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THE FREE EXERCISE THEREOF

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This Essay is about the freedom of religion, which raises the possibility that it is also about the existence of God. Ever since the Supreme Court's first classroom prayer decisions, back in the early 1960s, constitutional scholars and judges alike have premised their analysis of religious freedom questions on assumptions about the existence of God that may fairly be described as skeptical—including, most emphatically, the stance that is usually, but inaccurately, referred to as "neutral." For example, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[1] when the Court allowed the Forest Service to open to logging and roadbuilding lands that three Indian tribes held sacred, the Justices explained, with evident sincerity, that this result was neutral toward the religion of the tribes. But the effect of the logging, as even the Court conceded, was to devastate the tribes' religious traditions, which would hardly seem neutral from the point of view of the Native American believer. A mem-

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1. 485 U.S. 439 (1988).

ber of one of the tribes surely would find the *Lyng* decision a horrific interference with religious freedom; and the fact on which the Court relied, that the destruction of the tribes' religion was accidental rather than intentional, would be scant comfort.

Beginning in the mid-1980s, a Court majority led by Justice Antonin Scalia has followed the same "neutrality" principle in over half a dozen cases, ruling for the state on subjects ranging from forbidding the wearing of a yarmulke while in military uniform[2] to being forced, in contravention of religious principles, to obtain a Social Security number for a child.[3] The lower federal courts and, lately, the state courts have been caught up in the same trend, ruling for the state in one case after the other,[4] with the unsettling result that only religions possessing sufficient political clout to protect themselves are able to operate relatively free from state interference. So pronounced has the trend become that some scholars have pessimistically declared the death of free exercise of religion.[5] More cautious critics have

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2. *See* Goldman v. Weinberger, 475 U.S. 503 (1986).

3. *See* Bowen v. Roy, 476 U.S. 693 (1986).

4. *See, e.g.*, Thiry v. Carlson, 887 F. Supp. 1407, 1414 (D. Kan.), *stay granted*, 891 F. Supp. 563 (D. Kan. 1995), *aff'd*, 78 F.3d 1491 (10th Cir.), *cert. denied*, 117 S. Ct. 78 (1996) (holding that condemnation for use in a highway construction project of the gravesite of a stillborn child did not violate the parents' free exercise of religion); Havasupai Tribe v. United States, 752 F. Supp. 1471, 1485 (D. Ariz. 1990), *aff'd sub nom.* Havasupai Tribe v. Robertson, 943 F.2d 32 (9th Cir. 1991) (holding that the Forest Service's proposed operation of a uranium mine on national forest land did not violate the tribe's right to free exercise of religion at the mine site, despite the tribe's claim that the site was sacred and that any mining would interfere with the tribe's religious practices); Yang v. Sturner, 750 F. Supp. 558, 558 (D.R.I. 1990) (holding that a Rhode Island autopsy law did not "profoundly impair" the religious freedom of a Hmong couple who believed that the autopsy of their son would cause his spirit to return and take another person in the family); Manybeads v. United States, 730 F. Supp. 1515, 1517 (D. Ariz. 1989) (holding that removing Navajo Indians from the reservation where they lived did not violate the Free Exercise Clause).

5. *See, e.g.*, Rodney J. Blackman, *Showing the Fly the Way Out of the Fly-Bottle: Making Sense of the First Amendment Religion Clauses*, 42 U. KAN. L. REV. 285, 407 (1994) (arguing that further application of the reasoning in recent Supreme Court cases would "render the Free Exercise Clause virtually judicially dead" for minority religious practices); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 140 (1992) (arguing that the neutrality principle incorrectly places "the freedom of citizens to exercise their faith . . . [at the mercy of the] vagaries of democratic politics . . . ."); Karen T. White, *The Court-Created Conflict of the First Amendment: Marginalizing Religion and Undermining the Law*, 6 U. FLA. J.L. & PUB. POL'Y 181, 186-87 (1994) ("In an effort to enforce government neutrality, the

argued that the Justices are undervaluing the benefits that flow from genuine religious diversity and that, far from being neutral, the courts treat the religions that lose these cases—usually, but not always, the powerless—as presumptively false.[6] Implicit in this last criticism is the notion that the Justices likely would treat their own religions as being at least potentially true. Conduct of the sort demanded by the Western tradition—especially the Protestant tradition—is immediately recognized as religious; conduct of other kinds is seen as marginal to religious life. Thus, the Native Americans involved in *Lyng* cannot really need the forests; worship is basically how one prays (so the Justices must have reasoned), and nobody is interfering with that. Beyond that, we are free to follow the teachings of our religions up to the edge of the law but no further—even though the laws are drafted with some religions, and not others, in mind. (Nobody proposes to build a road through the Cathedral of St. John the Divine.) Applied in this manner, the neutrality rule itself becomes a kind of establishment of religion: establishing freedom for religions that look and operate like the denominations of the American Protestant tradition.

One need not accept the accuracy of this increasingly common polemical stance to recognize the seed of an important question. Some scholars have defended religious freedom on the ground that because the state does not know any facts about God, official skepticism (which carries an implicit official invitation to private pluralism) is the only sensible stand. But consider the matter the other way around: Over the years, any number of scholars—Stanley Fish is perhaps the most recent—have questioned whether a deeply religious individual can possibly be committed to the liberal values of pluralism and dialogue. The religiously devout, Fish argues, are less interested in participating in the marketplace of ideas than in shutting it down.[7] De-

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Court has rendered the Free Exercise Clause almost meaningless.").

6. *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993); *cf.* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 45-68 (1985) (maintaining that tort law considers the beliefs of traditional religions to be presumptively reasonable but requires that members of newer, idiosyncratic religions prove the reasonableness of their beliefs).

7. *See* Stanley Fish, *Why We Can't All Just Get Along*, FIRST THINGS, Feb. 1996,

spite the polemical cast of the argument, it raises a crucial challenge for advocates of religious freedom: to explain why anybody who is absolutely sure that God exists and is knowable ever would believe in religious freedom for others, except, perhaps, as a transitionary tool until the believer and his friends accumulate enough resources to force everybody else to toe their theological line. More carefully put, the question is whether *only* a skeptic or a nonbeliever could conclude that religious freedom is valuable as a *permanent* good.[8]

This conundrum matters—and not simply to religious believers who want to display their tolerance. If Fish and other critics are right in thinking that true believers cannot truly believe in religious freedom and religious pluralism as valuable for their own sake, the ability of the religious to support the liberal state is called into question because the religious freedom that liberalism trumpets becomes a trivial sideshow rather than one of its main attractions. After all, if the citizens whom we might call True Believers cannot support religious freedom, it follows that those who support religious freedom cannot be fellow True Believers (or, at best, are lying about one or the other of their affirmations). Thus the liberal state suddenly fits the caricature put forth by many of its critics: a state run by Nonbelievers who tolerate but at bottom scorn the True Believers. So rather than G.K. Chesterton's famous description of America as "a nation with the soul of a church," we would have a nation that *pretends* to have the soul of a church.

The challenge is more difficult than it may seem. It is not enough to answer with the traditional response of Christian theology that it is pointless for True Believer to capture the apparatus of the state and coerce Nonbeliever, because God's offer of

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at 18; *see also* Stanley Fish, *Liberalism Doesn't Exist*, 1987 DUKE L.J. 997 (reply to Carter) (treating liberalism as incompatible with religious fundamentalism).

8. By a permanent good, I mean one that should exist as long as the society does, rather than one that should exist until the society evolves in such a way that the question no longer arises. Free speech, for example, is a permanent good in a just society. So is the right to vote. An armed guard in a public school is not a permanent good: the guard is there in the hope that the day will come when he will not be needed, and the very people who decided to put him there also believe the society will be better when he is no longer needed.

grace must be accepted voluntarily for the acceptance to have any effect. The critic could easily reply that this is still merely a transitional justification for the free exercise of religion, that, deep down, True Believer remains certain that all is not right with the world until everybody understands God in the same way that he does. In other words, True Believer does not believe in religious freedom in the sense of religious pluralism, and certainly not for its own sake; he believes in pluralism as a necessary interlude before all his fellow citizens are True Believers too, like a Marxist who thinks the state must wither away before true socialism can take hold. So his true vision of pluralism is akin to the way that Locke believed in tolerance: tolerance of all the right ideas about God.[9]

Nor is it enough to respond, as some contemporary theologians have, that religious pluralism is of value even for True Believer who, by studying the ways in which others have found the path to God, might gain a richer understanding of his own faith and his own relationship to the Divine.[10] In this case, religious pluralism is useful only as an adjunct to True Believer's own search; after the search is concluded, the value of pluralism to him is no longer clear. Moreover, no matter what True Believer learns from the (false) understandings of others, his ultimate goal is not a diversity of beliefs; his ultimate goal is that everybody's understandings be True.

In this Essay, I try to take up Fish's challenge, explaining why one could fully believe in God—in particular, the transcendent Creator-God common to the great Western religions—and yet not only believe in religious freedom but also believe in the value of genuine religious pluralism. The Essay is only a speculation, and a relatively modest one at that. I certainly do not claim that strong religious belief somehow *entails* support for religious freedom and religious pluralism; too much tragic history makes mock of any such claim.

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9. *See* JOHN LOCKE, A LETTER CONCERNING TOLERATION 91-93 (Mario Montuori ed., Martinus Nijhoff 1963) (1689) (proposing to deny religious freedom to Catholics and atheists).

10. *See* JAMES C. LIVINGSTON, ANATOMY OF THE SACRED 367-68 (1989).

I.

Rather than taking refuge in abstraction, I will from the start be personal. Let me begin with a profession of my own faith, at least as much of it as is relevant to the subject matter of the paper. I will set out that profession of faith as a set of three principles, only one of which I will subsequently argue for. I must begin this way because I intend to speculate on what theory of religious freedom we might create were we to begin not with a neutral or skeptical assumption, but rather with a set of assumptions about religious truth.

The three principles are these:

(1) *God exists.* In particular, the transcendent Creator-God familiar to the great Western religions, Christianity, Judaism, and Islam, exists. And if the Creator-God exists, God has a Nature and a Will that human beings might dimly perceive.

(2) *The human task is to struggle toward God.* Although I make this a separate point, the medieval theologians argued that if the Creator-God is real and transcendent, it follows that human beings have an absolute duty to order their lives in accordance with God's will.[11] If God exists, moreover, then God's will is not relative but absolute: God wills *X*, not *Y*, and all those who think God wills *Y* rather than *X* are wrong. So the human task is to discern *X* and then do it. This, of course, is a vision of what form of life is best for people, and might therefore seem to be forbidden as a motivating force of the liberal state. But this is true only if the struggle toward God is defined in a way that limits rather than exalts human possibility; more to the point, if it is only a description rather than a prescription, it need make no difference whatever in the choices or conduct of any particular individual.

These first two premises, although not of course shared by everybody, at least have the virtue of being relatively

11. *See* 17 ST. THOMAS AQUINAS, SUMMA THEOLOGIAE Ia Zae. q. 7-10 (Thomas Gilby, ed. & trans., McGraw-Hill 1970).

uncontroversial among professional theologians. Acceptance of the third, however, might require (dare I say it?) a leap of faith—or at least, for the moment, a suspension of disbelief.

(3) *Individual humans and their faith communities are better able than the state to discern the will of God.* Even if we conclude, as I did a moment ago, that God wills *X*, not *Y*, and all those who think God wills *Y* rather than *X* are wrong, it does not follow that the state is the proper level at which to distinguish *X* from *Y*. On the contrary, for the state to differentiate *X* from *Y* would actually hinder rather than help the search for God's true will. Why? Because the state has no comparative advantage over the individual in discerning God's will. (Indeed, although I will not argue for the proposition here, there is reason to think that the state is almost certain to be less adept than the individual at discerning God's will.[12]) Thus the task of the state is to assist believers in discerning and doing God's will by the simple expedient of getting out of the way.

I emphasize that I am only asserting these principles, not deriving them. They are my own profession of faith, a tiny part of what I believe about God's relationship to humanity, but they nevertheless can serve as the starting point in constructing an answer to Stanley Fish. To do so, it is necessary to follow two steps: First, I will make the case that the believer who begins, as I do, with these principles could (and perhaps should) support a robust religious pluralism, which cannot exist without clear constitutional guarantees. Second, I will argue that the law of

12. The problem is at least twofold. First, and perhaps more obvious, the facts necessary to understand the Will and Nature of God are not facts to which the state has any special access. Second, unless one supposes that a majority has a comparative advantage over the individual in discerning the Will of God, the state's ability to aggregate preferences does not yield a better result than the one that the individual might reach. Naturally, a community of believers meeting in church or synagogue might, through corporate worship, reach a richer understanding than any believer alone; indeed, the shared activity of worship is often essential to the work of extending the religious narrative. But unless the state is essentially theocratic, and acts of democracy are essentially about God-worship, the state cannot fairly be analogized to a community of believers. (The literature on civil religion is not to the contrary because it supposes a substitution of state-worship for God-worship.)

the state, including the constitutional law, can begin from the same set of principles and reach the same strongly pro—religious-freedom result but without the damage to religious practice that flows from the current Court's attachment to neutrality. I will offer a preliminary sketch of what that law might look like.

Again, bear in mind that all of this is only speculation. I do not pretend that the approach I am investigating is free of problems. As will be seen, some of the answers that it provides to our religious freedom dilemmas are unsettling, at least to me—particularly on the matter of how to resolve religious objections to antidiscrimination laws. But most of the answers turn out to be either better than those our current jurisprudence is able to provide, or every bit as good, yet more solidly grounded. Indeed, the approach to religious freedom that presupposes the existence of the Creator-God provides the maximum protection for the freedom of individuals and, at the same time, protects the crucial work of faith communities struggling together toward a truer vision of the Divine.[13]

II.

Suppose that True Believer shares my principles. Will he nevertheless wind up where Fish insists that he must, disdaining pluralism and dialogue? Certainly True Believer's confidence that God exists might be seen as a problem rather than a solution: Will he not be tempted to follow the example of the Inquisitors, coercing Nonbeliever for Nonbeliever's own benefit? Indeed he might, were the first principle the only one in which he believed. But we are supposing that he also believes in the next two. How might this modify his thinking?

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13. The approach that presupposes the existence of God does not in any sense discriminate against the atheist or the agnostic. In the first place, its practical effect is to defend, and in some ways to enhance, the rights of atheists to exercise religion freely by not exercising it at all. Second, from the theological perspective, one can argue that there are no atheists. As Martin Buber pointed out in his wonderful monograph *Between Man and Man*, the atheist is in some ways closer to God than the believer, for the atheist engages in wrestling with the divine, an activity to which all too few believers attend, and to which all should. *See* MARTIN BUBER, BETWEEN MAN AND MAN (Ronald Gregor Smith trans., 1965).

A quick glance at the second principle might suggest that it will only make matters worse. If the human task is to struggle toward God, and if Nonbeliever is refusing to engage in that struggle, perhaps True Believer helps her if he coerces her into the struggle that she has been avoiding. But if True Believer acts in this fashion, he ignores the Gospel admonition to attend first to the beam in his own eye,[14] and one need not be a Christian to see the point. If the human task is to *struggle* toward God, then the image is one not of a destination but of a journey—and quite a difficult one at that. Nonbeliever is not alone in her need to make the trip. True Believer has the same obligation. If True Believer thinks he has reached the end of the path toward God, he ignores the point about (Created) human nature that the second principle expounds. Because the journey is a struggle, and because human beings are fallible, True Believer may err. One might object that the possibility of error is no more conclusive an argument against religious coercion than it is against coercion of any other kind, and this would be correct, except that we are beginning with the premise that God indeed exists (principle 1) and that the human task is to struggle toward God (principle 2). Consequently, the cost (to both True Believer and Nonbeliever) of coercion in service of an erroneous religious conclusion is significantly greater than the cost of coercion in service of an erroneous conclusion about some (literally) mundane question. At minimum, therefore, the possibility of error is reason enough for True Believer to pause to contemplate the possibility that Nonbeliever has access to more of the truth than True Believer does.

Do not misunderstand the point: this is not relativism. True Believer, by accepting principles 1 and 2, takes as given not only that God exists, but that God's Will is an absolute, and that that absolute Will is knowable if we can develop the proper tools. True Believer, by definition, believes that he has everything figured right, and—who knows?—he may even be correct, which is why so humane a theologian as Martin Buber wondered whether any of us is truly in a position to challenge, for example, Calvin's

14. *See Matthew* 7:3 (King James) ("And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?").

persecution of Servetus.[15] But Buber missed an insight that is present in his own work: because of our human fallibility, our access to God is *by definition* imperfect. That is why Calvin should have paused, and it is also why True Believer should pause.

But a pause is not a final decision. Having thought it over, True Believer might decide to proceed with his coercion of Nonbeliever. After all, if the lack of certainty were an argument against action, few of us—save a few fanatics—would ever act. Even convictions that we might be prepared to revisit are convictions.[16] And as long as the convictions have endured the degree of moral reflection and challenge that personal integrity requires, True Believer should ultimately feel free to act on them.[17] Or rather, he should feel free to act on them unless his sense of his own fallibility is further buttressed by an additional principle—for example, our third principle.

On the issue of coercion of Nonbeliever by True Believer, the third principle would seem to be decisive. By hypothesis, the state is less able than the individual to discern the proper path toward God. This means that even if True Believer is sure he is right and Nonbeliever wrong, he must not involve the state as an organized entity in trying to enforce his preference. The reason is not that he must respect Nonbeliever's "rights" (although, of course, the citizen in me believes that he should) but that the state is, according to the third principle, incompetent to make the very judgment that True Believer requires of it. Put simply, if he enlists the aid of the state, the state is likely to mess things up.

Here one draws upon the observations of Kierkegaard, who pointed out that as the Christian church in Europe became the Christian state, it lost its distinctively religious character.[18] In

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15. *See* BUBER, *supra* note 13, at 7.

16. As legal scholar Michael Perry has put the point, "at any given moment our convictions are what they are." MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 184 (1988).

17. For a further discussion on this point, see STEPHEN L. CARTER, INTEGRITY 15-29 (1996).

18. *See* SØREN KIERKEGAARD, ATTACK UPON "CHRISTENDOM" (Walter Lowrie trans., Princeton Univ. Press 1968) (1854-55).

particular, a state "church" loses much of its ability to bear witness to the sinfulness of the world and the state that runs it. Religion, as the postmodern theologian David Tracy has pointed out, is ultimately subversive of the secular world because it provides narratives drawing on sources other than the material.[19] Religions live through their narratives: they exist as constantly evolving stories about the relationship of the people with God. A religion is purified—comes to know its own narrative most fully—through its opposition to the world, through tension with those who stand against it and, ultimately, by the sacrifices that life may demand. As the late legal scholar Robert Cover explained, it is the process of standing in opposition to an often disbelieving and even oppressive world that helps a religious people to understand itself, for it is the experience of being the other that teaches the religion what aspects of its narrative it will preserve even when a sacrifice is demanded.[20] Some forms of sacrifice are readily understood as such by secular observers: the lynching of Roman Catholics in nineteenth-century America, the slaughter of Christian missionaries in various parts of the Far East, and, most notably, the Holocaust. One may go back further and consider, in the Western tradition, the slaughters of Jews and Christians alike at the hands of the Romans. All of these sacrifices resonate with us, because they touch the profound secular fear of death.

But most of the sacrifices that life in subversive opposition demands of the religious may often seem trivial to outsiders—consider not only *Lyng*, but the unhappy rhetoric of the Supreme Court in *Goldman v. Weinberger*,[21] in which an Air Force officer was disciplined for wearing a yarmulke and the Justices were unable to find a serious free exercise question. Similarly, I doubt that most outsiders know or care why adherents of Santería sacrifice animals, but what should be striking is that no matter how many prosecutions are brought under the animal protection statutes, the *santeros* continue to do it.[22]

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19. *See* DAVID TRACY, PLURALITY AND AMBIGUITY 74 (1987).

20. *See* Robert M. Cover, Nomos *and Narrative*, 97 HARV. L. REV. 4, 50-53 (1983).

21. 475 U.S. 503 (1986).

22. *See* Church of The Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

Plainly, they are sufficiently determined that secular criticism, and even secular punishment, will not stop them, and no wonder; in the Santería theology, the *orisha*, the personal god who influences the fate of a given individual, will die if the sacrifices end. This willingness to resist the destruction of its narrative is crucial for religious survival; in the words of David Tracy, "the religions live by resisting."[23] Not only do they live, but they take on meaning: Robert Cover's point was that a religion lives and grows in part through discovering, in this dialectical way, what in its narrative is truly important and truly valued, and what, although perhaps a part of the tradition, it is willing to alter or even to yield.[24] The point is not that oppression is good, but that for a religion determined to preserve its best self, tension is inevitable.

As the religion grows more powerful, it may sacrifice less, and thus may lose its purity. As someone once said, when the church gained temporal power, it surrendered the power to die for its beliefs in return for the power to kill for its beliefs. This is bad for religion. The reason is not that coercion on matters of faith is inherently wrong, although nearly all theologians now agree that it is. And, as I mentioned already, the reason also is not that Nonbeliever must accept God voluntarily, although all theologians agree on that too. The reason is that when the church seizes the reins of temporal power, it loses its distinctively religious character, its apartness, the subversive aspect of which Tracy writes. This means that once True Believer is in a position to coerce Nonbeliever, he has lost the ability to sacrifice, and thus his belief may be less pure, which means that he can never be certain that he is still True Believer.

There is a remaining possibility. Even if True Believer, fearing a loss of integrity, does not seize the apparatus of the state to coerce Nonbeliever, might he and his fellow True Believers join forces to coerce Nonbeliever without the aid of the state? Sadly, this is not an uncommon occurrence, even in the United States. American citizens, for example, have engaged in acts of violence and intimidation against Mormons, who were shot and

23. TRACY, *supra* note 19, at 84.
24. *See* Cover, *supra* note 20, at 50-53.

burned during the nineteenth century, and Jews and Roman Catholics, whom we have lynched by the score. Suppose True Believer, persuaded that seizing the apparatus of the state will be to his religious disadvantage, uses unofficial coercion instead? The answer is that the same objection applies: once he embarks upon the path of coercion, True Believer still risks losing his access to the Truth. The state, famously, is a fiction; it is the ability to apply force to attain one's ends that produces the set of phenomena that we call the state. Possession of the sole privilege of applying force has been, since Hobbes, the defining characteristic of the state.[25] It is the application of force, not the happenstance that one is able to apply it with legitimate authority, that generates the power that destroys the specialness of religion. So, for our practical purposes, if True Believer can coerce Nonbeliever without risk, he is acting with or as the state, and thus should be less certain of his ground.

III.

If I am correct that the True Believer who accepts all three of my principles would (or at least could) decide not to coerce Nonbeliever, can we generalize the argument, and thus derive a *law* rather than a *practice* of religious freedom? I believe that we can, by using the identical principles, produce a law of religious freedom that is better in most respects (although worse in a few) than the law that the courts have produced by invoking the principle of neutrality. By combining the three principles, it is possible to derive a single general principle that we might call *Religious Freedom Because God Exists*. The first principle tells us that God exists. The second affirms that the human task is to struggle toward this existing God. The third holds that the state cannot determine the path of the struggle as well as individuals and their faith communities can. This suggests that the role of the state is to get out of the way—a role that the Framers would have recognized at once, and warmly endorsed.[26] Indeed, if we begin with the proposition that we have religious freedom be-

25. *See* THOMAS HOBBES, LEVIATHAN 139-44 (E.P. Dutton & Co. 1950) (1651).
26. *See* WILLIAM LEE MILLER, THE FIRST LIBERTY 3-7 (1986).

cause God is real, not because of skepticism about that fact, we might continue our speculation with the conclusion that no state interest is as important as furthering the spiritual life of its citizens, whose purpose in life, after all, is to struggle toward God.

The resulting principle can be stated this way:

(4) *The state must allow every individual and faith community the maximum freedom to struggle toward God.*

Of course—because to do anything else, to exalt other interests over the struggle toward God would violate what, in the second principle, we have seen as the purpose of human existence. This principle is not entirely new, although I hope to do some new things with it. Historically, the principle is a sensible one; it is worthy of further exploration precisely because it was common (although perhaps not dominant) at the time of the drafting of the First Amendment. Indeed, the general notion of analyzing religious freedom as though God exists may be, for me, an article of religious faith, but it also was once a more general understanding. It underlies James Madison's 1785 *A Memorial and Remonstrance*,[27] his protest against Patrick Henry's bill for mandatory collection for the support of all churches in Virginia, and a crucial document in the nation's religious history; for *A Memorial and Remonstrance* was premised precisely on the thesis that the individual, not the state, is the proper level at which to discern the will of God.

A Memorial and Remonstrance was in no sense skeptical; it proclaimed proudly that the human obligation to God is superior to the human obligation to the state, and that the state itself is subordinate to God. Moreover, Madison's central defense of religious freedom presupposed the truth of God's existence: "Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us."[28] Why not?

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27. JAMES MADISON, A MEMORIAL AND REMONSTRANCE (1785), *reprinted in* MILLER, *supra* note 26, at 359.

28. *Id.* at 360-61.

Because their refusal to believe what is plainly true "is an offence against God, not against man."[29] Similarly, Thomas Jefferson's *Bill for Establishing Religious Freedom*[30] denied the state the power to coerce belief on the clearly stated ground that coercion is against God's plan.

Much recent scholarship asserts that historians of the religion clauses focus too narrowly on Madison and Jefferson, and thus minimize the Framers' debt to Roger Williams.[31] But the idea that religious freedom is valuable because God exists is consistent (and may be the *only* First Amendment theory that is consistent) with Roger Williams's original notion of the garden and the wilderness, with the metaphorical wall standing to separate the garden (the church) from the wilderness (the rest of the world).[32] To Williams, it was the garden, not the wilderness, that was precious and in need of protection: the wilderness would have to look after itself. When the wall was breached, Williams argued, the people in the garden had the duty to go out into the wilderness and make it a part of the garden.[33] For Williams, the wall of separation protected the church until its members were prepared for the work of evangelizing, of transforming the world according to their religious understanding. Once the wall was breached, then, the wilderness had to take its chances.

The separation metaphor, as originally articulated, actually makes little sense if one begins with skepticism on the existence of God. If religion is simply one of many equally valuable (or valueless) activities that some individuals see as enriching their

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29. *Id.* at 361.

30. THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1777), *reprinted in* MILLER, *supra* note 26, at 357.

31. *See* MILLER, *supra* note 26, at 153-224; Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 457-61 (1991). This point goes back to MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 1-31 (1965) (arguing that Williams's evangelical approach was more influential on the First Amendment Religion Clauses than was Jefferson's skeptical rationalism).

32. *See* ROGER WILLIAMS, MR. COTTONS LETTER LATELY PRINTED, EXAMINED AND ANSWERED (1644), *reprinted in* 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS 392 (1963) ("[W]hen they have opened a gap in the hedge or wall of Separation between the Garden of the Church and the Wildernes[s] of the world, God hath ever broke down the wall [itself] removed the Candle[s]tick, . . . and made his Garden a Wilderne[ss], as at this day.").

33. *See id.* at 392.

lives, there is no evident reason to grant it a level of protection that others are denied: there is, for example, no separation of art and state. But if God is real, if that is the reason to separate church and state, then it is easy to see how the search for God's true Will is aided when the garden—the church, the faith community where people work together to unlock God's Will—is protected. Behind the wall, believers struggle together toward God, as the second principle directs. They are able to do so in peace because the state, having derived the fourth principle, leaves them alone.

Besides, only if we take this fourth principle to be true can we make sense of the Court's otherwise historically inept effort to incorporate the Establishment Clause against the states, the very entities it was designed to protect.[34] The Clause was adopted as part of the division of powers between the state and national sovereignties: the states could establish churches if they chose, but the federal government could not.[35] Simple incorporation—the argument that the unincorporated clause limited the federal government, so the incorporated clause limits the states—was always incoherent, not least because it is difficult to figure out how to construct a state-level equivalent: established churches by county or city, perhaps, but not by state? It never made any sense.[36]

But suppose that we view the Framers as preferring state establishments over national establishments, not to placate states with official churches, but because of a normative belief that the judgment about the proper path to take in the struggle toward God would be better made at the state than at the federal level. (There is actually some evidence, although it is thin, that this was an important rationale for the Clause.[37]) Now incorpora-

34. I am here accepting, for the sake of argument and coherence, the idea that there are indeed two religion clauses—an Establishment Clause and a Free Exercise Clause—in the First Amendment, although I must add that I am largely persuaded by recent scholarship that there is actually only one. *See, e.g.*, Blackman, *supra* note 5, at 285.

35. *See* Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 843-44 (1986).

36. For further discussion of this point, see Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1159-60 (1991).

37. *See* JOHN H. GARVEY & FREDERICK SCHAUER, THE FIRST AMENDMENT 368

tion might be justified on the argument that we simply are extending the Framers' work: they thought that the state was the right level at which to determine God's Will, but they were mistaken. It is the nature of government, not the nature of federal government, that renders the determination difficult. The right level, then, is the individual and the faith community. And, again, that is the level at which the state must not interfere.

The devil is in the details, and the question is what it means to say that the wilderness—the state—must leave the garden alone. At the time of the drafting of the First Amendment, the government apparatus (at least at the federal level) did little that could conceivably get in the way of the struggle toward God. In today's regulated society, however, the state gets in the way of almost everything, in the sense that few areas of life escape the administrative apparatus. I am not decrying this trend; I am merely describing it. Whatever one thinks of life in the regulated state, one thing should be clear: as applied in the contemporary world, the fourth principle will be strongly accommodationist, meaning that it will require the state to carve out exemptions from many, and perhaps most, of its general regulations when they interfere with the struggle toward God.

For example, the *Lyng* decision,[38] which allowed the Forest Service to destroy the religion of three Indian tribes as long as it was done by accident, could hardly survive a principle holding that the state must allow the maximum freedom to struggle toward God. Although we have not yet considered the question of what interests might overcome the individual's need to struggle in his or her own way (the speculative answer will be a provocative one), it should be plain that the desires of a logging company to cut, of the Forest Service to profit, and of consumers to get wood products are not, singly or in combination, similar in importance to the need of the members of the tribes to fulfill the purpose of their existence by struggling, along their own path, toward God.[39] To rule otherwise would be to suppose that the

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(1992); MILLER, *supra* note 26, at 297-99.

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

39. It is worth noting here that the legislative history of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994), the 1993 statute purporting to reverse the alarming trend of court decisions I have been discussing, expressly

path toward God that the tribes have chosen is not likely to be an effective one—precisely the judgment that the third principle deems the state incompetent to render.

IV.

How would the law of the religion clauses look under this principle? I will consider this question by examining a handful of difficult areas of church-state law, beginning with the matter already under discussion: religious exemptions to laws of general application. That is where the courts have done the greatest damage, not only to minority (that is, politically powerless) religions such as the Native American faith involved in *Lyng*, but also, as Angela Carmella has pointed out, to some aspects of mainstream Christianity.[40] Although bad accommodation decisions exist in many areas of life, some of the most analytically interesting ones—and the ones that will be most helpful in figuring out what might overcome the working of the third principle—involve discrimination. American religion has a long history of segregation, especially on the basis of race. Three decades ago, Martin Luther King, Jr. referred to Sunday morning at

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preserves the result in *Lyng* and several other difficult cases. *See* S. REP. NO. 103-111, at 8-13 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897-903. I shall return to RFRA in the last part of this Essay.

40. *See* Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 GEO. WASH. L. REV. 782, 788 (1992). Carmella in fact makes a richer point. She argues persuasively that scholars of religious freedom, including accommodationists like myself, have been so hypnotized by the judicial abandonment of the free exercise rights of religious minorities that they have overlooked the fact that the courts have already abandoned protection of the free exercise rights of religions that did not somehow mark their separateness from the world. *See id.* Relatively "acculturated" religions (to use the term popularized by H. Richard Niebuhr in *Christ and Culture* (1951)) lost judicial protection by not fitting the judicial model of religion, which requires something exotic. *See id.* at 787. She gives the example of *Needham Pastoral Counseling Center, Inc. v. Board of Appeals*, 557 N.E.2d 43 (Mass. App. Ct. 1990), in which an organization that offered counseling services for coping with depression and stress was denied status as a religious group for zoning purposes because its counselors, in addition to offering prayer and other religious assistance, used some methods also used by secular counselors. *See id.* at 46-47. According to Carmella, had the counselors used only methods that the court considered religious, such as laying on of hands, rather than a mix of secular and religious techniques, the Center's use would have qualified as religious. *See* Carmella, *supra*, at 790.

11:00 as "the most segregated hour of the week"—and, sadly, it still is. Although the Southern Baptist Convention in 1995 adopted a resolution apologizing and asking forgiveness for its past support of racism,[41] the fact remains that the SBC was founded before the Civil War precisely to enable the racist southern churches to escape the interference of northern Baptists who were pressing for an end to slavery.

As a de jure matter, religious entities, in most of their operations, are nowadays subject to the prohibitions of Title VII, which forbids employment discrimination on the basis of, among other grounds, race and sex.[42] Title VII exempts religious employers from its prohibition on discrimination on the ground of religion, an exemption that the courts have sustained against constitutional challenge.[43] But outside of the central operations of the faith—the selection of clergy, for example—the courts (and the Equal Employment Opportunity Commission) have been reasonably consistent in requiring religious organizations to meet the other requirements of Title VII.[44] There are bemusing exceptions, such as the federal court that, rather than ruling on a sex discrimination challenge to a hiring preference for Jesuits in the Marquette University theology department, dismissed the action on the ground that the plaintiff would not have been hired even had she been a man.[45] Why not? Because she was avowedly pro-choice and the Catholic Church is officially pro-life.

The exceptions matter, but in order to decide whether or when

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41. *See* Gustav Niebuhr, *Baptist Group Votes To Repent Stand on Slaves*, N.Y. TIMES, June 21, 1995, at A1.

42. *See* 42 U.S.C. § 2000e-1(a) (1994).

43. *See* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334-40 (1987).

44. *See, e.g.*, Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985) ("[E]mployment decisions [of religious organizations] may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions."); EEOC v. Pacific Press Publ'g Ass'n, 676 F.2d 1272 (9th Cir. 1982) (holding that a religious publishing house could not provide unequal pay to its female employees or terminate an employee for violating church doctrine, regardless of whether the actions were based on the employer's religious beliefs); McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972) (finding that the exemption does not allow religious employers to discriminate on the basis of sex, race, color, or national origin in furtherance of a sectarian hiring policy).

45. *See* Maguire v. Marquette Univ., 814 F.2d 1213, 1218 (7th Cir. 1987).

there should be any, we must first construct a theory. Our fourth principle—that the state's job is to get out of the way of believers and their faith communities—helps put us on the right path. Bear in mind that the question is not, quite, whether religious groups should be able to discriminate; or rather, that *is* the question, but the word "discriminate" does not carry the same meaning as it does in more objectionable contexts. A religion may discriminate in favor of its members in the same way that a family may do so: the law recognizes, in both cases, that a valuable institution may not survive if not permitted to define and nurture its own vision of community. A Religion that cannot call its own members to service (even to the exclusion of others) will shortly lose the virtues of religion. The value of religion to democracy, as I pointed out earlier and have argued in detail elsewhere, is defined by its differences, by its often subversive powers of dissent.[46] Religions that are pressed to create themselves in the image of the surrounding society will cease to offer to their adherents a different set of meanings from those authored by the state and thus will cease to be the communities of resistance against the state that they must, at their best, become. Pressure of this kind is the essence of totalitarianism.

All of this may seem a merely utilitarian justification for keeping the state's hands off; critics have derided it as no more than an argument that religions must be free because they are useful.[47] Under the fourth principle, however, the same result obtains—only more strongly. For now it does not matter whether the state understands the value of religions to its own democratic aspirations. In the state that begins with the proposition that the Creator-God exists and successfully derives the fourth principle, the need to leave the religions free to constitute their own communities without interference will be axiomatic, for it more or less restates that principle.

This does not mean that religious groups should be free to

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46. *See* CARTER, *supra* note 6, at 23-43, 124-35.

47. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1442 (1990) ("[Eighteenth-century] evangelicals found this very mode of argument objectionable, because it implied that religion was to be used as an instrument of statecraft, thus implicitly subordinating religion to the goal of 'political prosperity'.").

discriminate on any ground that they choose, but the state should, in interfering with their freedoms, tread warily. Even under the neutrality principle, the courts formerly understood this, often requiring that the government show a very strong interest—in some cases, the word "compelling" was used—in order to justify an interference with religious freedom.[48] Consequently, the courts analyzed religious freedom claims under the same balancing tests used in other areas of constitutional law.[49] The Court lately has abandoned the compelling interest standard in such cases,[50] a move the Congress has tried but (largely) failed to overrule with RFRA.[51]

If, however, we have religious freedom because God is real, and if the duty of the state in such matters is to get out of the way of believers as they struggle toward God, we would naturally conclude that the state can interfere with religious freedom only in the rarest of cases. The interesting question is what the correct standard then would be. In order to winkle it out, it is useful to begin with the one case that the religious claimant lost but that virtually every religious freedom supporter agrees was decided the right way: the Supreme Court's 1983 decision in *Bob Jones University v. United States*.[52]

In *Bob Jones*, a religious university was threatened with the loss of its tax-exempt status because of its racially discriminatory practices.[53] The university argued that because racial separation was a part of its religious belief, it was immune from state punishment. The Justices brushed this argument aside. In finding the federal government's interest in eradicating racial

48. *See* Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981); New Life Baptist Church Academy v. Town of E. Longmeadow, 885 F.2d 940, 944-46 (1st Cir. 1989).

49. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987) ("[I]nfringements [upon free exercise of religion] must be subjected to strict scrutiny . . . .").

50. *See* Employment Div. v. Smith, 494 U.S. 872, 882-90 (1990).

51. One of the purposes for which Congress enacted the Religious Freedom Restoration Act was "to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened." Religious Freedom Restoration Act of 1993 § 2, 42 U.S.C. § 2000bb(b)(1) (1994).

52. 461 U.S. 574 (1983).

53. Bob Jones University maintained a policy that prohibited interracial dating and marriage. *See id.* at 580-81.

discrimination to be superior to the religious university's claim of a free exercise right to engage in racial discrimination, the Supreme Court was nevertheless cautious, taking pains to set forth in some detail the nation's odious racial history. Analytically, the question was whether the interest in overcoming that history was compelling, which is, among available balancing tests, the highest standard to which the Justices ever hold a state action. The courts have lately retreated from endorsing the notion that overcoming our racist history is compelling (that is certainly one way to read *Hopwood v. Texas*[54]), but by the time the case was argued the university had few defenders. When the Court announced its judgment in *Bob Jones*, even the Reagan Administration was not heard to complain.

My mention of the Reagan Administration is not intended as an ad hominem. The 1980 Republican Party platform quite openly took the school's side against the Internal Revenue Service, the government body that was pursuing, in the words of the platform, a "vendetta."[55] Not long after taking office, the Reagan Administration announced its intention to change IRS policy and grant tax exemptions to racially discriminatory private schools.[56] But later on, under tremendous public pressure, the Administration reversed itself.[57] As we try to determine what should qualify as a compelling interest if we begin with the assumption that religious freedom exists because God is real, the fact of this public pressure may be the central fact of the case. The truly interesting question may be not precisely why the Justices found the interest in eradicating racial discrimination to be compelling—the Court never quite tells us

54. 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996). In *Hopwood*, the Fifth Circuit Court of Appeals struck down a law school's affirmative action program, finding that "a state does not have a compelling state interest in remedying the present effects of past *societal* discrimination." *Hopwood*, 78 F.3d at 949.

55. *See* Martin Schram & Charles R. Babcock, *Reagan Advisers Missed School Case Sensitivity*, WASH. POST, Jan. 17, 1982, at A1 (reporting that the 1980 Republican platform sought to eliminate the IRS policy of denying tax exemptions to independent segregated schools).

56. *See* Stuart Taylor, Jr., *U.S. Drops Rule on Tax Penalty for Racial Bias*, N.Y. TIMES, Jan. 9, 1982, at 1.

57. *See* Lee Lescaze, *Reagan Submits Bill Denying Tax Breaks to Segregated Schools*, WASH. POST, Jan. 19, 1982, at A1.

that—but rather why the public was so certain that the Justices were right.

After all, if we begin with the notion that we have religious freedom because the Creator-God exists, it is not obvious that the religions should even be subject to our most basic antidiscrimination laws. Might such regulations not interfere with the ability of a religious community to struggle toward God? In my own role as True Believer, I might scoff at the religious claim, certain that I understand the Divine Will better than Bob Jones University does, and that God commands racial equality, not racial division. But the third principle tells us that this argument is out of bounds. My passions tell me as an African American—and an American—that nobody should be exempt from laws on racial discrimination; my intellect offers reasons for this, and my common sense points out that any exemption will be used in our racially troubled nation as the pretext for much that is horrid. But here I must return to an earlier analogy, for the speculative side of my nature wonders why a church should be more regulated on this point than a family—and a family is not regulated at all. You may (as most of us do) host racially segregated parties; you may (and most of us do) choose close friends, loves, and spouses exclusively from within your own racial group; you may (as most of us do) attend religious services at a church or synagogue or temple that is, as the courts say in the school cases, racially identifiable. You or I or anyone may do all of these things and, because we value so highly the autonomy of the family, we do not punish it and, indeed, do not even think it odd.

But if we have religious freedom because God exists, I suspect that our certainty that we do not want our religious groups to be free to discriminate on this ground—race—over which so much blood has been spilled might represent a national *theological* judgment. Perhaps we are dressing up in the language of "compelling state interest" the shared conclusion that God—this real, extant, and transcendent Creator-God—does not in fact will racial prejudice. Perhaps we conclude that God wills racial equality. So we are unafraid to punish the churches that preach race hatred because we are, deep inside, certain that they are wrong: not just morally wrong, but theologically wrong. In other

words, this is the rare case, one of the very few and perhaps the only one, on which we as a nation have reached an enforceable consensus on the Will of God: we are sure that God wants equality. We are, in practice, True Believers. Small wonder, then, that we seem a little bit fanatical on the subject.

Now this, admittedly, is heady stuff. I take the argument in this direction not because I am certain it is the only explanation, but because the speculation helps us to understand why another line of cases is so terribly wrong and dangerous. I have in mind the cases on whether religious landlords who consider fornication an offense against God may discriminate against putative fornicators in renting their property.[58] Cases of this kind are surprisingly common, because many states have adopted laws that forbid discrimination in housing on the basis of marital status. Even though most of those laws originally were adopted in order to protect single people, they are being used with growing frequency by couples who wish to live together, as we used to say, without benefit of clergy.[59]

Now, let us agree, for the sake of argument, that it generally is wrong to discriminate against couples on the basis of marital status. On the other hand, in a nation facing a moral crisis sufficiently acute that each politician falls over the next to insist on the value of the traditional family, it is far from ridiculous, and certainly it is not invidious, to offer some forms of preferential treatment for married couples. In fact, nearly every state, including every state that bans discrimination on the basis of marital status, has some policies that grant to married couples

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58. *See, e.g.*, Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994) (per curiam), *cert. denied*, 115 S. Ct. 460 (1994); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996); Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994).

59. Let me pause to make clear that I am here speaking only of heterosexual couples. Discrimination in housing on the basis of sexual orientation has always struck me as a variety of simple sex discrimination, to wit, were one of these individuals the opposite sex, the landlord would be willing to rent. The fact that sexual orientation discrimination might be covered by an anti-sex-discrimination ordinance does not answer the question of whether the state's interest is sufficiently compelling to overcome a religious freedom defense. In my book *The Culture of Disbelief*, however, I offer a preliminary answer, employing a version of some of the tools discussed in this section of the paper. *See* CARTER, *supra* note 6, at 153-55.

benefits that are denied to everybody else.[60] Does this simply show a foolish inconsistency that need not long detain us? I think not: I think it shows that the states themselves do not believe that their interest in banning discrimination on the basis of marital status is compelling.

Justice Clarence Thomas raised this point in 1994 in his lonely dissent from the denial of certiorari in *Swanner v. Anchorage Equal Rights Commission.*[61] *Swanner* raised the very issue I have been discussing, and the Supreme Court of Alaska held that the state did indeed have a compelling interest to support its prohibition. As Justice Thomas pointed out, however, not only does Alaska itself discriminate on this supposedly forbidden ground, but no court has ever held discrimination on the subject of marital status to be subject to anything other than the "rational basis" test, the lowest level of equal protection scrutiny.

More important, to conclude that discrimination on the basis of marital status is as compelling as discrimination on the basis of race is to trivialize our nation's twin racial histories, one of oppression, the other of triumph—or, as I might prefer to say, one of national sin, the other of national redemption. The depredations of slavery and Jim Crow (and, in a different way, of the routing and imprisoning of the Indian nations) are unique historical events. We have, quite famously, not yet come to terms with the legacy of the history; the truth is, we have not yet come to terms with the history itself. We are a strange nation to celebrate with such fanfare the lives of the men who preserved slavery in the Constitution when much of the rest of the world was trying to abandon it, and our strange nation is full of peculiar states that celebrate the lives of the men who fought in armed struggle to protect the peculiar institution.

What is most intriguing about the marital status cases, however, is that the claimed compelling state interest lacks the enthusiastic popular endorsement of the kind that backs the anti—racial discrimination principle invoked in *Bob Jones.* There is no public clamor for us to fight against marital status

60. *See* David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 452-85 (1996).
61. 115 S. Ct. 460 (1994).

discrimination a national war of such moral significance that every entity, even the religions, must sometimes yield. If we have religious freedom because God exists, this might imply that we as a nation are not prepared to establish the supervening *theological* principle that sexual relations outside of marriage are a part of the Divine Plan.

True Believer, even if persuaded to accept our three (now four) principles, might not be troubled by the discovery of a connection between popular understanding of the Divine Will and the existence of a compelling interest. The reason is that True Believer might reasonably decide, in light of the fourth principle, that no merely secular state interest is *ever* sufficient to trump religious freedom: for the state to keep its hands off religion could mean that the state must *always* keep its hands off. The legal scholar Kathleen Sullivan has argued that the state must keep the peace among the religions,[62] and True Believer might be persuaded of this. More likely, however, he would conclude that peace is less important than the struggle toward God; or rather, that if peace is necessary in order to struggle toward God, it is necessary because that is the way that God wants it.

This, of course, is not only heady but dangerous stuff: any talk of a link between compelling state interests and popular understanding of the Divine sounds like what the neutrality principle calls an establishment of religion and what the proposition we have been investigating, religious freedom because God exists, would deem a violation of the third principle. By hypothesis, the state is not supposed to care what individuals believe that God wills; if a concern for popular theological opinion becomes the basis for the compelling state interest standard, surely the entire model collapses. But the argument is not that popular religious belief does or should form the *basis* for the judicial conclusion that a compelling interest exists; the argument is merely that popular religious belief may make the judicial conclusion (whatever its actual source) more acceptable to the public.

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62. *See* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 222 (1992).

V.

From this perspective, the notion that religious freedom exists because God is real may be better able than neutrality to explain the cases in which parents are punished for choosing religion-based rather than medicine-based care for their sick children. Take as an example *McKown v. Lundman*,[63] in which the Supreme Court early in 1996 denied certiorari on a petition raising a free exercise challenge to Minnesota's wrongful death award of $1.5 million to the biological father of eleven-year-old Ian Lundman, who died after his mother and step-father, both Christian Scientists, tried to use Christian Science healing techniques to heal his diabetes.

In a constitutional world governed by our principle that the state must stay out of the way of the struggle toward God, this result is at least reason to pause. Although *Lundman* was evidently the first case to award damages for faith healing, prosecutions of parents whose children die under similar circumstances are reasonably common.[64] Many of the cases involve Christian Scientists who do not accept the superiority of contemporary medicine to their faith-based care; and many others involve Jehovah's Witnesses, who do not accept blood transfusions because of the biblical prohibition on ingesting blood.[65] But official punishment is surely not the ideal response to the understandable and entirely justified effort to protect the life of the sick child. Usually, the states try to prevent the death of the

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63. 530 N.W.2d 807 (Minn. Ct. App. 1995), *cert. denied*, 116 S. Ct. 828 (1996).

64. *See, e.g.*, Walker v. Superior Court, 763 P.2d 852, 869-73 (Cal. 1988) (holding that conviction of a Christian Scientist mother for failing to provide medical treatment for her child did not violate the mother's freedom of religion); Hermanson v. State, 570 So. 2d 322, 337 (Fla. Dist. Ct. App. 1990) (affirming the conviction of Christian Scientist parents who failed to provide medical treatment for their child), *quashed by* 604 So. 2d 775 (1995); Commonwealth v. Twitchell, 617 N.E.2d 609 (Mass. 1993) (reversing the involuntary manslaughter convictions of Christian Scientist parents who relied on spiritual treatment of their child's bowel condition).

65. *See, e.g., In re* McCauley, 565 N.E.2d 411, 414 (Mass. 1991) (affirming the authorization of a child's blood transfusion, despite the protests of her Jehovah's Witness parents); State v. Perricore, 181 A.2d 751, 759 (N.J. 1962) (requiring a blood transfusion for the child of Jehovah's Witnesses, despite the religious objection of the parents); O.G. v. Baum, 790 S.W.2d 839, 841 (Tex. Ct. App. 1990) (denying relief to Jehovah's Witnesses whose child was appointed a temporary managing conservator with the authority to consent to blood transfusions for the child).

child rather than punish it later. The typical case involves a petition from a hospital for the temporary dissolution of the parents' rights over the child and the appointment of a guardian ad litem to make the decision on the surgery or transfusion. After the decision is made and the procedure has been performed, the parents' rights are restored.

In other writing, I have defended this approach as a sensible and probably inevitable compromise.[66] Like others, I have insisted that the state's interest in preserving the life of the child is sufficiently compelling to outweigh the very strong parental interest in controlling the religious upbringing of the child—a parental interest, as the Supreme Court has wisely noted, that is of constitutional dimension.[67] At the same time, I have cautioned that the approach is anything but neutral: the courts that override the parents' religious objections may insist that they are taking no position on the merits of the religious claim, but that assertion cannot be correct.[68] To understand why, consider the case of the Jehovah's Witnesses, many of whom believe that even an unwilling violation of the rule against ingesting blood will lead to the loss of salvation.[69] When the state nevertheless insists that the sick child must receive the transfusion, its action is anything but neutral, for if the parent is correct, the state is making an insupportable decision, stealing the child's chance for eternal life. Consequently, the only fair interpretation of the state's choice is that it believes the parents' religious claim to be false.

In a world in which the guiding principle is neutrality, the state is not permitted to reach a decision on such grounds, which leaves us in a bit of a paradox.[70] But in our more specu-

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66. *See* CARTER, *supra* note 6, at 219-20.

67. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

68. *See* CARTER, *supra* note 6, at 220-21.

69. *See id.* at 219; *supra* note 65 and accompanying text; *see also In re* Long Island Jewish Med. Ctr., 557 N.Y.S.2d 239, 240 n.1 (Sup. Ct. 1990) (citing *Genesis* 9:3-4; *Leviticus* 3:17, 17:10-14; *Deuteronomy* 12:23; and *Acts* 15:29).

70. Some supporters of parental freedom to follow their religions and to choose alternative medical care for their children point out that we allow parents to make many choices that expose their children to very high risks: smoking while pregnant, keeping loaded guns in the house, driving at break-neck speeds in horrendous weather conditions, and, in a recent tragedy, trying to pilot a plane across the country while still too small to reach the pedals or see out the windscreen unaided. Only

lative world, the world in which the guiding principle is that religious freedom exists because God does, the paradox may vanish—and for the same reason that it disappears in the race discrimination cases. In every case involving efforts to force blood transfusions or surgery for minor children, the courts have ruled in favor of the hospital and against the religious objections of the parents.[71] In many of these cases, the courts have found that the state's interest in the life of the child is compelling.[72] This would seem to interfere with the parental judgment, and yet there is no clamor to have these cases overturned. Even the proposed Parental Rights and Responsibility Act,[73] which would require that the state show a compelling interest whenever it tries to interfere with the parents' judgment about the religious upbringing of children, excludes from its general rule for parental decisions that would affect the children's health.[74] Why the evident lack of concern?

The answer, I would suggest, is surely that a majority of Americans simply does not believe the heart of the parents' religious claim: in particular, most Americans do not believe that God will deny the child eternal salvation if the child hap-

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when the parents make their choice for religious reasons, the argument runs, do we suddenly see the need for legal intervention. But this clever argument ultimately is unconvincing, because the basic analogy does not work. None of the examples include the elements of immediacy and relative medical certainty involved in the surgery and blood transfusion cases: we generally know that the child is sick now, not that the child is at risk for a future illness, and we know that doctors believe there to be a significant chance of cure with appropriate treatment. The analogies work quite well, however, for children who are gravely ill with conditions that doctors believe they can treat but doubt they can cure, for the element of medical certainty is no longer present.

71. *Cf.* CARTER, *supra* note 6, at 219-20.

72.

> The child is the citizen of the State. While he 'belongs' to his parents, he belongs also to his State. Their rights in him entail many duties. Likewise the fact the child belongs to the State imposes upon the State many duties. Chief among them is the duty to protect *his right to live and to grow up with a sound mind in a sound body*, and to brook no interference with that right by any person or organization.

In re Sampson, 317 N.Y.S.2d 641, 652 (Fam. Ct. 1970) (quoting *In re* Clark, 185 N.E.2d 128, 132 (C.P. Lucas County 1962)); *see supra* note 65 and accompanying text.

73. S. 984, 104th Cong. (1995); H.R. 1946, 104th Cong. (1995).

74. S. 984 § 3(4)(B); H.R. 1946 § 3(4)(B).

pens to receive a blood transfusion. True, four out of five Americans believe that prayer can heal diseases, and, in general, Americans assert strong positions in favor of the right of parents to control (I also like the Court's word, "direct"[75]) the religious upbringing of their children. But the public draws the line when a child's (temporal) life is in danger. Yet the ready acceptance of the judicial determination that the life of the child is too precious to risk for the sake of the parents' religious freedom need not be viewed as paradoxical; it may rest instead on a broadly shared theological understanding, a bit of truth gleaned from the struggle toward God.

The reader will recall that we saw the same process at work in the race cases. What this suggests is that, even if religious freedom exists because God exists (principle 1) and if we ultimately conclude that the state is disabled from taking sides in the struggle toward God (principles 3 and 4), there is a single reservation: when the public concludes, by strong and clear consensus, that God's Will on an issue is fully understood, it will allow interference with religious freedom, breaching the wall that would otherwise be virtually impregnable. If this speculation is correct, then we can say that the public, believing overwhelmingly in a knowable Creator-God, has concluded that it knows at least two aspects of the Creator-God's will: racial discrimination is an absolute wrong, and the lives of small children are absolutely precious. For the sake of those absolutes, we will thus countenance state intervention that we would otherwise condemn.

VI.

Now we begin to understand why there is no public clamor to overturn such cases as *Lyng*. The problem is not simply that the religions affected are minority religions about which few people care; the problem is that the religions affected are unusual religions in which few people believe. This could explain why the remarkable coalition of religious groups that was able to bring about passage of the Religious Freedom Restoration Act in

75. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

1993[76] has shown virtually no interest in the Native American Cultural Protection and Free Exercise of Religion Act,[77] which would explicitly protect a variety of Native American religious traditions that are threatened by the indifference, not the hostility, of regulators.

To its credit, the Supreme Court has made clear that it will not countenance official hostility, even toward religions that are unfamiliar or widely disbelieved. So, for example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[78] the Justices unanimously struck down a city animal rights ordinance that made exceptions, either as written or as applied, for virtually all killing of animals except the killing done by adherents of the Santería religious tradition. This conclusion is obviously correct under either the neutrality principle or the vision I have been discussing here. More important—although there are no polling data of which I am aware—I suspect that the distinction it draws is one that most Americans could readily accept. The state may not single out a religious group for special persecution, even in the name of protecting animal rights, but this says nothing about the enforceability of animal rights ordinances that affect Santería by inadvertence rather than design. Indeed, although I think the question a difficult one, the courts generally have sustained the operation of such ordinances against religious freedom challenges, and most members of the public probably would find this acceptable.

But finding a regulation acceptable is a very far cry from believing that the regulation is expressive of Divine Will. So even if, as I have suggested, a majority of Americans would agree that God wills racial equality, and are prepared to be a little bit fanatical on the point, I would be surprised if a majority agreed with the proposition that God wills that animals not be sacrificed—not least because the Bible is full of counter-examples.[79] Now let us suppose that a court, following the letter of the Religious Freedom Restoration Act, demands a compelling

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76. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

77. S. 2269, 103d Cong. (1994).

78. 508 U.S. 520 (1993).

79. *See, e.g.*, *Genesis* 22:13, 31:54; *Leviticus* 1:2-17, 2:1-16, 4:3, 24-26; *Numbers* 6:14; *Joshua* 8:31; *Isaiah* 43:23; *Jeremiah* 17:26 (King James).

interest before it will allow application of a perfectly neutral animal rights ordinance against Santería. Animal sacrifice, after all, is central to the Santería theology, which teaches that the blood of animals is needed to nourish the *orishas*, the personal gods that influence human destiny.[80] Suppose further that the court were to decide (as I believe it should) that no compelling interest existed, and that therefore the *santeros* were free to sacrifice animals as part of their worship. The public might be irritated, but I would be surprised were there a strong general clamor (as opposed to a clamor among animal rights activists) for overturning the decision. Why? Because the animal sacrifice question would lack the religious fervor that usually accompanies demands for state action that treats religious beliefs as effectively wrong.

Thus it is possible (within the framework of our speculation) to advance the following hypothesis: the public will go along with state action limiting the religious freedom of groups that it happens to think wrong but will militate for action only against groups that it thinks are actively pursuing the opposite of what God wants. So, on such cases as *Lyng* and *Lukumi Babalu Aye*, a majority of Americans is prepared, although perhaps with some groaning, to countenance any result. But on a case like *Bob Jones*, the public will accept only one answer: the answer that God wills. This may not be good constitutional law, and a nation like ours, dedicated to religious pluralism, should shudder at the notion that we choose which religions to repress according to what God commands. Even True Believer might pause, if only for the transitional reason discussed at the outset, that his religion could be the next to go.

But I am here describing what I think *might be* rather than what I think *should be*. And if the description is unsettling, that suggests that Stanley Fish's challenge turns out to be harder to meet than I proposed. It may be that no matter how hard True Believer tries to follow his rational conclusion that principle 4 is correct, that the state furthers religious freedom only by staying out of the way, he will finally yield anyway to the splendid temptation to coerce others to do the right, to remake the secu-

80. *See Lukumi Babalu Aye*, 508 U.S. at 525.

lar world in accordance with the Truth, and, if necessary, to use force to get there. Perhaps he will be influenced by the famous epigram of Moses Maimonides—"Everything that you do, do for the sake of God"[81]—and will thus decide, like so many True Believers before him, that "everything" includes the coercion of Nonbelievers, if not in matters of doctrine, at least in matters of morality.

I would be the last person to argue that religion has no place in politics: religious freedom is not freedom if it stops when True Believers open their mouths in the public square, and America would not be America had True Believers ever behaved that way. Fortunately, they have not. The most obvious example is that we would have been denied the openly religious activism of the Reverend Martin Luther King, Jr., leader of the Southern Christian Leadership Conference. It has become a commonplace in our revisionist times to insist that Dr. King's public ministry was actually something else: for example, a secular political crusade dressed up with the trappings of religion. This description strikes me as historically inaccurate, as well as insulting to the many religious and nonreligious people who were so moved by Dr. King's appeals to the Word of God that they took up the cross and followed him, often at significant personal cost. Dr. King's public work was the same as his private work: preaching the Word of God and making his public life a witness to God's Will, in the hope and the faith that others would be inspired to follow.

It is useful here, however, to remind ourselves of human frailty. Dr. King was not perfect; he was a man, he had flaws; but that is the point of the story, and, in a sense, the power of his example. Since Aristotle, the Western tradition has accepted that God is perfect. But man has always been considered at best perfectible—and, for Christians, not even that. Human beings are mortal; in the Christian vision, human beings are *fallen*. The significance of this point is that we cannot reasonably expect anybody to live the life of perfect obedience to God, because to do so would be *inhuman*. What we can reasonably expect is a life of striving, falling, and striving again. This understanding frees

81. ABRAHAM JOSHUA HESCHEL, MAIMONIDES 203 (Joachim Neugroschel trans., Doubleday 1991) (1982) (originally published in German in 1935).

human beings of what would otherwise be the unbearable guilt of knowing how our own imperfection falls short of God's perfection.[82] For democratic citizens, it frees us from what otherwise would be the unbearable contradiction of fearing to preach God's word to others because of an inability to live it perfectly ourselves. What True Believers believe, they should be willing to proclaim.

At the same time, I continue to fear that too many True Believers fail to heed the lessons that Kierkegaard correctly drew from the descent of Christianity into Christendom: the threat that emerges from too much religious activism in politics is not a threat to democracy or to politics, but a threat to religion itself. Roger Williams was right: the wall of separation is needed to protect the garden, not the wilderness. Some of today's loudest critics of the way in which the judiciary has sadly misused that wall would do well to ponder the power of Williams's insight.

VII.

All of this, let me remind the reader, is in the nature of a speculation, a preliminary investigation of how religious freedom might look were we to begin with a believing rather than a skeptical premise. Naturally, I understand that constitutional law as it stands is much to the contrary: skepticism, even when it manifests itself as disbelief or hostility, is said to be the required government stance. I do not argue that a believing stance would be a better one, or that we would be better off as a theocracy; as I hope my commitment to principles 3 and 4 makes clear, I would rather keep government out of religious life. It is also not my purpose here to offer a full-blown theory of religious freedom under the Constitution. Nevertheless, for me as a Christian, it is important to be able to answer the challenge that Fish and others have raised, to decide whether True Believers can believe in the liberal state. That, of course, is a large project, too large for this paper. For the moment, it is sufficient to address the question of whether the religiously

82. *See* KARL RAHNER, FOUNDATIONS OF CHRISTIAN FAITH 90-115 (William V. Dych trans., Seabury Press 1978) (1976).

devout (and religiously confident) also can be zealous and sincere advocates of genuine and permanent religious freedom. And although I have obviously left some major theoretical and political battlegrounds for later exploration—for example, the content of the curriculum of the public school day—my preliminary answer to the question is a resounding *Yes*.