that the current United States Supreme Court does not accept this logic. The Court recently ruled that there is no Free Exercise claim unless an individual is required to violate a specific and obligatory tenet of his religious belief. *See* Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 391–92 (1990); Laycock, *supra* note 26, at 377.

121 There are two versions of the slippery slope argument, logical and empirical. Here I use the concept in its empirical version. The argument is that although *A* and *B* are rationally different, and thus permitting *A* does not logically require permitting *B*, nonetheless, empirically, the result of permitting *A* would be the allowance of *B*. *But see* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985) (arguing that slippery slope arguments are always necessarily empirical). For a slippery slope argument with respect to the moral status of euthanasia, see B. Williams, *Which Slopes are Slippery?*, *in* MORAL DILEMMAS IN MODERN MEDICINE 126 (Michael Lockwood ed., 1985).

people's fear, that "what starts with mere preference . . . will escalate to . . . coerced participation in observances of the dominant religion."[122] He contends that "these fears gain substance from history, and also because the line between coercion and mere influence is easily crossed and hard to monitor."[123]

The validity of the historic foundation of Laycock's fear was discussed earlier at length, and sufficient support was provided for the proposition that religions in the Western world—including orthodox religions—would avoid crossing the line between coercion and preference and remain tolerant even if the state were permitted to support religion.[124] In addition, in response to Laycock's reference to historical data regarding religious coercion, one can suggest contradicting contemporary data from several West European democracies in which such a line is strictly secured.[125]

Laycock's second observation, that it is very hard to articulate a coherent coercion standard,[126] may in fact be understood as a separate, third ground for rejecting the non-coercion interpretation. Proponents of this argument get support from adherents of the narrow reading of non-coercion, such as United States Supreme Court Justice Antonin Scalia, who ridicules sarcastically the broad interpretation supporters, who attempt to draw consistent guidelines for such nebulous concepts as "psychological coercion."[127] I find Scalia's argument unconvincing. It is really doubtful whether any interpretation of nonestablishment provides straightforward, easy to apply guidelines. As was mentioned earlier, Laycock himself admits that neutrality, and especially substantive neutrality to which he subscribes, is hard to ap-

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122 Laycock, *supra* note 59, at 321.

123 *Id.* Laycock illustrates this point by the allegedly unsuccessful struggle of Justice Kennedy to articulate a coherent coercion standard, pointing to Kennedy's positions in *Lee v. Weisman*, 505 U.S. 577, 593–99 (1992), and *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 660–61 (1989).

124 *See supra* text accompanying notes 41–57.

125 Smolin contends that the same applies to the pre-nonestablishment era in the United States. *See* Smolin, *supra* note 62, at 1093 ("Religious conflict has not generally threatened the temporal peace in America, despite the fact that colonies and states exercised de jure and de facto establishment of religion from the colonial era until World War II.").

126 *See* Laycock, *supra* note 59, at 321; *see also* Steven G. Gey, *Religious Coercion and the Nonestablishment Clause*, 1994 U. ILL. L. REV. 463, 492 ("[T]he term coercion is open to a wide range of definitions, each leading to very different results.").

127 *Lee*, 505 U.S. at 636 (Scalia, J., dissenting) ("[I]nterior decorating is a rock-hard science compared to psychology practiced by amateurs.").

ply.[128] In fact, it is doubtful whether many common constitutional essentials will pass a straightforwardness test. But one thing is clear, between neutrality and direct coercion there are a few other nuances. Rejecting neutrality, therefore, does not require one to take up direct coercion as the standard. According to this view, toleration requires more than not compelling your position and not making criminal competing positions. It also requires that one honor competing positions and give them some space to exist in dignity. It seems to this writer that there is a clear difference, for example, between a state, such as the contemporary United States, that rejects communism as a political philosophy and promotes by actual deed another worldview, and a state, such as the United States in the early 1950s, that creates an atmosphere, even if not through direct coercion, in which communists are viewed as reactionaries, if not criminals. If this distinction is valid, and if autonomy is endangered from the second type of state action but not from the first type, then nonestablishment should be interpreted to comply with this distinction. In conclusion, my argument in short is that while Laycock's observation—that it is very hard to articulate a coherent coercion standard—is correct and challenges proponents of the non-coercion version of the nonestablishment norm, this observation does not warrant a total abandonment of that effort.

H. Conclusion

So far I have discussed four interpretations of nonestablishment, rejecting two—strict and neutrality—and accepting two—non-coercion and non-institutionalization. While discussing various rationales for these interpretations, I made and tried to support several propositions that, taken together, underlie my position respecting the question of church-state relations. Before I move on to discuss freedom of

128 Proponents of formal neutrality claim that it is an easy test to apply. *See* Mark Tushnet, *Of Church and State and the Supreme Court:* Kurland *Revisited*, 1989 SUP. CT. REV. 373, 400 (stating that formal neutrality would be a "rigid and easily applied test"). This, however, is not true, as McConnell clearly illustrates. *See* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 738 (1992).

> It is not always easy to tell whether a given law is religiously neutral. . . . [W]ould it be formally neutral for the State to deny unemployment benefits to persons unemployed for reasons of religious conviction, when others are given benefits for unemployment caused or prolonged by some (but not all) nonreligious personal factors, such as inappropriateness of the work or distance from home?

Id.

religion, it is worthwhile, I think, to repeat these propositions and the worldview they represent.

State activity involves—implicitly and at times even explicitly—cultural and moral positions, and evokes moral and cultural conflicts. The moral and cultural conflicts are not necessarily always between traditionalist theism and modernist liberalism, as some thinkers believe, and the conflicts are not always drawn along religious/secular lines.[129] Contrary to the position held by both David Smolin and Kathleen Sullivan, there is no "stark contrast between loyalty to autonomy and loyalty to God's fixed moral code."[130] One should avoid the "over-intellectualized interpretations of personal autonomy"[131] according to which every autonomous decision is the result of "self-critical rationality," as well as the over-simplified interpretation of religiosity according to which religion is about non-reflective and strict obedience to an unreasoned set of rules. Religion does, however, play a role in the cultural and moral conflicts within society, and religious people may from time to time have unique positions in cultural and moral debates. There is no good reason to specifically exclude religion from the decision-making public square, and so there is no reason to prevent the state from providing religion preferential treatment or even from shaping its positions and activity based on religious foundations, as the strict and even the neutrality interpretations of nonestablishment require.

In this Section I did argue, however, that a state that cherishes autonomy should include among its constitutional essentials freedom from religion, which imposes an obligation on the state not to coerce—and to protect from private coercion—anyone to maintain particular religious beliefs or to participate in religious rituals. It was also argued that such a state should prohibit not only direct coercion but also indirect coercion. It should therefore adopt a broad non-coercion, nonestablishment norm. In a state that adheres to this norm, any state intervention resulting in favoring religion in general, or any specific religion, that makes it much harder for people to remain nonreligious or to avoid practicing a religion other than theirs, would be prohibited. Finally, it was argued that religious people who would like to ensure that the state may not be able to impose its authority and values upon religion in order to advance its own ends, as well as to avoid the danger of diluting, if not perverting, the spiritual quintes-

129 I believe that those who describe reality that way unnecessarily load the atmosphere and complicate the situation.

130 Smolin, *supra* note 62, at 1096.

131 RAZ, *supra* note 8, at 371.

sence of religion, should strive to include a non-institutionalization nonestablishment norm in their state's constitutional order.

IV. FREEDOM OF RELIGION

A. *Introduction*

The vast majority of Western states accept that people should be granted freedom of religion. However, two major questions are disputed among the proponents of this right. First, there is a dispute about whether freedom of religion is a branch of a broader human right such as freedom of conscience, as the international human rights law suggests, or a special and distinct freedom, as the United States Constitution is interpreted to suggest.[132] In response to this question, I shall argue that freedom of religion should be understood and justified primarily as a prerequisite for free choice that is required in order to accommodate the value of autonomy. To support this proposition, I will present and defend two arguments. First, it will be argued that for the sake of this discussion religion should be viewed as one type of comprehensive culture. The second argument is that one's membership in his cultural society is a prerequisite for his ability to live autonomously. In addition, I will mention and concur with two other rationales for freedom of religion: It should be understood as a way to recognize and respect human beings and the foundational components of their identity, and as a means to promote social utility. It will be argued, however, that none of these arguments single out religion as deserving unique treatment in comparison to parallel human phenomena. Religion, understood as a comprehensive culture, involves conscientious acts. Freedom of religion should be understood, therefore, as a derivative of the right to culture and freedom of conscience.

The second question, and the one that has occupied both the court and academia in the United States in the past several years, is about the scope of this freedom: Should freedom of religion be un-

132 Not all authorities accept this interpretation of the United States Constitution, however. Many American constitutional scholars deny that the United States Constitution gives special protection to religious liberty. *See, e.g.*, STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995) (stating that the religious clauses are only about federalism and are incoherent if applied to religious liberty); William P. Marshall, *Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES 385, 392–404 (1996) (arguing that the Free Exercise Clause is just a special case of the Free Speech Clause); Underkuffler-Freund, *supra* note 40, at 961 (stating that constitutional doctrine regarding religious freedom should be reoriented to "focus . . . on the protection of individual conscience").

derstood as merely prohibiting the state from discriminating against religion, so that neutral, generally applicable, laws are legitimate; or should it be construed broadly to require the state to exempt religion from neutral-on-its-face laws that interfere with the observances of religion?[133] In response to this question, I shall argue that in order to meet the three above mentioned rationales for protecting religion—promotion of autonomy, respect for cultural identities, and accommodation of conscientious constraints—freedom of religion must be interpreted broadly to require exemptions.

B. Why Freedom of Religion

1. Religion Is a Belief System Which the State Cannot Evaluate

Before presenting the arguments that underlay my understanding of freedom of religion, I would like to present and reject the traditional Enlightenment rationale for this freedom.[134] From the Enlightenment point of view, freedom of religion is based on the state's inability to refute religious truths. The argument in short is that while the state inevitably can and must evaluate claims based on rational inquiry and knowledge, it has no basis for evaluating the truth of religious claims held by religious individuals. Religious belief "is not capable of demonstration"; it is not, therefore, "capable to produce knowledge, how well grounded and great soever the assurance of faith may be wherewith it is received; but faith it is still, and not knowledge; persuasion and not certainty."[135] Consequently, whereas the state can and should have an overriding power to "coerce all members

133 One may even further argue that the requirement that the state accommodate religious exercise should not be construed merely to cases of state-imposed impediments but should include also certain impediments imposed by private actors, such as employers. *See* Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 385–86.

134 I am not an expert of Enlightenment philosophy. Therefore, the following presentation of the so-called Enlightenment rationale, including the reference to the works of John Locke, is partially based on McConnell's presentation of this rationale. *See* McConnell, *supra* note 14, at 1498–99. The most important work in this field is ERNST CASSIRER, THE PHILOSOPHY OF THE ENLIGHTENMENT (Fritz C. Koelln & James P. Pettegrove trans., 1957) (1932).

135 JOHN LOCKE, A THIRD LETTER FOR TOLERATION (1692), *in* 6 THE WORKS OF JOHN LOCKE 143 (1963). The origins of this dichotomy between these two types of human knowledge, the one based upon human power to reason and the other based on faith, can be traced to Thomas Aquinas's *Summa Theologica*. *See* THOMAS AQUINAS, SUMMA THEOLOGICA (Pietro Caramello ed., Benziger Bros. 1947) (1485).

of society to comply with the rational principles that order human affairs,"[136] it should not interfere with religious conscience.

This rationale is flawed. First it is based on an accompanying distinction that many religious people would not accept, between earthly affairs—the city of man—and divine affairs—the city of God. What enabled Enlightenment era thinkers to privilege religious behavior was the assumption that this behavior is distinct from secular behavior not only in its *source of justification* but also in its *subject matter.* Their point was that the state should not interfere with religious truth not merely because it is not a competent judge of such truth, but also because it does not have to do so, since these truths have no bearing on the state agenda. This dichotomy between secular and religious affairs is, however, problematic. First, as was explained earlier,[137] the idea of the two swords—the dichotomy between sacred and profane—is totally alien to religions such as Judaism and Islam. Religious truth extends in these religions to politics and economics no less than to beliefs and rituals. That dichotomy is suspicious even in a Christian-oriented society, such as the United States, where secular judgment extends not only to politics and economy but also to the realm of morality. Madison's observation, "that the Civil Magistrate is a competent Judge of Religious truth . . . is an arrogant pretension,"[138] is sound, but the practical question is still what should be, according to Madison, the status of the state respecting moral issues? If the state is a competent judge in these matters, why should it defer to religious objectors more than to secular ones?

The Enlightenment distinction between reason and belief is also not convincing because it falls short in providing a reason for special treatment of liberal religions.[139] As explained earlier, these religions take reason to be their verifying source and are, therefore, subject to rational inquiry no less than secular pursuits.[140] Why, therefore, should the state not coerce liberal religious people to comply with the

136 McConnell, *supra* note 14, at 1498. McConnell here refers to Locke's *Second Treatise of State. See* JOHN LOCKE, THE SECOND TREATISE OF STATE §§ 87–89 (1690), *reprinted in* TWO TREATISES OF GOVERNMENT 366–69 (P. Laslett rev. ed., 1963).

137 *See supra* text accompanying notes 63 & 70.

138 James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* 2 THE WRITINGS OF JAMES MADISON 183, 187 (Gaillard Hunt ed., 1901).

139 Enlightenment era thinkers may not have had in mind such liberal religions, so the seeming failure of their rationale to justify granting freedom of religion to these streams can not be counted against them. Contemporary thinkers, who face liberal religions, must, however, meet the challenge presented in the text.

140 *See supra* text accompanying notes 47–49.

rational principles that order human affairs, in cases where it considers that they err?

Finally, the Enlightenment dichotomy between faith and reason, which is based on the verifiability of reason, is somewhat anachronistic. Indeed, the belief that all truths are verifiable through a process of rational or empirical inquiry characterized the Enlightenment era. The assumption was that as long as rational discourse is purified from unreasonable beliefs, the bare truth would be exposed and unanimously accepted. However, this prediction was not fulfilled and its underlying assumption is no longer widely accepted. Rawls's theory of liberalism, for example, is dependent upon the existence of a "plurality of conflicting . . . conceptions of the meaning, value and purpose of human life . . . affirmed by the citizens of democratic societies"[141] (the fact of pluralism). And Bruce Ackerman's political liberalism is based on the position that "[w]hile everybody has an opinion about the good life, none can be known to be superior to any other"[142] (the truth of pluralism). The argument respecting the fact and truth of pluralism is not confined merely to the realm of the "good life." Nowadays, there is no longer a common agreement that even natural sciences are the realm of pure scientific investigations.[143] If reason is no longer a magic word, and we all understand that reasonable people can disagree, privileging religion, based on a reason-belief dichotomy, is somewhat anachronistic. After rejecting this distinction as a potential source for freedom of religion, we can proceed and describe which reasons may support freedom of religion.

2. Freedom of Religion as a Prerequisite to the Religious Person's Ability to Practice His Freedom of Choice

a. Introduction—The Right to Culture

Freedom of religion should be understood first and foremost as an inference from fundamental liberal principles. The defining feature of liberalism is that it grants people freedom to lead their lives according to their beliefs about what is valuable in life. Individuals, however, "do not view themselves as inevitably tied to the pursuit of the particular conception of the good and its final ends which they

141 John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4 (1987).

142 ACKERMAN, *supra* note 7, at 11.

143 *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 77–90 (1962); KARL R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (1959).

espouse at any given time."[144] Freedom involves, therefore, not only the right to lead one's life in accordance to one's beliefs, but also the right to examine and revise those beliefs. So far we have only recited well-known liberal essentials. The novel argument, however, is that if we cherish the ability of people to exercise their freedom to choose, we must also protect their societal culture from structural debasement or decay, because cultural membership is a prerequisite for individuals to exercise their capacity for choice and self-reflection. In order to support this argument one needs to elaborate on the nature of human beings.

Communitarians, such as Sandel and MacIntyre, tend to present two polarized descriptive theories of individual identity—atomized or situated, unencumbered or encumbered—and to attribute this polarized description to the liberal-communitarian debate.[145] In what is described as the "agency debate," liberals are portrayed as advocating the atomized perception of the fully formed, self-sufficient, and freely choosing individual. Communitarians, on the other hand, are described as claiming that the community, of which an individual is a member, is constitutive of that individual's identity and not merely contingent or accidental to it. This dichotomy is challenged, however, by liberals on two levels. Several liberal thinkers deny that liberalism is—or should necessarily be—grounded in an atomistic answer to the agency debate, or that Communitarianism, as a first order claim about what is valuable, requires its adherent to also hold a non-atomistic position in the agency debate.[146] Other liberals challenge the polarized description itself. They argue that in fact people are neither encumbered nor unencumbered selves. They claim that on the one hand, people are capable of making free choices with respect to what is valuable in life, but on the other hand, their cultural affiliations do play a role in the way they decide to live their life.

The argument that people's culture plays a role in their decision-making process is twofold. First, one's culture *creates* the pool of options available to one. As Kymlicka puts it, "[T]he context of individual choice is the range of options passed down to us by our culture. Deciding how to lead our lives is, in the first instance, a matter of

144 John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 544 (1980); *see also* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 81 (1995); Ronald Dworkin, *In Defense of Equality*, 1 SOC. PHIL. & POL'y 1, 24–40 (1983).

145 *See, e.g.*, MICHAEL J. SANDEL, INTRODUCTION TO LIBERALISM AND ITS CRITICS 5 (1984).

146 *See generally* Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685 (1992).

exploring the possibilities made available by our culture."[147] Second, one's tools of evaluation are heavily influenced and shaped by the culture in which one grows and lives. Culture, to take Geertz's definition, is "an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes towards life."[148] Our culture, thus understood, indeed provides, as Dworkin asserts, "the spectacles through which we identify experiences as valuable."[149]

What stems from the above descriptive argument is, as Kymlicka states, that "[f]or meaningful individual choice to be possible, individuals need not only have access to information, the capacity to reflectively evaluate it, and freedom of expression and association. They also need access to a societal culture."[150] Now, Kymlicka admits, one may ask, even if we accept that the access to a cultural structure is crucial to people's capacity to make meaningful choices, "why do the members of a national minority need access to their own culture? Why not let minority cultures disintegrate, so long as we ensure their members have access to the majority culture?"[151]

Kymlicka does not deny that successful assimilation is possible. He tries, however, to defend his position that one's membership in one's culture is a prerequisite for autonomous life, arguing that successful integration, nonetheless, may at times be almost impossible for some members of the minority, and is almost always difficult. Later, however, he suggests another justification for ensuring cultural rights. He argues that "even where the obstacles to integration are smallest, the desire of national minorities to retain their cultural membership remains very strong."[152] Therefore, Kymlicka concludes, "in developing a theory of justice, we should treat access to one's culture as something that people can be expected to want . . . . Leaving one's culture, while possible, is best seen as renouncing something to which one is reasonably entitled."[153]

Whether Kymlicka's second argument—that people are deeply connected to their own culture and thus their expectation to have

147 KYMLICKA, *supra* note 144, at 126.

148 CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 89 (1973).

149 RONALD DWORKIN, A MATTER OF PRINCIPLE 228 (1985).

150 KYMLICKA, *supra* note 144, at 84.

151 *Id.* at 84. Kymlicka cites several scholars who make that argument. *See id.* at 84 n.12. In the text, he quotes mainly Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J. LAW REFORM 751, 762 (1992).

152 KYMLICKA, supra note 144, at 85–86.

153 *Id.* at 86.

their culture protected should be met—is convincing or not is a separate question, which will not be discussed now.[154] The important point that should be stressed here, however, is that this second argument actually substitutes for the first argument, and more than merely supports it. Either successful integration is not feasible, and therefore maintaining one's culture is a necessary condition for personal autonomy, or successful integration is practicable and therefore maintaining one's culture is not a necessary condition for one's personal autonomy. Which of these propositions is more accurate depends, in my opinion, on the exact meaning of the concept "culture" to which these propositions relate.

While describing the sort of culture he focuses on, Kymlicka seems at first to use the word culture in a broad sense, defined as "a culture which provides its members with meaningful ways of life across the full range of human activities."[155] However, when Kymlicka enters the substantive discussion, it becomes apparent that what he actually has in mind is a narrower definition of culture whose participants do not share moral values or traditional ways of life, and whose only real distinctive features are common language and shared history. Kymlicka does this for a reason. He believes that by narrowing the definition of culture he increases its appeal for liberal thinkers. He argues that the lack of shared values is precisely what enables a culture to provide "a meaningful context of choice for people, without limiting their ability to question and revise particular values or beliefs."[156] Stated another way, the lack of shared values is precisely the reason why protecting cultural rights may be viewed as promoting liberal values.[157] The problem, however, is that by defining culture so narrowly Kymlicka weakens his position against those who reject the claim that cultural membership is a necessary condition for autonomous life. Further, he tends to collapse his position into that of his opponents because given his narrow definition there is little separating the two positions.

Many thinkers deny the current existence in Western countries of separate, distinct cultures and describe the contemporary scene as "a freewheeling cosmopolitan life, lived in a kaleidoscope of cultures."[158] Their claim cannot be easily rejected. It is hard to deny that a native of one Western state would be able to integrate successfully into the

154 *See id.* at 107–30.

155 *Id.* at 76.

156 *Id.* at 93.

157 *See id.* at 105.

158 Waldron, *supra* note 151, at 762.

culture of another Western state. Moreover, it seems utterly unconvincing to argue that such a person would be unable to make sense and take advantage of the options the new country's culture affords him unless he completely assimilates into this culture. This does not necessarily mean that people from Western states do not have acceptable reasons for maintaining their particular "thin" distinctive national cultural features. It does imply, however, that maintaining the conditions for autonomous life cannot be one of the justifications for the right of liberalized cultures to maintain their culture.

Whether Western nations' cultures are still meaningfully distinguishable, as Kymlicka argues, or whether people within these states should more accurately be identified with a criss-cross eclectic array of cultural materials, as his opponents claim, it cannot be denied that some people still live within the bounds of a distinguishable all-encompassing culture. By encompassing culture I mean a group whose shared characteristics encompass various important aspects of life. Encompassing culture "defines people's activities . . . determines occupations . . . and defines important relationships. . . . It affects everything people do: cooking, architectural style, common language, literary and artistic traditions, music, customs, dress, festivals, ceremonies."[159] As opposed to members of liberalized cultures, members of all-encompassing cultural groups do share moral values and traditional ways of life. Members of these cultures, at least many of them, especially those beyond the age of the formative years,[160] will never succeed in assimilating into other cultures.

To be sure, not every person is a member of an all-encompassing culture. It is not argued here that membership in an all-encompassing culture is necessary for a valuable life, nor is it even implied that such membership would improve the lives of people. The modest claim made here is that some people are affiliated with all-encompassing cultures which they cannot successfully alter; that those people

159 Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 61 Soc. Res. 491, 498 (1994); *see also* Avishai Margalit & Moshe Halbertal, *Response to Amelie Oksenberg Rorty*, 62 Soc. Res. 171, 171–73 (1995); Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. Phil. 439, 442–47 (1990).

160 In childhood such integration is possible. As Andrew Koppelman pointed out to me,

> kidnappings of Jewish children have sometimes occurred, and the kidnappers . . . have sometimes succeeded in raising the children as sincere Christians. In such cases and similar ones one cannot say that these children were harmed because they do not have a culture. They do have a culture; the culture is just a different one than that of their parents.

Letter from Andrew Koppelman to Gidon Sapir (Apr. 1, 1998) (copy on file with author).

need their culture as a necessary condition to exercise their freedom to choose; and thus a state that cherishes autonomy must protect such cultures from structural debasement or decay.[161]

If this claim is accepted, the practical question that follows is what exactly is the state required to do in order to guarantee the survival of all encompassing cultures? The International Covenant on Civil and Political Rights states, in Article 27, "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[162] But, again, the begging question is what responsibilities does this human right to culture impose on states with cultural minorities?

One possible answer could be that the only thing that a state should do is to privatize culture. The idea, in short, is that so long as the state responds with "benign neglect" to cultural differences, the members of each culture will sustain it through their own choices. Another position, and in this writer's opinion a more realistic one, is that in order to guarantee the survival of minority cultures the state must also take some measures in support of those cultures.[163] The

161 Supporters of cultural rights often support their case with another argument. They claim that "societal diversity enhances the quality of life, by enriching our experience, expanding cultural resources." Richard Falk, *The Rights of Peoples (in Particular Indigenous Peoples)*, *in* THE RIGHTS OF PEOPLES 17, 23 (James Crawford ed., 1988); *see also* KYMLICKA, *supra* note 144, at 121–23; BRIAN SCHWARTZ, FIRST PRINCIPLES, SECOND THOUGHTS: ABORIGINAL PEOPLES, CONSTITUTIONAL REFORM AND CANADIAN STATECRAFT 1–86 (1986). Indeed, if, as we claimed in Section II, autonomy means the ability to choose between a variety of valuable options, then maintaining a diversity of cultures should be considered an advantage. It should be noted that this argument for cultural diversity has its counterparts in arguments in favor of federalism. *See, e.g.*, Steven Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752 (1995).

162 *See* International Covenant of Civil and Political Rights, Dec. 16, 1966, art. 27, 999 U.N.T.S. 171.

163 The position that requires states to abandon the benign neglect stance and take positive measures to protect minority cultures was clearly adopted in several recent international documents dealing with minority rights. *See, e.g., Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, in* UNIVERSAL MINORITY RIGHTS 159, 161 (Alan Phillips & Allan Rosas eds., 1995) ("States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories, and shall encourage conditions for the promotion of that identity."); *Selected OSCE Documents and Provisions: Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, in* UNIVERSAL MINORITY RIGHTS 351, 352 (obliging member states to "protect the ethnic, cultural, linguistic and religious identity of national minorities on their territories and create conditions for the promotion of that identity").

idea is that the state unavoidably promotes certain cultural identities—through decisions over languages, public holidays, state symbols, etc.—and thereby disadvantages others. In a state that maintains a democratic system, it is also clear that the state will promote the majority culture. Therefore, unless the state takes some measures in support of cultural minorities, these societal cultures will eventually be outvoted in policies that are crucial to their survival.[164]

b. Religion as a Cultural System

Now, how does all of this relate to religion? Religion, as many sociologists and anthropologists acknowledge, is first and foremost a cultural system. As Lawrence Friedman has observed, "culture" refers to "crucial, essential aspects of group life, marrow-deep beliefs and institutions, such that any alteration in this 'culture' can seriously injure or damage the group in its very groupness. Language and religion are often 'culture' in this sense."[165] Religion, much like other cultures, involves a shared vocabulary of tradition and convention, which underlie a range of social practices and institutions. As such, it plays the same role for its adherents as any specific nonreligious culture plays for its members. In most cases religion is not just a culture, but rather an encompassing culture. If we combine the description of religion as an encompassing culture with the understanding that "the state cannot help but give at least partial establishment to a culture,"[166] we unavoidably end up with the conclusion that unless certain corrective measures are taken, minority religions, much like other minority cultures, will find themselves in a disadvantaged position.[167] A state that would like to promote a meaningful freedom of

164 *See* Kymlicka, *supra* note 144, at 108. Loyal to his narrow definition of culture, Kymlicka uses "language" as the paradigmatic cultural material and as an illustration for the sort of distinctive cultural features that will disappear absent governmental support. However, the more encompassing the minority culture is, the more distinctive cultural materials it would strive to preserve. This is a truth that some Western thinkers, who live in a cosmopolitan culture, fail to appreciate.

165 Lawrence M. Friedman, *The War of the Worlds: A Few Comments on Law, Culture, and Rights*, 47 CASE W. RES. L. REV. 379, 381 (1997).

166 KYMLICKA, *supra* note 144, at 111.

167 Somewhat surprisingly, advocates of minority rights do not universally accept this simple reference. Kymlicka, for example, holds that there is no analogy between religion and culture. He contends that "[i]t is quite possible for a state not to have an established church. But the state cannot help but give at least partial establishment to a culture . . . ." *Id.* It seems that Kymlicka, much like many other political philosophers, does not succeed in understanding that religions play on the same courtyard as other cultures. He does not understand, for example, that when the state takes Sunday as the Sabbath, it prefers Christian culture over Jewish or Muslim cultures, or that

choice must, therefore, protect religious cultures no less than it has to protect minority nonreligious cultures.

Freedom of religion is understood in this context not as an aspect of privatizing religion—since such privatization is not possible—but rather as a means to defend the fundamental human right to practice and enjoy one's own minority religious culture, in order to enable the members of these minority religious cultures to genuinely choose freely even in a society which partially endorses the majority's religious or nonreligious culture.

The reduction of religion into culture, and freedom of religion into the right to culture, which underlies the prerequisite-for-choice-argument for freedom of religion, stands in stark contrast with the common position that supports freedom of religion on the basis of the presumed uniqueness of religion. Some religious people, especially conservative ones, would probably reject such a position. For them to define religion as a cultural system might seem an acceptance of anthropological theories of communal religious developments, which challenge the religious claim to divine origins. This, however, is not true. This rationale does not, at all, factor in such a debate; it has no position regarding questions such as the source of any religion or its ultimate value. It only states the obvious: that religious systems function and share similar characteristics as nonreligious cultural systems and are thus entitled to the same protection that the state should provide to other cultures. Reconstructing freedom of religion as a special case of the right to culture does have, however, several apparent advantages that one should not overlook. Let me describe three of these advantages.

c. Religion as Culture and the Problematic Task of Defining Religion

By viewing religion as encompassing culture we avoid, first, the problematic task of defining religion as a special phenomenon. The task of defining religion is problematic for several reasons. First, there are those who claim that the term religion cannot be defined at all, either because there is "no single feature or set of features that all religions have in common and that distinguishes religion from everything else,"[168] or because the process of classification is "inherently

when the state replaces, according to his suggestion, "religious oaths in courts with secular oaths," it prefers secular culture over religious culture. *Id.*

168 George C. Freeman, III, *The Search for the Constitutional Definition of Religion*, 71 GEO. L.J. 1519, 1565 (1983).

arbitrary."[169] Second, even if we would be willing to assume that a clear definition of religion can be found, it is questionable whether those in charge of defining are capable of doing so. Commentators, dealing with the task of defining religion for the purpose of the religious clauses, point out the simple fact that "[t]he ability of future religions to emerge, to participate in the marketplace of cultural ideas, and to serve as satisfying loci of human values . . . hinges on the breadth of judicial imagination."[170] These commentators often raise the concern that the judiciary is incapable of engaging in such a defining project.[171] They are concerned that the courts would be biased against "unfamiliar and creative forms of religious expression."[172] Some even conclude that this probable bias makes the attempt to define religion unconstitutional in a system that prohibits the establishment of religion.[173]

The main point that "religion as culture" makes, is that it is time to stop the attempt to distinguish between religious and nonreligious culture. The argument in short is that the social and cultural conditions in the contemporary world make the task of defining religion as a distinct phenomena totally irrelevant; that even if we can provide a coherent definition of religion, this definition has no bearing on the justification for freedom of religion in contemporary Western democracies, and is thus totally unnecessary.

d. Religion as Culture and Nonestablishment

The second advantage of describing religion as an encompassing culture, and of justifying freedom of religion as a measure to secure the ability of members of minority cultures to choose freely, is that such an approach resembles and complements the arguments that led us to adopt the non-coercion interpretation of nonestablishment. As was just explained, the underlying assumptions behind this reading of

169 Anita Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U. L. REV. 163, 164 (1977) ("A judge cannot appeal to the canons of logic to decide whether a given classification is the necessary or the correct one. Because classification cannot be carried on deductively the task is inherently arbitrary one.").

170 *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1631 (1987) [hereinafter *Developments*].

171 Lupu, *supra* note 17, at 358.

172 *Developments*, *supra* note 170, at 1631.

173 *See* Sharon L. Worthing, *"Religion" and "Religious Institutions" Under the First Amendment*, 7 PEPP. L. REV. 313, 345–46 (1980) ("If governmemt can define what is a 'church,' it can also define what is not a church, and can do so in a manner which excludes religions which are not favored by government officials. The very existence of such a power would be unconstitutional under the establishment clause.").

freedom of religion are that the state promotes certain cultural identities and thereby disadvantages others; that religion is a competitor in the cultural battlefield; and that the state must take some measures in support of cultural minorities, including religions, in order to enable them to survive. *Freedom of religion is understood in this setting as a measure aimed to guarantee the survival of minority cultures that have lost in the majoritarian cultural battlefield.*

This is exactly the rationale behind the non-coercion conception of the establishment norm that was suggested in Part III. The underlying argument behind the rejection of both the restrictive and neutrality versions of nonestablishment was a combination of three propositions: First, the state cannot remain neutral among competing positions since any state activity involves—implicitly and at times even explicitly—cultural and moral positions. Second, moral and cultural conflicts are not necessarily always between traditionalist theism and modernist liberalism; however, religions do play a role in the cultural and moral conflict within society. Third, there is no good reason to specifically expel religion from the decision-making public sphere, which means that there is no reason to prevent the state from shaping its positions and activity based on religious foundations. The conclusion drawn from these propositions was that religion should be treated equally by allowing it an equal chance to participate in the majoritarian political-cultural process in which some positions will win while others will lose. The underlying argument behind the broad interpretation of the non-coercive version of nonestablishment—which ruled out not only direct coercion but also indirect coercion—was that the losers in the cultural debate need some leeway in order to survive, and that merely avoiding coerced assimilation will fall short of providing that leeway. *The bottom line is that the nonestablishment norm should be construed as a prohibition against indirect coercion, aimed at providing some minimal conditions for the survival of all losing competitors in the moral/cultural debate.*

The close resemblance between culture in general and religion, the difficulty in drawing legal lines between the two, and the non-justifiability of a different treatment of these human phenomenon is clearly evident in major nonestablishment disputes as the following case may illustrate. On December 22, 1986, the City of Pittsburgh placed at the entrance to the City-County building an eighteen foot Chanukah menorah, owned by Chabad, a Jewish group, next to the city's forty-five foot Christmas tree. In a different display, a crèche, owned by a private Catholic group, was placed on the grand staircase of the Allegheny County Courthouse. The Greater Pittsburgh Chapter of the American Civil Liberties Union and seven local residents

filed suit seeking permanently to enjoin the county from displaying the crèche and menorah on the ground that the display of both the menorah and the crèche violated the Establishment Clause. No challenge has been made to the display of the tree. The United States Supreme Court ruled that while the Chanukah menorah display did not violate the Establishment Clause, the crèche display did.[174]

The *Allegheny* case generated much scholarly discussion. The commentary concentrated on the disagreement between the majority and the minority in *Allegheny* over the correct reading of the Establishment Clause: should the Establishment Clause be understood as prohibiting only proselytizing religion, as Justice Kennedy understood; endorsement of religion, as Justice O'Connor implied; or should both interpretations be rejected in favor of another interpretation of the Clause. Indeed, the dispute over the proper interpretation of nonestablishment constituted the disagreement between the majority and the minority regarding the constitutionality of the crèche display. However, a close examination of the case reveals that another center of disagreement between the majority and minority, especially respecting the menorah display, was over the meaning of the displays at stake, that is, whether they are religious symbols or not.

Justice Blackmun delivered the opinion of the Court. He began his opinion with an inquiry into the origins and meaning of the menorah and Chanukah. He found that "Chanukah, like Christmas, is a cultural event as well as a religious holiday."[175] He also concluded that "menorahs—like Chanukah itself—have a secular as well as a religious dimension."[176] After defining both Chanukah and the Menorah as having both religious and secular meaning, Justice Blackmun asserted that the menorah in the pending case represented the secular meaning, because it was displayed alongside the Christmas tree which "unlike the menorah is not itself a religious symbol."[177] He explained that "[t]he widely accepted view of the Christmas tree as the preeminent secular symbol of the Christmas holiday season serves to emphasize the secular component of the message communicated by other elements of an accompanying holiday display, including the Chanukah menorah."[178] He concluded, therefore, that displaying these two symbols was meant simply to recognize that "both Christmas

174 *See* Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989).

175 *Id.* at 585.

176 *Id.* at 587 n.34.

177 *Id.* at 616.

178 *Id.* at 617. In a later footnote, Justice Blackmun apparently presented a slightly different opinion, by asserting that "the menorah retains its religious significance even in this display." *Id.* at 619 n.68.

and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society."[179]

Justice Brennan disagreed with Justice Blackmun's findings. First, he found, contrary to Blackmun, that the menorah has nothing but a religious meaning, which no accompanying secular symbols could banish. The tree, however, can potentially have a religious meaning alongside its secular meaning. Justice Brennan also found that in the pending case it was the menorah that dominated the tree. Based on these findings he decided that "[e]ven though the tree alone may be deemed predominantly secular, it can hardly be so characterized when placed next to such a forthrightly religious symbol."[180] Justice Brennan concluded, therefore, that the display of the menorah had the effect of promoting a "Christianized version of Judaism"[181] and was therefore unconstitutional.

Justice O'Connor expressed a middle position between Blackmun and Brennan. On the one hand, she refused to view the menorah as having a secular meaning as Justice Blackmun claimed.[182] On the other hand, she insisted, contrary to Justice Brennan, that the tree "cannot fairly be understood as conveying government endorsement of Christianity."[183] Based on these two findings, Justice O'Connor concluded that "[b]y accompanying its display of a Christmas tree—a secular symbol of the Christmas holiday season—with a salute to liberty, and by adding a religious symbol from a Jewish holiday also celebrated at roughly the same time of year . . . the city did not endorse Judaism or religion in general."[184]

Justice Kennedy refused to examine this type of question altogether, claiming that an inquiry into the exact meaning of these symbols will turn the court into a "national theology board" which is beyond the court's expertise and probably also beyond its constitutional powers.[185] Indeed, one may agree that the court is not the best arbiter of such questions. But, let us assume that the court was asked, for example, to declare unconstitutional a display of a Christmas tree

179 *Id.* at 616.

180 *Id.* at 641.

181 *Id.* at 645.

182 *See id.* at 633. Justice O'Connor admitted that Chanukah has certain secular aspects. She, nonetheless, disagreed with Justice Blackmun because she found it to be still predominantly a religious holiday with the menorah as its central religious symbol and ritual object. Justice O'Connor, therefore, does not deny the possibility that a religiously-rooted holiday or symbol may become secular; nor does she deny the ability and duty of the court to examine this possibility.

183 *Id.* at 633.

184 *Id.* at 635.

185 *Id.* at 678.

standing alone, or a public Thanksgiving celebration. Would it not be both permissible and reasonable for the court to dismiss the case on the basis that these symbols/rituals are no longer religiously oriented and therefore conclude that the case is not related to the Establishment Clause at all?[186] Indeed, it is questionable whether the Court is the right arbiter of such questions, especially since it is predictable that the Court will be confronted with much harder cases than the status of Thanksgiving. However, it seems hard to deny that in a constitutional system where establishment of religion is prohibited but establishment of culture is not, the question of whether a government activity communicates an endorsement of religion or merely an endorsement of a certain culture is in large part a legal question to be answered on the basis of interpretation of social facts. If establishment of religion is prohibited but not establishment of culture, and if, as the Court in *Allegheny* correctly implied, symbols, rituals, and laws of religious origin are susceptible to transformation into nonreligious cultural shape, it becomes essential to distinguish between ones which are religious and others which are cultural.

The complicated—and, in certain cases, the impossible—factual distinction between culture and religion is a major question in a constitutional doctrine, such as the American doctrine that prohibits establishment of religion but permits establishment of culture.[187] The argument that was presented above is, however, that this distinction is not only factually complicated, but also morally non-justifiable. Even if presenting a menorah and a Christmas tree does not constitute establishment of the Jewish or Christian religion, it nonetheless constitutes establishment of the Judeo-Christian culture. Establishment of Judeo-Christian culture has the same result as establishment of Jewish or Christian religion; they both alienate and burden those who belong to other religious or cultural minorities. If establishment of religion

186 In the formative years of the United States when Thanksgiving was first proclaimed, the answer to this question would have probably been different from the present one. *See* Underkuffler-Freund, *supra* note 40, at 952 ("In his presidential years, Madison issued Thanksgiving Day proclamations . . . . He later wrote almost apologetically of his yielding on this issue . . . . He acknowledged that these proclamations deviated from his principles of separation of church and state . . . .").

187 For example, in order to determine whether civil involvement—either judicial or legislative—in the granting of a get (a bill of divorce required by Jewish law to dissolve a marriage) is constitutionally permissible in the United States, one crucial question would be whether granting a get is a secular or religious matter. *See* Lawrence Marshall, *The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations*, 80 Nw. U. L. Rev. 204, 219 (1985). Marshall concludes that the get procedure is religious, according to a test that asks whether it has "any rational justification other than the significance that some religion puts on it." *Id.*

should be restricted by a broad non-coercion nonestablishment norm, to enable religious or non-religious minorities to survive in dignity, the same rule should apply also to the establishment of culture.

The Northwestern University Law School library is closed on merely a handful of days: Thanksgiving, Christmas, New Year's Day, and Easter. It is reasonable to claim that, notwithstanding the fact that all four occasions have clear Christian origin, this schedule cannot be seriously considered establishment of religion. These four holidays have already become part of American culture, and are also celebrated by individuals who are not Christians. The celebration of these four Christian rooted holidays illustrates, however, that the American official "secular" culture is more or less Christianized. Many Jews, even if they are no longer religious, celebrate Jewish holidays such as Passover, Rosh Hashanah, Yom Kippur, Succoth, Chanukah,[188] and Shabuoth. Indeed, some of these holidays, especially Chanukah and Yom Kippur, receive a certain level of recognition;[189] however, they are not an integral part of the American culture as the Christian holidays. It is very likely that atheists of Jewish origins will not feel at home in Christian cultural orientation, or alternatively, will adapt themselves through assimilation into the dominant American Christian culture.[190]

The argument presented and defended in this work so far is not that a state should be prohibited from establishing both culture and religion, with nonestablishment interpreted according to the strict or neutrality readings, but rather that the establishment of both religion and culture is morally justifiable as long as it is done in compliance with the minimal requirements of the non-coercion reading. In this

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188 As Justice Blackmun observed,

> The Chanukah story always has had a political or national, as well as religious, dimension: it tells of national heroism in addition to divine intervention. Also, Chanukah, like Christmas, is a winter holiday . . . . Just as some Americans celebrate Christmas without regard to its religious significance, some nonreligious American Jews celebrate Chanukah as an expression of ethnic identity, and "as a cultural or national event, rather than as a specifically religious event."

Allegheny, 492 U.S. at 585 (citing Appellant's Brief at 143).

189 As *Allegheny* illustrates, Chanukah is acknowledged in some localities. *See id.* It gets even a greater recognition in commercial advertisements. It is also common among some members of the faculty at Northwestern to offer students the option of canceling classes on Yom Kippur and making it up on another day.

190 Similar, and probably even stronger, feelings of alienation will be felt by atheist people from Moslem origins residing in the United States. *See, e.g.*, Farah Sultana Brelvi, *"News of the Weird": Specious Normativity and the Problem of the Cultural Defense*, 28 COLUM. HUM. RTS. L. REV. 657 (1997).

reading, the state will be permitted to display and identify itself with both religious and cultural symbols of a specific orientation. The state should be prohibited, however, from taking measures that would put religious, non-religious, or cultural minorities in such a disadvantaged position that they would be prevented from surviving, flourishing, and remaining an integral part of the general society.

e. Religion as Culture and Major Freedom of Religion Cases

A third advantage of defining religion as a comprehensive culture and freedom of religion as a minority rights requirement is that it resembles the basic intuition behind major freedom of religion cases. In the well known case of *Wisconsin v. Yoder*[191] the United States Supreme Court invalidated Wisconsin's refusal to exempt ninth and tenth grade Amish students from the requirement of attending school until the age of sixteen. The official rationale given by the Court was that it is an essential element of the *Amish religion* that members be informally taught to earn their living through farming and other rural activities, and that compulsory high school education was at odds with that belief. A sensitive reading of that case would reveal, however, that a much more convincing interpretation of the motivation behind both the Amish's request and the Court's approval of that request is the understanding that enforcement of compulsory education requirements on this culturally distinguished community will significantly increase the chance that Amish youngsters would withdraw from the Amish community and abandon the Amish culture.[192] The Amish community is one of very few groups within the American culturally pluralistic society which is fundamentally different from other subgroups. It rejects modernity completely, and keeps an entirely distinguished, all encompassing culture. It seems that the Court's ruling in *Yoder* is the result of the court's acknowledgment of this rationale. Obviously, the Court could not simply rule based on the cultural integrity rationale. It had to shape its ruling in a constitutionally recognized manner. However, the "cultural" dimension of the Court's decision is nonetheless very apparent.

Other freedom of religion cases that should in my opinion be reconsidered according to the right to culture are those dealing with

191 406 U.S. 205 (1972).

192 Indeed the Court argued that the state's action "carries with it a very real threat of undermining the . . . *community* and religious practices as they exist today." *Id.* at 218 (emphasis added). For a similar interpretation of that case, see KYMLICKA, *supra* note 144, at 162.

Indian rituals, such as *Lyng*[193] and *Smith*.[194] In *Lyng* the United States Supreme Court held that the federal government could construct a road though federal land, even though this would destroy certain Indians' traditional rituals. The rationale behind this ruling given by Justice O'Connor was that "incidental effects of government programs . . . which have no tendency to *coerce* individuals into acting contrary to their religious beliefs" are not sufficient enough to create a free exercise case.[195] In *Smith*, the United States Supreme Court upheld Oregon's law that criminalized the possession of the drug peyote, and its refusal to give an exemption to Native Americans, whose use of the drug is a central part of their religious rites. The Court held that so long as the ban on peyote was generally applicable, and not motivated by a state desire to affect religion, the law was fully enforceable.

Both cases were strongly criticized by commentators. Most commentators took issue with what they considered the Court's minimal conception of free exercise. In *Lyng*, the criticism centered around the Court's insistence that free exercise covers merely outright prohibitions, indirect coercion, and penalties on the free exercise of religion. In *Smith*, the major problem was the Court's understanding that free exercise does not require accommodation of religion. Few commentators concentrated on the Court's ill treatment of Native American traditions. Some commentators considered these decisions as illustrations of the Court's general tendency to discriminate against minority religions. Very few commentators emphasized what seems to me to be the crux of the problem: the cultural or legal inability of the Court to avoid the religion-culture dichotomy, as well as the realization that avoiding such dichotomy is a prerequisite for a fair treatment of the Native American people.

It is the very classification of traditional Native American customs as religious that is problematic:

> Indian religions do not have a body of sacred literature . . . . Nor do many Indian religions center around belief in a single, omnipotent Deity. Indian religions often have no charismatic founders or chronologies of significant religious events . . . . Indeed, "religion" is an English word without equivalent in many Indian languages, where "religion" is not distinct from culture.[196]

193 Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

194 Employment Div. v. Smith, 494 U.S. 872 (1990).

195 *Lyng*, 485 U.S. at 450.

196 Robert C. Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land*, 19 ECOLOGY L.Q. 795, 799 (1992).

These characteristics of Native American religions support the argument that "the modern western tendency to break up human life into such categories as religion, politics, economics, etc. is not very useful in describing or understanding traditional Indian life."[197] Or, as another commentator argued, "any division into 'religious' or 'sacred' is in reality an exercise which forces Indian concepts into non-Indian categories and destroys the original conceptualization in the process."[198] Had the United States Supreme Court been required by law to accommodate cultural minorities, and had it been more familiar and aware of the vital importance of preserving the cultural materials that inform these cultures, it would have probably reached a more morally sound conclusion in cases such as *Lyng* and *Smith.*

3. Freedom of Religion as a Method to Accommodate the Duties of Religious People

This Part began with the question of whether freedom of religion should be understood and justified as a branch of a broader human right such as freedom of conscience or as a special and independent freedom. So far, freedom of religion has been described and justified as a derivative of the right to culture. Now we will present and endorse two other rationales for freedom of religion: It should be understood as a way to recognize and respect human beings and the foundational components of their identity, and as a means to promote social utility. While concurring with these rationales I will argue, however, that none of these arguments single out religion as deserving unique treatment in comparison to parallel human phenomena.

Michael McConnell is among those who hold that freedom of religion is an independent freedom. He contends that there is a distinction between religious and secular conscience, which justifies a special treatment for religion. The difference between religious and secular forms of conscience lays in the source of each: the former represents deference to a god, while the latter is merely the result of individual autonomous decision. Accordingly, conflicts arising from secular consciousness are perceived as conflicts between the judgment of the individual and the state, while conflicts arising from religious convictions are perceived as conflicts between earthly and spiritual sovereigns. Religion requires special treatment "not because religious judgments are better, truer, or more likely to be moral than nonreli-

197 Robert S. Michaelsen, *American Indian Religious Freedom Litigation: Promise and Perils,* 3 J.L. & RELIGION 47, 49 (1985).

198 D. THEODORATUS, U.S. DEPT. OF AGRIC., ON CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUEST-ORLEANS ROAD, SIX RIVERS NATIONAL FOREST 44 (1979).

gious judgments, but because the obligations entailed by religion transcend the individual and are outside the individual's control."[199]

This rationale is problematic because it is based on a sectarian religious position.[200] A secular person may deny the existence of a god or the linkage between a god, that may exist, and the alleged obligation. Why should he agree to grant special freedom to those who link their behavior to their god's will?[201] One way to try to resolve that problem is to rephrase the underlying assumption in an existentialist format, as indicating a belief rather than a verified truth: Religious actions are accompanied by the subjective belief of the religious person that he defers to his god's will, while secular conscientious actions are accompanied by the actor's understanding that he acts out of his own judgment. According to this version, religion should get special treatment because preventing religious people from complying with what they consider an outside-of-their-control obligation would cause them more pain than that caused to secular conscientious objectors.

But the new version of the argument is not convincing either. As a matter of fact it is even insulting. For a purely secular pacifist, participation in a war stands in contradiction to a moral obligation imposed on him, and is not merely a conflict with his own free and voluntary will. For such a person not to participate in a violent action is a duty, not a privilege.[202] The fact that his awareness of this duty resulted from human moral reasoning does not make his subjective feeling of obligation weaker than that of a religious person who believes he receives his obligations from a transcendent source. Thus, if

199 McConnell, *supra* note 14, at 1497.

200 It should be noted that McConnell indeed presented this argument in the context of a historical analysis of the rationale behind the American free-exercise norm, which was framed by people whose "belief in the existence of God was natural and nearly universal." *Id.* at 1498. His originalist inquiry makes sense, but does not provide a convincing rationale for contemporary evaluation that is not committed to past presumptions.

201 Moreover, dividing the source of behavior to religious-transcendent and secular-immanent ones clearly overlooks other possibilities. Denying the authority of a god does not make a person a positivist, since one can still accept secular natural law as the source of his behavior.

202 Sandel, for example, links freedom of religion and freedom of conscience while asserting that "[i]t is precisely because belief is not governed by the will that freedom of conscience is unalienable." Michael J. Sandel, *Freedom of Conscience or Freedom of Choice, in* ARTICLES OF FAITH, ARTICLES OF PEACE 74, 88 (James Davison Hunter & Os Guinness eds., 1990). One does not have to be a communitarian, like Sandel, in order to make that statement. Liberalism is not necessarily about denying the existence of moral obligations derived from sources other than the self.

the level of grievance that the actor's inability to comply with his obligation will cause him should decide the case, there is no reason to prefer religious objectors to conscientious ones. As Douglas Laycock correctly observes, "The nontheist's belief in transcendent moral obligations—in obligations that transcend his self-interest and his personal preferences and which he experiences as so strong that he has no choice but to comply—is analogous to the transcendent moral obligations that are part of the cluster of theistic beliefs that we recognize as religious."[203]

We cannot distinguish religious commitments from other conscientious commitments based on the centrality of each to individual's self-definition. This, however, does not mean that freedom of religion cannot be interpreted as an accommodation of the central role that religious duties play in the life of religious people. What it means is just that freedom of religion shares this important rationale with freedom of conscience. Indeed, one of the basic reasons to grant religious freedom should be that "[t]o be insensitive to the pain of those forced to choose between religious faith and the norms of the wider community is cruel, and to ignore the potential for destructive conflict between state policy and religious commitment is foolish."[204]

4. Religion Provides Moral Inspirations and Balances State Power

Another common justification for special treatment of religion by the state is spelled out by several scholars[205] in terms of social utility. Religions, it is claimed, can serve two chief functions in a democracy. "First, they can serve as the sources of moral understanding without which any majoritarian system can deteriorate into simple tyranny, and, second, they can mediate between the citizen and the apparatus of government, providing an independent moral voice."[206] These two functions that religion can fulfill, inspiration and mediation, are important enough, it is argued, to treat religion specially in order to guarantee its independent existence. The advantage of this rationale is that it is totally secular. To admit the instrumental value of religion one need not be religious or accept any religious premise. Another advantage of this rationale is that it does not rely on the interests of

203 Laycock, *supra* note 59, at 336.

204 Lupu, *supra* note 17, at 359.

205 *See generally* STEPHEN CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993) (providing an eloquent presentation of this argument).

206 *Id.* at 36.

religious people and focuses instead on how the society at large benefits from special freedom of religion.

This nonsectarian rationale may indeed serve as a good reason to protect freedom of religion. Personally, I am much more sympathetic to that argument than to the counter-argument, raised by several scholars, that the advantages of religion should be balanced with the evils that it sponsors such as "discord, hate, intolerance, and violence."[207] This rationale does not provide, however, a distinction between religion and conscientious behavior. If we value religion because it provides moral inspirations and balances the state's power by retaining its independent moral voice, then we should also value conscientious nonconformity in general. Conscientious dissenters, as individuals or through organized groups, contribute much like religious dissenters to the maintenance of vibrant moral discourse and "reduce the likelihood of democratic tyranny."[208] For example, conscientious dissenters led the civil struggle against the Vietnam War, which finally resulted in a withdrawal of the American nation from an allegedly immoral activity. Indeed, freedom of religion is another way—in addition to separation of powers, a bicameral legislature, and federalism—to prevent the deterioration of the majoritarian system into simple tyranny. However, since its role in enhancing conscientious behavior is what is valued, freedom of religion should be understood in this context as a derivative of the general freedom of conscience and not as a separate right.

C. The Scope of Freedom of Religion

1. The Position Respecting Accommodation Is Not Linked to the Attitude Towards Religion

So far we discussed the potential rationales for freedom of religion. It was argued that freedom of religion should be understood as a derivative of the right to culture and freedom of conscience. Now, it is time to tackle the second question—what should the scope of this freedom be?

Before we start, it is important to clarify one point. The dispute over the scope of freedom of religion—should it be understood as merely prohibiting the state from discriminating against religion, so that neutral, generally applicable laws are legitimate, or should it be

207 Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1265 (1994).

208 CARTER, *supra* note 205, at 37.

construed broadly to require the state to accommodate religion by exempting it from laws neutral on their face that interfere with the observances of religion—is not necessarily between those who have a positive view respecting religion and those who do not. Kathleen Sullivan, who considers religion a potential threat to the maintenance of a peaceful society, supports, nonetheless, the strong position, and even takes it to its extreme by noting that, perhaps, even a practice that "reenacts Christ's crucifixion with a real crucifixion of its own" while performed by willing adults, should have a free exercise exemption from homicide laws![209] Maimon Schwarzschild, who contends that "[r]eligion seems an odd choice as prime threat to liberalism" at the end of the twentieth century,[210] takes, nonetheless, the weak position that "the ban on 'prohibiting free exercise' must mean . . . only that the government may not deliberately suppress a religion or its rites."[211]

The same interesting pattern is also found in the rulings of the United States Supreme Court. The Rehnquist Court that departed from the strict version of the nonestablishment norm that characterized the Warren and Burger Courts also departed from the accommodating position on the free exercise norm that characterized the Warren and Burger Courts[212] and adopted instead a weak interpretation of this norm.[213]

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209 Sullivan, *supra* note 16, at 219.

210 Maimon Schwarzschild, *Religion and Public Debate in a Liberal Society: Always Oil and Water or Sometimes More Like Rum and Coca-Cola?*, 30 SAN DIEGO L. REV. 903, 911 (1993).

211 Maimon Schwarzschild, *Pluralist Interpretation: From Religion to the First Amendment*, 7 J. CONTEMP. LEGAL ISSUES 447, 468 (1996).

212 *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 213–215 (1972); *see also id.* at 220 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion.").

213 *See* Employment Div. v. Smith, 494 U.S. 872, 879 (1990) (holding that the Free Exercise Clause provides no protection against a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that [Smith's] religion prescribes (or proscribes)"); *see also* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1120 (1990) ("The compelling interest test has been applied numerous times since *Yoder*. The Court reiterated the compelling interest test no fewer than three times in the year preceding *Smith*, including in two unanimous opinions."); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 158 (1997) [hereinafter McConnell, *Institutions and Interpretations*] ("Prior to *Smith*, the freedom-protective interpretation was a firmly established (albeit haphazardly enforced) doctrine of constitutional law."). It should be noted, however, that there are those who deny that the Rehnquist Court departed in *Smith* from previous rulings and

2. Why Not Accommodation? The Alleged Clash with the Requirements of Nonestablishment

So should freedom of religion include accommodation or not? Let us start with the opposite question—why not? The major argument against the accommodation of religion is that for a state to accommodate religion by exempting it from otherwise applicable laws is to take a position of preference towards religion in contradiction to the requirements of the nonestablishment norm.[214] The argument in short is that to require the state to exempt religion from otherwise applicable laws is to privilege religion contrary to the neutral treatment required by the establishment norm.

Assuming for a moment, contrary to our previous conclusion, that the nonestablishment norm indeed requires neutrality, two common ways are suggested to refute that argument against accommodation. One way is to interpret free exercise to require not merely accommodation of religion but accommodation of conscience.[215] That way free exercise does not single out only religion but rather conscientious behavior in general, and does not, therefore, contradict neutrality towards religion that the establishment norm dictates.

This solution is problematic for two reasons. First, if our understanding is that freedom of religion and nonestablishment of religion are "twin brothers," then it would be reasonable to expect that their terms would be interpreted similarly. If "religion" in the free exercise norm covers religious as well as nonreligious conscientious behavior, then the same should apply to the nonestablishment norm. But then, we end up with the same initial problem of free exercise that requires what the nonestablishment forbids. But even if we would, for some kind of reason, interpret "religion" in free exercise differently than "religion" in nonestablishment, accommodation of all conscientious objections is still in tension with nonestablishment. The nonestablish-

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claim that *Yoder* is the only occasion on which the accommodation position has prevailed in any Supreme Court setting. *See* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 446 (1994).

214 *See, e.g.*, City of Boerne v. Flores, 521 U.S. 506, 536–37 (1997) (Stevens, J., concurring); Eisgruber & Sager, *supra* note 207, at 1266–70; William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection, and Free Speech Concerns*, 56 MONT. L. REV. 227, 237–42 (1995); Sherry, *supra* note 120, at 136–50.

215 *See, e.g.*, PERRY, *supra* note 12, at 29 ("[I]t might be ideal if the constitutional law of the United States were revised to protect acts of secular conscience on a par with acts of religious conscience."); Rodney K. Smith, *Conscience, Coercion and the Establishment of Religion: The Beginning of an End to the Wandering of a Wayward Judiciary?*, 43 CASE W. RES. L. REV. 917 (1993).

ment norm, understood as a neutrality requirement, forbids the state to give preference to religion over other human causes and activities. Accommodation of all sorts of conscientious objections indeed does not give preference to religion over *all* other human causes, but it does, however, prefer religion, among other conscientious objections, over *some* other secular commitments such as "those flowing from parental obligation . . . or lifelong cultural practice."[216]

The other defense of accommodation is the straightforward argument that accommodation is consistent with neutrality. According to Douglas Laycock, "a law that penalizes religious conduct discourages religion. The discouragement is often severe . . . . But in many of the cases, an exemption for conscientious objectors has only a de minimis tendency to encourage any aspect of religion. The exemption is substantively neutral; the lack of an exemption is not."[217] This rationale is not free of problems either, however. As Laycock himself admits, there are "[c]laims for exemptions that align with self-interest," and those claims are problematic because "they create incentives to join the exempted faith."[218] Thus, as Laycock correctly observes, "[t]he problem for religious neutrality is that denying the exemption discourages religious belief in one set of people, and granting the exemption encourages religious belief in another, overlapping, set of people . . . . The case is hard, and the most nearly neutral course will not be very neutral."[219]

So, how can this dilemma be resolved? Laycock's suggestion is, apparently, that legislators and judges should distinguish between the two types of exemptions, those that involve self-interest and those that do not. They should recognize claims for exemption that do not create an incentive for nonbelievers to practice religion, and either reject altogether claims for exemptions that align with self-interest, or recognize them, subordinate to the objectors' acceptance of an alternative burden which will reduce the self-interest reasons for claiming the ex-

216 Eisgruber & Sager, *supra* note 207, at 454.

217 Laycock, *supra* note 20, at 1016. The United States Supreme Court seems to concur with this position. *See* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987) (holding that when the government acts "with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities").

218 Laycock, *supra* note 59, at 347.

219 Laycock, *supra* note 20, at 1017. In a later article, Laycock claims that "the difficulty does not arise in the run of cases." Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 17. Notwithstanding some exceptional cases, he says, "in most contexts, an exemption for religious practice does not encourage non-believers to join the faith. Much religious activity is self-restraining, burdensome, or meaningless to non-believers." *Id.*

emption.[220] This offer may indeed resolve the logical tension between free exercise and nonestablishment, but as a matter of principle it is very disturbing.

Let us take a familiar case. The consumption of wine is a required element in a Jewish Shabbat ritual. For most people, however, drinking a glass of good wine is also a pleasure. What Laycock implies is that a state that decides to prohibit the consumption of wine, may not exempt such consumption for religious purposes, or at least should balance that "incentive to join this exempt faith" by imposing an alternative burden, say, a two hundred percent tax. Well, avoiding exemption of wine consumption for religious purposes is problematic because it restrains religious liberty, a value that Laycock himself considers the crux of the religious clauses. If religious liberty is the rationale behind free exercise, then denying exemption to religious requirements, even if the denial is confined to instances where these requirements align with self-interest, is wrong. Exempting wine consumption for religious purposes while imposing an alternative burden will not lead to a much different result. Rich observant Jews will easily buy wine. The Jewish religion permits, as default, to perform the relevant ritual over bread instead of wine. Poor Jews will either give up wine and use bread instead, buy wine at the expense of, say, a second pair of shoes for their children, or humiliate themselves while requesting—and probably receiving—financial support from their wealthy fellow Jews. (The same type of humiliation that they incur while receiving scholarships to enable them to send their children to private religious schools.) Is this result in line with religious liberty?[221]

One may ask, honestly ask, if Laycock's suggestion is unacceptable, how then should the problem of exemptions that align with self-interest be addressed? Two responses may be suggested. The first straightforward response to this question is that the problem should not be addressed because it is not much of a problem. Let us put things in the right context. The paradigmatic candidates for exemptions would be members of an encompassing religion or culture, who conduct their entire lives according to a comprehensive set of rules and customs. The exemption from state laws that contradict religious duties will be given only to those who conform to the entire religious or cultural system. Let us pick again the wine consumption example. Even if wine consumption is a pleasure, it should not be forgotten that an observant Jew observes numerous rules and customs in addition to

220 *See* Laycock, *supra* note 59, at 347; Laycock, *supra* note 20, at 1017–18.

221 I am aware of the polemic nature of the previous description, and I do not mean to ridicule Laycock's suggestion which sometimes may work.

wine rituals, and that the exemption from the general prohibition on wine consumption will be given to—and only to—people who observe these rules and customs. It is hard to believe that a non-observant Jew will join the Orthodox stream in order to enjoy the exemption.

Now, it may be argued that the wine consumption example is misleading, that wine consumption is not tempting enough, but the prospects to enjoy other—more significant—exemptions may convince people to join a comprehensive minority culture. Indeed, it is not argued here that such a scenario is utterly impossible, but in this author's opinion it is, however, very rare. To pick a more complex illustration: Army service in Israel is compulsory for both males (three years) and females (two years). Several Orthodox authorities rule, however, that *halakhah* prohibits women from being drafted.[222] Israeli law accommodates this position. Orthodox women who reach the draft age are exempt from military service upon declaring[223] adherence to *halakhah.* Exemption from military service is undoubtedly an advantage, but to the best of this author's knowledge the prospects of being exempted did not convince secular Israeli young females to join the Orthodox stream.

But, even if the above response is not completely accepted, things should be put again in the right context. The dilemma that we are trying to resolve is how can the state accommodate religious people by exempting them from otherwise applicable laws without granting them a privilege, contrary to the requirement of neutrality. Such a question is valid, however, if—and only if—we adopt the neutrality interpretation of nonestablishment. In this Essay, however, I have tried to show why it is not morally required to adopt the neutrality interpretation, and why the non-coercion interpretation of nonestablishment is preferred. If this position is accepted, the dilemma loses much of its relevance.

In the past two Sections I attempted to describe freedom of religion and nonestablishment as measures aimed at guaranteeing the existence of minority cultures that have lost out in the majoritarian cultural battlefield. In this setting exemptions can get rid of any neutrality pretension and make sense as a non-neutral requirement, aimed at guaranteeing the survival of minority cultures in a non-neutral political system. It is predictable and totally acceptable that some moral/cultural worldview will prevail over others. Majority cultures

222 The prohibition is grounded on the statement in *Babylonian Talmud, Nazir* 59a: "R. Eliezer b. Jacob says: How do we know that a woman should not go to war bearing arms? Scripture says, 'A woman shall not wear that which pertaineth unto a man.'"

223 *Halakhah* discourages swearing.

do not need legal defense. They have enough political power to shape state policies in a way that enables them to escape any substantial burden in the first place. It is the minority cultures that will probably face some trouble trying to stick to their tenets. In most cases in Western democracies, the burden will not be intentional,[224] but rather caused by ignorance or lack of appreciation of the minority's tenets. Such ignorance or lack of appreciation will result in legislation, neutral on its face, but nonetheless burdensome to minority cultures. Without any mandatory requirement of exemptions, in cases where the burden is heavy and the state does not have any compelling interest in imposing it, minority cultures will have trouble surviving, let alone flourishing.

V. THE PROPOSED MODEL

A preliminary point, which I believe to be essential for the proper understanding of the views expressed in this Essay, is that the question of the relationship between religion and state should be properly viewed as part of the broader question concerning the relationship between culture and state.

The comprehensive discussion contained in this Essay leads us to four major arguments. First, the state cannot, and is not morally required to, remain neutral between competing cultures and moralities. The state promotes certain cultural identities and thereby disadvantages others, and such promotion—even if done through the state's public institutions—does not necessarily contradict the moral obligation of the state to safeguard and promote the autonomy of its citizens. Second, religion is, first and foremost, an encompassing culture that covers various important aspects of life. Religion is—and should not be denied the right to be—a player in the cultural competition. Third, the losers in the cultural debate need some leeway in order to survive. Certain measures in support of cultural minorities, including religions, are required, in a majoritarian system, to enable them to survive. Fourth, a state that values autonomy and autonomous decision-making is morally required to take these supportive measures, or to ensure that they are otherwise taken.

Among the measures required to protect minority religions (or other cultures), three that we have offered are included in the First Amendment's religious clauses properly understood. First, the state is

224 *See* McConnell, *Institutions and Interpretation*, *supra* note 213, at 157 (stating that "[d]emonstrably hostile or discriminatory acts against religion are blessedly rare in this country, but ostensibly neutral impositions on religion—especially minority religions—are common").

required not to force—and to protect from private force—an individual to maintain particular beliefs or to participate in religious or cultural rituals against his will. Second, the prohibition of force extends to indirect coercion. The state is required to abstain from taking measures that result in favoring religion or any specific culture that makes it much harder for people to avoid assimilation into that religion or culture, or even to avoid practicing a religion or culture other than their own. Third, the state must guarantee minority cultures the right to practice their culture. The state is even required to exempt these minority religions or cultures from neutral, generally applicable laws that interfere with the observance of their religion or culture, in cases where the burden on these cultures is heavy and the state does not have any compelling interest in imposing the burden.

If adopted, the model I have proposed here requires states that adhere to it to practice a limited amount of restraint; it permits a state to go well beyond strict neutrality toward religion, morality, and culture. The state is merely required to avoid the coercive establishment of culture, religion, and morals, and the institutionalization of religion under a nonestablishment norm, and to accommodate minority religions and cultures, under the free exercise norm.

Taken as an operational proposal my position may not seem so new or different: after all, conservative, non-liberal scholars advocate a rather similar model. The novelty of my proposal lies in its foundation on a liberal worldview or at least on a certain school within Liberalism. It is my claim that a liberal state is not only permitted, but is even required, to adopt such a model.

VI. Conclusion

After a long era of decline in the influence of religion, the Western world faces today a revival of religion. Some observers would explain this phenomenon as a part of a routine cycle of religiosity and secularism, a wave that will fade the way it came. I believe, however, that there is a much better explanation for this change. When ideas are born, they wait eagerly to be tested against reality. When ideas are implemented in reality they must be tested against the new reality they created. Liberalism was an extremely powerful idea. It was implemented in the Western world and indeed created a great change. I believe, however, much like many other observers, that the liberal state failed to meet some important needs of the human race which religion used to fulfill. These shortcomings of the liberal state are now being filled again by religion. Our days indicate a radical change in the power of conservative religious values in the public domain.

This change, some American scholars believe, must be manifested in a constitutional amendment, or in a revised interpretation, of the religious clauses. I believe that the model proposed in this Essay—which assumes the vital importance of religion in human life, including the public sphere, and at the same time does not neglect the commitment to human freedom—is not only constitutionally plausible but may also serve as a valuable tool for those who would like to reshape the American model for the relationship between religion and state in a manner more favorable to the cause of religion.

Lord Lowry of Crossgar (1919–1999)