

William & Mary Law Review

Volume 42 (2000-2001)
Issue 3 *Institute of Bill of Rights Symposium:
Religion in the Public Square*

Article 3

March 2001

Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause

Michael J. Perry

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Religion Law Commons](#)

Repository Citation

Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 Wm. & Mary L. Rev. 663 (2001), <https://scholarship.law.wm.edu/wmlr/vol42/iss3/3>

Copyright c 2001 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmlr>

WHY POLITICAL RELIANCE ON RELIGIOUSLY GROUNDED MORALITY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

MICHAEL J. PERRY*

I say, sir, that the purity of the Christian church, the purity of our holy religion, and the preservation of our free institutions, require that Church and State shall be separated; that the preacher on the Sabbath day shall find his text in the Bible; shall preach "Jesus Christ and him crucified;" shall preach from the Holy Scriptures, and not attempt to control the political organizations and political parties of the day.

—Senator Stephen A. Douglas¹

* University Distinguished Chair in Law, Wake Forest University. © 2001, Michael J. Perry. This Essay is my contribution to the conference on "Religion in the Public Square" at William & Mary Law School on March 24, 2000. I was honored to present a version of this Essay in three other venues: on March 1, 2000, as the Calvin W. Corman Lecture at Rutgers University (Camden) School of Law; on March 2, 2000, as a lecture at Lafayette College (Easton, Pennsylvania); and on November 3, 2000, as an address to the conference on "Law, Religion, and the Public Good" at St. John's University School of Law. I am grateful to the audiences in all four venues for vigorous and clarifying discussion. I am also grateful, for helpful comments, to Tom Berg, Dan Conkle, Perry Dane, Chris Eberle, Stephen Gardbaum, Andy Koppelman, Doug Laycock, Michael McConnell, and Steve Smith.

This Essay is one of a series of five essays on religion in politics. Two other essays in the series will be published in a symposium issue of the *Wake Forest Law Review*. See Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Is Not Illegitimate in a Liberal Democracy*, 36 WAKE FOREST L. REV. (forthcoming May 2001) [hereinafter Perry, *Political Reliance*]; Michael J. Perry, *Christians, the Bible, and Same-Sex Unions: An Argument for Political Self-Restraint*, 36 WAKE FOREST L. REV. (forthcoming May 2001). Another of the essays—a lecture I am due to give at University of Dayton School of Law on February 8, 2001—will be published in the *University of Dayton Law Review*. See Michael J. Perry, *Catholics, the Magisterium, and Moral Controversy: An Argument for Independent Judgment*, 26 U. DAYTON L. REV. (forthcoming 2001). The final of the five essays—my McElroy Lecture at University of Detroit Mercy School of Law on April 5, 2001—will be published in the *University of Detroit Mercy Law Review*. See Michael J. Perry, *Religion, Politics, and Abortion*, U. DET. MERCY L. REV. (forthcoming 2001).

1. CONG. GLOBE, 33d Cong., 1st Sess. app. at 656 (1854). Thanks to Doug Laycock for calling this passage to my attention.

Imagine a legislator who must decide whether to vote to outlaw, or otherwise disfavor, particular conduct—abortion, for example, or same-sex unions. She wonders what weight, if any, she should put on her religiously grounded belief that the conduct is immoral; in particular, she worries that it might not be appropriate for her to disfavor the conduct on the basis of her religiously grounded moral belief.² In another essay in the series of which this Essay is a part,³ I argue that the morality of liberal democracy does not counsel her against disfavoring the conduct on the basis of religiously grounded moral belief.⁴ In this Essay, I pursue a different but, for us citizens

2. Let me clarify the idea of a moral belief—for example, the belief that homosexual sexual conduct is always immoral—that is “religiously” grounded.

First: For purposes of my argument in this Essay, a moral belief is “religiously” grounded, in whole or in part, if it is rooted, in whole or in part, in one or more of three ideas:

- The idea of a God-inspired text (or texts), like the Bible, believed to teach moral truth—if not all moral truth, at least all the moral truth one needs to be saved.
- The idea of a God-anointed figure (or figures), like the Pope, believed to teach moral truth.

- The idea of a God-created and -maintained order—including, in particular, a God-fashioned human nature—believed to be a fundamental criterion of moral truth.

Second: The religious grounding of a moral belief is person-relative: A moral belief that is religiously grounded for one person may not be for another. Two persons may both believe that homosexual sexual conduct is always immoral but each for a different reason: one, solely for a religious reason, the other, solely for a nonreligious (secular) reason. In the strong sense in which I mean it here, a person’s moral belief is religiously “grounded” if and only if she accepts the moral belief because she accepts one or more religious premises that support the belief—for example, the premise that the Bible teaches that the conduct is immoral—and if she would not accept the belief if she did not accept the supporting religious premise or premises. Thus, a person’s moral belief is not religiously grounded, in this strong sense, if she would accept the belief even if she did not accept any supporting religious premise—that is, if she would accept it solely because she accepts one or more nonreligious (secular) premises that support the belief. Basing a political choice on a moral belief that is religiously grounded, in the sense just indicated, poses in their most difficult and urgent form the various questions about religion in politics addressed in the series of essays of which this Essay is a part. See sources cited *supra* note *. Assume that, as I argue in another essay in the series, basing a political choice on a religiously grounded moral belief is not problematic according to the morality of liberal democracy. See Perry, *Political Reliance*, *supra* note *. It follows, then, a fortiori, that it is not problematic for a person to base a political choice on a moral belief that, for her, is religiously grounded in a weaker sense: a moral belief that, though she accepts it because she accepts one or more religious premises that support it, she would accept even if she did not accept any supporting religious premise.

3. See sources cited *supra* note *.

4. See Perry, *Political Reliance*, *supra* note *.

In the strong sense in which I mean it here, to make a political choice “on the basis of” a belief—to base the choice on the belief—is to make a political choice that one would not make in the absence of the belief. (To make a political choice partly, not solely, “on the basis of” a

of the United States, complementary inquiry: Does the United States's constitutional morality of religious freedom—in particular, the requirement that government not “establish” religion—forbid government to disfavor conduct on the basis of a religiously grounded belief that the conduct is immoral? That the morality of liberal democracy does not counsel a legislator or other policymaker against disfavoring conduct on the basis of religiously grounded moral belief does not entail that the nonestablishment norm (as I prefer to call it) permits government to disfavor conduct on the basis of religiously grounded moral belief. As I have explained elsewhere, the nonestablishment norm that is part of American constitutional law is, in some respects, more restrictive than the morality of liberal democracy; in some respects, the limitations placed on government by the nonestablishment norm are greater than, they go beyond, the limitations placed on government by the morality of liberal democracy.⁵

The First Amendment to the Constitution of the United States famously insists that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Yet, according to the authoritative case

belief is still to make a political choice that one would not make in the absence of the belief.) To rely on a belief in making a political choice is not necessarily to base the choice on the belief: One may be relying on the belief as principal or merely as additional support for a choice that one would make on the basis of some other ground, even in the absence of the belief. The claim that one may not base a political choice on a belief of a certain kind—for example, a religiously grounded belief—is therefore weaker, in the sense of less restrictive, than the claim that one may not rely on the belief at all, that one may not put any weight whatsoever on the belief, in making a political choice. If the weaker (less restrictive) claim cannot be sustained, then a fortiori the stronger (more restrictive) claim cannot be sustained either. If, as I conclude in the essay cited at the beginning of this note, the weaker claim cannot be sustained that, according to the morality of liberal democracy, one may not make a political choice disfavoring conduct on the basis of a religiously grounded belief that the conduct is immoral, it is unnecessary to focus on the stronger claim that in making the choice one may not rely on the belief at all. And if, as I conclude in this Essay, the weaker claim cannot be sustained that, under the nonestablishment norm, government may not disfavor conduct on the basis of a religiously grounded belief that the conduct is immoral, it is unnecessary to focus on the stronger nonestablishment claim that in disfavoring the conduct government may not rely on the belief at all.

5. See Michael J. Perry, *Freedom of Religion in the United States: Fin de Siècle Sketches*, 75 IND. L.J. 295, 327-29 (2000) [hereinafter, Perry, *Freedom of Religion*].

law—law that is constitutional bedrock in the United States⁶—it is not just “Congress” but all three branches of the national government that may not prohibit the free exercise of religion, abridge the freedom of speech, etc. Moreover, it is not just the (whole) national government but the government of every state that may not do what the First Amendment forbids. I have suggested elsewhere that there is a path from the text of the First Amendment, which speaks just of Congress, to the authoritative case law.⁷ But even if there were no such path, it would nonetheless be constitutional bedrock in the United States that neither the national government nor state government may either prohibit the free exercise of religion or establish religion (or abridge “the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”).⁸ For Americans at the beginning of the twenty-first

6. On the idea of constitutional “bedrock,” see MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* 20-23 (1999).

7. See MICHAEL J. PERRY, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES* 10-12 (1997). On the controversial question whether the Fourteenth Amendment was meant to make the First Amendment’s “free exercise” and “nonestablishment” norms applicable to the states, see Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994), and Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995). Lash argues that the Fourteenth Amendment was meant to make applicable to the states both a broad free exercise norm and a nonestablishment norm. For a recent instance of the argument that the Fourteenth Amendment was not meant to make the First Amendment’s nonestablishment norm applicable to the states, see Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 24 OHIO N.U. L. REV. 1 (1998). For the argument that the Fourteenth Amendment was not meant to make any First Amendment norm applicable to the states, see Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539 (1995).

8. See Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 690 (1992) (“The government may not ‘establish’ religion and it may not ‘prohibit’ religion.”). McConnell explains, in a footnote attached to the word “establish,” that:

The text [of the First Amendment] states the “Congress” may make no law “respecting an establishment” of religion, which meant that Congress could neither establish a national church nor interfere with the establishment of state churches as they then existed in the various states. After the last disestablishment in 1833 and the incorporation of the First Amendment against the states through the Fourteenth Amendment, this “federalism” aspect of the Amendment has lost its significance, and the Clause can be read as forbidding the government to establish religion.

century, the serious practical question is no longer whether the "free exercise" and "nonestablishment" norms apply to the whole of American government, including state government. They *do* so apply. And there is no going back. The sovereignty of the free exercise and nonestablishment norms over every branch and level of American government—in particular, their sovereignty over state government as well as the national government—is now, as I said, constitutional bedrock in the United States. For Americans today, the serious practical inquiry is what it means to say that government (state as well as national) may neither prohibit the free exercise of religion nor establish religion. I have addressed elsewhere, at length, what it means to say that government may not prohibit the free exercise of religion.⁹ It is not the free exercise norm that bears on the problem we are now addressing, however, but the other constituent of the American constitutional law of religious freedom: the nonestablishment norm. In the United States, what does it mean to say that government may not establish religion? What does the nonestablishment norm forbid government to do?

The idea of an "established" church is a familiar one. For Americans, the best known example is the Church of England, which, from before the time of the American founding to the present, has been the established church in England.¹⁰ (Though, of course, the Church of England was much more established in the past than it is today.¹¹) In the United States, unlike in England,

Id. at 690 n.19.

9. See Perry, *Freedom of Religion*, *supra* note 5, at 297-302.

10. Cf. Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: the Document and the Doctrine*, 114 HARV. L. REV. 26, 119 (2000) ("Let us recall the world the Founders aimed to repudiate, a world where a powerful church hierarchy was anointed as the official government religion, where clerics *ex officio* held offices in the government, and where members of other religions were often barred from holding government posts.").

11. What is the present reality? Professor Saunders observes:

The special status of the Church of England manifests through legal links with the British crown. Under legislation, the reigning queen or king is "supreme governor" of the church and swears a coronation oath to maintain it. As such, the monarch may not be a Catholic, or marry a Catholic, and must declare on accession to the throne that he or she is a Protestant.

This is surprising enough in a western liberal democracy at the end of the twentieth century. But there is more. The monarch also appoints the archbishops and other leading church dignitaries. Twenty-six of these "Lords Spiritual" sit in the upper house of the legislature, the House of Lords. The

there may be no established religion: The nonestablishment norm forbids government to enact any law or pursue any policy that treats one or more churches as the official church or churches of the political community; government may not bestow legal favor or privilege on one or more churches—that is, one or more churches *as such*—in relation to one or more other churches or to no church at all. More precisely: *Government may not take any action that favors one or more churches in relation to one or more other churches, or to no church at all, on the basis of the view that the favored church(es) is, as a church—as a community of faith—better along one or another dimension of value (truer, for example, or more efficacious spiritually, or more authentically American).* The nonestablishment norm deprives government of jurisdiction to make judgments about which church(es), if any, is, as such, better than another church.

British Parliament can legislate for the church and prescribe modes of worship, doctrine and discipline. And the church has delegated legislative authority in relation to church affairs. Measures initiated by the church may be accepted or rejected, but not amended, by the Parliament and override earlier inconsistent law.

Cheryl Saunders, *Comment: Religion and the State*, 21 CARDOZO L. REV. 1295, 1295 (2000). Professor Saunders then states:

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

Id. at 1295-96. Clearly, and happily, that England has established a church does not mean everything it once meant.

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

BRIAN BARRY, *A TREATISE ON SOCIAL JUSTICE VOLUME II: JUSTICE AS IMPARTIALITY* 165 n.c (Oxford Political Theory, 1995).

The norm requires government to be agnostic about which church—which community of faith—is better; government must act without regard to whether any church is in fact better than another. In particular, government may not privilege, in law or policy, membership in one or more churches—in the Fifth Avenue Baptist Church, for example, or in the Roman Catholic Church, or in the Christian church generally;¹² nor may it privilege a worship practice—a prayer, liturgical rite, or religious observance—of one or more churches.¹³

From 1947, when the Supreme Court first applied the nonestablishment norm to the states,¹⁴ to the present, the justices of the Court have been divided about what it means to say that government may not establish religion.¹⁵ The division among the present justices is as great as it has ever been.¹⁶ This state of affairs partly explains why I am not interested in ferreting out the

12. Consider this, as an example of a position that privileges the Catholic Church generally:

The revelation of Christ is "definitive and complete", Pope John Paul affirmed to the Congregation for the Doctrine of the Faith, on 28 January. He repeated the phrase twice in an address which went on to say that non-Christians live in "a deficient situation, compared to those who have the fullness of salvific means in the Church".

Other Faiths are Deficient, Pope Says, TABLET (London), Feb. 5, 2000, at 157. The harsh doctrine that there is no salvation outside the Church has been revised, however: "[Pope John Paul II] recognized, following the Second Vatican Council, that non-Christians can reach eternal life if they seek God with a sincere heart. But in that 'sincere search' they are in fact 'ordered' towards Christ and his Church." *Id.* (citation omitted).

13. Cf. Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 19 U.C. DAVIS L. REV. 793, 812 (1996) (arguing that "[a]t the core of the Establishment Clause should be the principle that government cannot engage in a religious observance or compel or persuade citizens to do so").

What the nonestablishment norm forbids is one question. Another, and different, inquiry arises when we have answered the question what the nonestablishment norm forbids: Is it a good thing that the nonestablishment norm is part of our constitutional law, or is it a bad thing? I have argued elsewhere that it is a good thing. See Perry, *Freedom of Religion*, *supra* note 5, at 326-32. Most Americans believe that it is a good thing. But there is, among Americans, not just one answer to the question why it is a good thing, and not every answer will appeal to every person. For example, although some secular answers may appeal to some religious believers, religiously grounded answers will not appeal to nonbelievers.

14. See *Everson v. Board of Education*, 330 U.S. 1, 8 (1947).

15. Akhil Amar has recently referred to "the many outlandish (and contradictory) things that have been said about [the nonestablishment norm] in the *United States Reports*." Amar, *supra* note 10, at 119.

16. See, e.g., *Mitchell v. Helms*, 120 S. Ct. 2530 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

Supreme Court's answer to the question what the nonestablishment norm forbids government to do: There is no such animal. But even if there were such an animal, my principal concern here would not be the Court's answer. The preceding paragraph is meant to state, not the Court's answer, but the best answer.

Similarly, the paragraphs that follow are meant to present the best answer to the question of whether political reliance on religiously grounded morality violates the nonestablishment norm, not to predict the answer the Court would give. But, as it happens, there is no reason to doubt that the present Supreme Court—a majority of it, at least—would give what I defend in this Essay as the best answer, though, for reasons I give below, it is difficult to imagine a case that would present the serious version of the question: May government ban or otherwise conduct on the basis of a religiously grounded belief that the conduct is immoral *when the belief lacks plausible, independent secular grounding*? I explain below why this is the serious version of the question.

I have discussed elsewhere various problems—various conflicts—that have arisen under the nonestablishment norm, including prayer in public schools and government financial aid to religiously affiliated schools and other institutions.¹⁷ Here I want to address this nonestablishment problem: Does the nonestablishment norm forbid legislators or other policymakers, in voting to ban or otherwise disfavor conduct, like abortion or same-sex marriage, to act on the basis of their religiously grounded belief that the conduct is immoral?¹⁸ It does not. As I said, the nonestablishment norm forbids government to privilege one or more churches. It does not forbid legislators (or other policymakers), even when they happen to constitute a legislative majority, to make a political choice disfavoring conduct on the basis of a religiously grounded belief that the conduct is immoral; that is, it does not forbid them to base the political choice on a moral belief just in virtue of the fact that, for them, that belief is religiously grounded.

Now, one may want to insist that the nonestablishment norm forbids government not just to privilege, in law or policy, one or

17. See Perry, *Freedom of Religion*, *supra* note 5, at 316-26.

18. Again, to act "on the basis of" a belief is to take action that one would not have taken in the absence of the belief. See *supra* note 4.

more churches, but also to take action based on religiously grounded belief, including any religiously grounded moral belief. But does it? As I said earlier, it is constitutional bedrock for us Americans that government may not establish religion (or prohibit the free exercise thereof). Although the nonestablishment norm that is constitutional bedrock for us Americans forbids government to privilege one or more churches, it does not go so far as to forbid government to take action based on religiously grounded moral belief. No such rule is—no such rule has ever become—part of our constitutional bedrock.¹⁹ Nor does authoritative case law contain any such rule, as Justice Scalia has emphasized:

Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions. We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved. . . . [P]olitical activism by the religiously motivated is part of our heritage.²⁰

19. It bears mention that no generation of "We the People" ever established, as part of our constitutional law, any such rule. The first part of the constitutional text—the Preamble—declares:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. preamble. In American constitutional culture, few if any persons—even, remarkably, few if any constitutional theorists—disagree that the Constitution comprises at least some directives issued by—that is, some norms "ordained and established" by—"We the People." More to the point, few disagree that the Constitution comprises some such norms partly because the norms were "ordained and established" by "We the People." It is now a convention—an axiom—of American constitutional culture that "We the People of the United States" not only "do ordain and establish this Constitution for the United States of America" but *may* ordain and establish it. This is not to say that *only* "We the People" may establish norms as constitutional. Nor is it to deny that a norm never established as constitutional by "We the People" can become constitutional bedrock for us. For a discussion of all of this, see PERRY, *supra* note 6, at 15-23.

20. *Edwards v. Aguillard*, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting). "Today's religious activism may give us the Balanced Treatment Act [which according to the majority in *Aguillard* violated the nonestablishment norm], but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims." *Id.*

However, to say that the rule that government may not take action based on religiously grounded moral belief is neither part of our constitutional bedrock nor even contained in our authoritative case law is not to say that the rule should not become part of our constitutional law; it is not to say that the Supreme Court should not constitutionalize the rule. Perhaps the rule *should* become part of our constitutional law. But the rule that government may not take action based on religiously grounded moral belief should *not* become part of our constitutional law; the rule should *not* become part of the content of the nonestablishment norm.

Let us begin with the practical impediments to construing the nonestablishment norm to disable government—that is, to disable legislators and other policymakers—from outlawing or otherwise disfavoring conduct on the basis of a religiously grounded belief that the conduct is immoral. (Remember: The nonestablishment norm, however construed, is, like the free exercise norm, a constitutional norm and, as such, is supposed to be judicially enforceable and enforced.)

- For virtually every moral belief on which a legislature might be tempted to rely in disfavoring conduct—for example, the belief that abortion, or homosexual sexual conduct, is immoral—it is the case that although for many persons the belief is religiously grounded (grounded on a religious premise or premises), for many others the belief is not religiously grounded but, instead, is grounded wholly on secular (nonreligious) premises. How, then, is a court to decide whether a law banning abortion (for example) would have been enacted even in the absence of the religious premises? Indeed, a legislator may well be uncertain whether she would have supported the law in the absence of the religious premises.

- In the unlikely event that there is a confident answer to such a counterfactual inquiry, is it prudent to fashion a nonestablishment requirement the judicial enforcement of which could easily lead to this state of affairs: One state's antiabortion law is adjudged unconstitutional by a court because in the court's opinion the law probably would not have been enacted in the absence of the religious premises, but another state's virtually identical antiabortion law is adjudged constitutional by a different court because in the court's opinion the law probably would have been enacted in the absence of the religious premises?

• Moreover, is it prudent to fashion a nonestablishment requirement the likely principal yield of which is that legislatures would engage in strategic behavior (in particular, they would trumpet secular premises) aimed at making it appear that the antiabortion law would have been enacted even in the absence of the religious premises?

The judiciary could steer around such obstacles—it could opt for a “second best” solution—by construing the nonestablishment norm to require, not that the law in question would have been enacted even in the absence of religious premises, but only that the moral belief on which the legislature based the law, a moral belief that for many persons is religiously grounded, have an independent secular ground—that it be a moral belief that for *some* persons is *not* religiously grounded.²¹ But *that* requirement is so weak as to be inconsequential: What moral belief on which a legislature in the United States is likely to rely, in banning or otherwise disfavoring conduct, lacks a secular ground? Consider, for example, both the belief that abortion is immoral and the belief that same-sex unions are immoral: Neither belief lacks a secular ground. Although many who believe that abortion is immoral do so only on the basis of a religious premise (or premises), others do so on the basis of a secular premise as well as on the basis of a religious premise; indeed, some do so only on the basis of a secular premise. The same holds true for many who believe that same-sex unions are immoral. Indeed, some who affirm that abortion is immoral and some who affirm that same-sex unions are immoral are not religious believers.

One might respond by saying that the nonestablishment requirement (i.e., the “second best” requirement) should not be merely that the moral belief on which the legislature based the law have an independent secular ground, but that the independent

21. See, e.g., Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992) (“[T]he negative bar against establishment of religion implies the affirmative ‘establishment’ of a civil order for the resolution of public moral disputes. . . . [P]ublic moral disputes may be resolved only on grounds articulable in secular terms.”).

Recall that, as I explained earlier, the religious grounding vel non of a moral belief is person-relative: A moral belief that is religiously grounded for one person may not be for another. A belief that conduct is immoral is religiously “grounded” for a person if she would not believe that the conduct is immoral if she did not credit one or more religious premises that support the belief—for example, the premise that the Bible (understood as God-inspired and therefore authoritative) teaches that the conduct is immoral. See *supra* note 2.

secular ground be *plausible*. If the courts were to apply the plausibility requirement in a deferential fashion, as they arguably should,²² the requirement would be as inconsequential as the rationality (or "rational basis") requirement has typically been in the context of socioeconomic regulation.²³ Let us assume, then, for the sake of discussion, that if the courts were to apply the plausibility requirement at all, they would apply it in a non-deferential fashion. The problem with the requirement, applied nondeferentially, is evident: The secular bases of widely controversial moral beliefs are typically both contestable and contested. Authorizing (nondeferential) judicial inquiry into the "plausibility" of the secular basis of a widely controversial moral belief comes perilously close to inviting judges to substitute their moral judgment for the moral judgment of legislators and other policymakers. Such substitution is scarcely a desirable state of affairs in a democracy. This is not to deny that in a constitutional democracy a court should be prepared to substitute its *constitutional* judgment for the *constitutional* judgment of a legislature or other part of government. Nor is it to deny that a constitutional provision might rule out, as a basis of political choice, some moral judgments. For example, the Fourteenth Amendment to the United States Constitution rules out, as a basis of political choice, the judgment that it is immoral for a "white" person to marry a person who is not "white."²⁴ My point is simply that we should be wary about fashioning a constitutional requirement the

22. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). See generally *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993) (discussing the ideas about constitutional law presented in Thayer's article).

23. See, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993) ("Where there are 'plausible reasons' for Congress' action 'our inquiry is at an end.'" (quoting *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980))).

24. See *Loving v. Virginia*, 388 U.S. 1, 7-9 (1967); PERRY, *supra* note 6, at 88-97. Government may not disfavor conduct based on any racist belief—for example, the belief that interracial marriage is immoral. This is not because the belief is false, or believed to be false, but simply because government would be acting unconstitutionally; it would be making a judgment that it is not constitutionally free to make. Of course, that the Constitution forbids government to make a particular judgment—that interracial marriage is immoral, for example, or that the Pope is the Antichrist and Roman Catholicism is a false religion—may well be due, at least in part, to the fact that many believe the judgment to be false. Of course, it may also be due solely to the fact that many believe that whether or not the judgment is false, it is no part of the proper business of government to make the judgment.

judicial enforcement of which practically invites judges to substitute their moral judgments for those of legislators and other policy-makers.²⁵

There is, finally, another important reason to be wary about construing the nonestablishment norm to forbid government to disfavor conduct on the basis of a moral belief that, though religiously grounded, lacks a plausible, independent secular ground.²⁶ Unlike the other reasons, this reason for wariness is not about practical impediments or proper judicial role. It is about impartiality between religious grounds and secular grounds for moral belief; it is also about the equal citizenship of religious believers. In that sense, this reason is about first principles and is therefore the most fundamental reason of all to reject a construal of the nonestablishment norm according to which government may not disfavor conduct on the basis of a moral belief that, though religiously grounded, lacks plausible, independent secular grounding.

As I have explained elsewhere, there are three basic categories of moral inquiry: (1) Which human beings should we care about; (2) What is truly good for those we should care about, and what is bad for them; and (3) How should we resolve conflicts between goods—in particular, between what is good for some we should care about and what is good for others we should care about?²⁷ (Andrew

25. See generally JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999) (discussing the courts and legislatures as forums for resolving disagreements about justice and individual rights).

26. A fortiori, it is a reason to be wary about construing the nonestablishment norm even more radically to forbid government to disfavor conduct on the basis of a religiously grounded moral belief—that is, to disfavor conduct that government would not disfavor in the absence of a religious premise or premises.

27. When we are engaged in what we understand to be “moral” argument, most of us seem to be arguing about one or more of three basic questions. In my Gianella Lecture, in the course of commenting on the controversy among legal academics and contemporary moral philosophers as to what the subject matter of morality is, I sketched the three questions. See Michael J. Perry, *What Is “Morality” Anyway?*, 45 *VILL. L. REV.* 69, 98-105 (2000). It may be helpful to rehearse the questions, or sets of questions, here.

First, and most fundamentally, “moral” argument is often about this:

Which human beings ought we to care about—which ones, that is, besides those we already happen to care about, those we already happen to be emotionally or sentimentally concerned for or attached to: ourselves, our families, our tribes, and so on? Variations on the question: Which human beings ought to be the beneficiaries of our respect; the welfare, the well-being, of which human beings

ought to be the object of our concern? Which human beings are subjects of justice; which are inviolable (or "sacred")? All human beings, or only some?

There is a related question, but it is really just a variation on the question about which human beings are inviolable: Who is a human being; that is, what members of the species *Homo sapiens* are truly, fully human? Women? Nonwhites? Jews? Cast as the claim that only some individuals are human beings, the claim that only some human beings are inviolable has been, and remains, quite common. According to Nazi ideology, for example, the Jews were pseudohumans. See Johannes Morsink, *World War Two and the Universal Declaration*, 15 HUM. RTS. Q. 357, 363 (1993). There are countless other examples, past and present:

Serbian murderers and rapists do not think of themselves as violating human rights. For they are not doing these things to fellow human beings, but to *Muslims*. They are not being inhuman, but rather are discriminating between the true humans and the pseudohumans. They are making the same sort of distinction as the Crusaders made between humans and infidel dogs, and the Black Muslims make between humans and blue-eyed devils. [Thomas Jefferson] was able both to own slaves and to think it self-evident that all men were endowed by their creator with certain inalienable rights. He had convinced himself that the consciousness of Blacks, like that of animals, "participate[s] more of sensation than reflection." Like the Serbs, Mr. Jefferson did not think of himself as violating *human* rights.

The Serbs take themselves to be acting in the interests of true humanity by purifying the world of pseudohumanity.

Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993, at 111, 112, 125 (Stephen Shute & Susan Hurley eds., 1993).

Second, "moral" argument is often about this:

What is good—truly good—for those we should care about (including ourselves)? And what is bad for them? In particular: What are the requirements of one's well-being? (The "one" may be, at one extreme, a particular human being or, at the other, each and every human being.) What is friendly to (the achievement of) one's well-being, and what is hostile to it? What is conducive to or even constitutive of one's well-being, and what impedes or even destroys it?

Third, "moral" argument is often about priorities among conflicting goods:

Should I act in a way that is good for A (someone I should care about) in one respect but bad for her in another? Or in a way that is good for A but not good, or even bad, for B (someone else I should care about)? Or in a way that is good for me but not good, or even bad, for you? (That, according to the Gospel vision, I should love the Other does not mean that I should not love myself too. According to the Gospel vision, I should love the Other "as myself".) Or in a way that is good for my family (tribe, nation, etc.) but not good, or even bad, for your family?

See generally GARTH L. HALLETT, PRIORITIES AND CHRISTIAN ETHICS (New Studies in Christian Ethics, 1998) (discussing the classic moral dilemma whether to prefer the nearest—family—or the neediest—the starving). See also PETER UNGER, LIVING HIGH AND LETTING DIE: OUR ILLUSION OF INNOCENCE (1996) (exploring our behavior towards people in great need).

"Moral" argument is often and preeminently about one or more of these three large subjects: Which human beings ought we to care about? What is truly good for those we should care about—and what is bad for them? And how should we resolve conflicts among

Koppelman asserts that the nonestablishment norm forbids government to "formulate official answers to religious questions."²⁸ But the three basic inquiries I have just articulated are not "religious" questions. They are "moral" questions—albeit, moral questions to which some persons sometimes give religiously grounded answers.) For many religious believers in the United States, no response to one or more of these three fundamental moral questions is as plausible, *if plausible at all*, as a religiously grounded response. For example: For many religious believers, no secular warrant for the claim that we should care about each and every person—that each and every person is inviolable—is plausible; only a religious warrant is plausible.²⁹ Therefore, to construe the nonestablishment norm to forbid government to disfavor conduct on the basis of a moral belief that, though religiously grounded, lacks, or may lack, plausible, secular grounding makes no sense at all to such believers, for whom the only plausible response—or at least the most plausible response—to one or more of the three fundamental moral questions is a religiously grounded response.

Others, including some religious believers, may wonder what sense it makes, if any, to read the nonestablishment norm to forbid government to privilege one or more churches while leaving a legislative majority free to make a political choice on the basis of a moral belief that has only a religious ground—a ground that, almost certainly, only some churches accept. Is this distinction—between, on the one side, government privileging one or more churches and, on the other, government making a political choice on the basis of a moral belief having only a religious ground—merely formalistic?

goods—in particular, between what is good for some we should care about and what is good for others we should care about? As between the first and second questions, the second—or at least a particular instance of it—is, existentially, the more fundamental of the two. Normally, one cares about oneself; one is committed to one's own welfare. So, a particular instance of the question "What is truly good for those we do or should care about?" is the question "What is truly good for oneself?" And a particular instance of that question, in turn, is "Which human beings is it truly good for one to care about?" But it is useful, I think, to keep the two questions distinct: Which human beings ought we to care about? And what is truly good for those we do or should care about—and what is bad for them?

28. Andrew Koppelman, *Secular Purpose* 37 (Mar. 2000) (unpublished manuscript, on file with author).

29. See MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 11-41 (1998).

Is it a distinction without a difference? Does the distinction bear the weight I am putting on it here? This is a fair question—to which the answer is yes, the distinction *does* bear the weight. It *does* make sense to read the nonestablishment norm as I do. Let me explain.

Government can get along very well without privileging one or more churches—without privileging, that is, either membership in, or a worship practice of, one or more churches. There is simply no practical need for government to do so; indeed, there is a practical need for it *not* to do so (or so many Americans believe).³⁰ But legislators cannot get along without relying on moral beliefs, because they must often resolve controversies that are fundamentally and ineliminably moral in character. One may respond—especially one who rejects religious belief—that legislators *can* get along without relying on moral beliefs *that lack plausible secular grounding*. But from the perspective of many religious believers in the United States, to forbid legislators to make a political choice on the basis of a moral belief with a religious ground, unless the belief also has a plausible, independent secular ground (that is, for the judiciary to strike down the political choice if it lacks plausible, independent secular grounding), would be to import into the Constitution a controversial conception of the proper relation between morality and religion, according to which morality—at least, morality “in the public square”—can and should stand independently of religion. For some Americans—especially for some who are not religious believers—that conception of the proper relation between morality and religion is attractive. For the large majority of Americans who are religious believers,³¹ however, their

30. See Perry, *Freedom of Religion*, *supra* note 5, at 329-32. Douglas Laycock has made much the same point:

There is no need for the government to make decisions about Christian rituals versus Jewish rituals versus no religious rituals at all. For government to make that choice is simply a gratuitous statement about the kind of people we really are. By making such statements, the government says the real American religion is watered-down Christianity, and everybody else is a little bit un-American.

Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 380 (1992).

31. Compared to the citizenries of the world's other advanced industrial democracies, the citizenry of the United States is one of the most religious—perhaps even the most religious. According to recent polling data, “[a]n overwhelming 95% of Americans profess belief in God.” Richard N. Ostling, *In So Many Gods We Trust*, TIME, Jan. 30, 1995, at 72. Moreover, “70%

most fundamental moral judgments are inextricably rooted in their religious faith; moreover, they are skeptical that those judgments can stand—can be warranted—independently of religious faith, whether their own religious faith or *some* religious faith. For such Americans, to construe the nonestablishment norm to forbid legislators to base a political choice on a religiously grounded moral belief unless the belief also has a plausible, independent secular ground would be to unfairly deprive religious faith (relative to secular belief) as a ground of moral judgment—and to unfairly deprive too, therefore, those moral judgments that cannot stand independently of religious faith. While understandably appealing to some who reject religious faith, such a construal is widely and deeply controversial. Such a construal is, in a word, sectarian and has no claim on the large majority of Americans for whom religious faith and moral judgment are often inextricably related.

From the perspective of those for whom their religious faith and their fundamental moral judgments are inextricably connected, constitutional scholars like Andrew Koppelman³² and Kathleen Sullivan³³ (and, in an earlier incarnation, myself³⁴) are trying to conscript the nonestablishment norm to serve their own conception of the proper relation between morality and religion—a contestable and widely contested conception that should not be accorded constitutional status in a country most of whose citizens believe that their most fundamental moral judgments cannot stand independently of their religious faith. Indeed, it is far from obvious why *any* conception of the proper relation between morality (in the public square) and religion—including a conception according to which morality should stand independently of religion—should be accorded constitutional status in a society in which the question of the proper relation between morality and religion is so disputed. So, let me emphasize: That there should *not* be a rule forbidding political choices based on a religiously grounded belief unless the

of American adults [are] members of a church or synagogue." Book Note, *Religion and Roe: The Politics of Exclusion*, 108 HARV. L. REV. 495, 498 n.21 (1994); cf. Andrew Greeley, *The Persistence of Religion*, CROSS CURRENTS, Spring 1995, at 24.

32. See *supra* note 28 and accompanying text.

33. See *supra* note 21 and accompanying text.

34. The argument I make in this Essay competes with an argument I made a few years ago. See PERRY, *supra* note 7, at 30-38. For critical commentary on my earlier argument, see Laycock, *supra* note 13.

belief also has a plausible secular ground does not entail that there *should be* a rule that such choices may not be based on a secularly grounded belief unless the belief also has a religious ground. *Neither rule should be part of our constitutional law.* It comes as no surprise that there has never been a movement to constitutionalize anything like the latter rule, but Koppelman, Sullivan, and some others would have the Supreme Court constitutionalize something like the former rule.

In the course of (e-mail) discussions as I was revising this Essay, Andrew Koppelman pressed the question "why it's appropriate for the state to be determining the authoritative sources of theological guidance."³⁵ (According to Koppelman, for government to disfavor conduct on the basis of the belief that the conduct is immoral is, in the absence of a plausible, independent secular ground for that belief, "indistinguishable from, and amounts to, a state determination of the authoritative sources of theological guidance."³⁶) But I am not arguing that government may determine "the authoritative sources of theological guidance" for you, or for me, or indeed for anyone, as we or they struggle to discern the correct answer to one or another controversial moral question. I am arguing only that in deciding whether to disfavor conduct (at least partly) on the ground that the conduct is immoral, one or more legislators—even a majority of them—may answer the question of whether the conduct is in fact immoral on the ground or grounds in which *they* have the most confidence, in which *they* place the most trust, and then make their political choice accordingly. In particular, they may do so whether or not the ground(s) is religious—and, so, even if it *is* religious.³⁷ Koppelman's position, by contrast, is that they may not do so if the ground is religious, unless there is a plausible, independent secular ground for the view that the conduct is immoral.³⁸

35. E-mail message from Andrew Koppelman to Michael Perry (June 27, 2000) (on file with author).

36. E-mail message from Andrew Koppelman to Michael Perry (July 31, 2000) (on file with author).

37. Of course, this is not to say that the political choice they make—for example, a choice disfavoring racial intermarriage, or same-sex marriage, on the ground that it is immoral—is necessarily constitutional. The choice may violate a constitutional provision other than the nonestablishment norm.

38. One might be tempted to respond along these lines: The nonestablishment norm,

Nothing I have said is meant to deny that religious grounds for moral belief are destined to be controversial in a religiously pluralistic society like the United States. But secular grounds for moral belief are destined to be controversial—"sectarian"—too. As Chris Eberle has argued:

The challenge to the advocate of restraint is that of discovering some relevant difference between religious and secular norms in virtue of which it is reasonable to advocate restraint regarding the former but not the latter. Only by identifying some such relevant difference can the advocate of restraint non-arbitrarily exclude religious but not secular grounds from political deliberation.³⁹

In the context of this Essay, the question is whether any "relevant difference" warrants a construal of the nonestablishment norm according to which (a) government is free to make a political choice on the basis of a moral belief that has a plausible, independent secular ground, no matter how controversial that secular ground may be, and without regard to whether the moral belief also has a religious ground, but (b) government is not free to make a political choice on the basis of a moral belief that has a religious ground, no matter how ecumenical (i.e., widely shared among religious denominations) that religious ground may be, unless the moral belief also has a plausible, independent secular ground?⁴⁰ One

understood as Koppelman understands it, is concerned with legislative "outputs" rather than with legislative "inputs." See Koppelman, *supra* note 28, at 42. Therefore, no one who accepts that understanding of the nonestablishment norm need dispute the claim that legislators are constitutionally free to proceed on the ground(s) in which they have the most confidence, in which they place the most trust, even if the ground is religious.

The problem with this response is that according to Koppelman's understanding of the nonestablishment norm, if at the end of the day the legislature decides to disfavor the conduct on the basis of the belief that the conduct is immoral, and if there is no plausible, independent secular ground for that belief, the legislature's decision violates the nonestablishment norm. So, *pace* Koppelman, a legislature is *not* constitutionally free to proceed on the basis of a moral belief that has only a religious ground—a moral belief that lacks a plausible, independent secular ground.

39. Christopher J. Eberle, *Why Restraint is Religiously Unacceptable*, 35 RELIGIOUS STUD. 247, 261-62 (1999).

40. It would beg the question to invoke the nonestablishment norm in support of that construal of the norm: The question at hand is precisely whether the nonestablishment norm should be so construed. The claim that such a construal of the nonestablishment norm is

needs a most compelling argument to warrant such a problematic—indeed, sectarian—reading of the nonestablishment norm. I am myself aware of no such argument.⁴¹

In the absence of such an argument, depriving religious grounds for moral belief relative to secular grounds would be conspicuously unfair. Such depriving would discriminate against religious grounds for moral belief, thereby subverting the equal citizenship of religious believers who, unlike citizens who are not religious believers, would be prevented from having *their* most important moral beliefs transformed into law (absent a plausible, independent secular grounding for those beliefs).⁴²

axiomatic for Americans is simply mistaken.

41. Cf. Michael W. McConnell, *Political and Religious Disestablishment*, 1986 BYU L. REV. 405, 413 ("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.").

One might want to argue that under my reading of the nonestablishment norm, all sorts of terrible things could happen—for example, a legislature could ban the use of all electrical devices on Sundays (except, perhaps, those necessary to protect lives) on the basis of a biblically grounded moral belief. Does anyone really believe that any legislative body would even want to do such a thing, much less actually do it, were there no nonestablishment norm? (Do legislative bodies in other advanced industrial democracies—democracies that have no nonestablishment norm—do such things?) Is the nonestablishment norm, understood as Koppelman does, really all that stands between us and such a frightening state of affairs? If the "parade of horrors" argument is the last resort of those who would defend the understanding of the nonestablishment norm against which I argue here, I am content to rest my case.

Although one or more legislatures in the United States might want to do some things that many would regard as trouble, let us not forget that the "terrible" things a legislature might want to do—for example, ban pre-viability abortions—are almost certainly all things for which there is a plausible secular rationale. See *supra* text accompanying note 21. The nonestablishment norm, understood as Koppelman does, is no impediment to legislatures doing such things. This is not to say there is never a constitutional impediment to a legislature doing such a thing, just that the nonestablishment norm is not an impediment.

42.

[T]hose whose understandings of justice are derived from religious sources [would be] second-class citizens, forbidden to work for their principles in the public sphere. This understanding [of the nonestablishment norm] would be a sharp and unwarranted break from our political history. From the War for Independence to the abolition movement, women's suffrage, labor reform, civil rights, nuclear disarmament, and opposition to pornography, a major source of support for political change has come from explicitly religious voices.

Michael W. McConnell, *Freedom of Religion at a Crossroads*, 59 U. CHI. L. REV. 115, 144 (1992) (commenting on the "secular purpose" prong of the so-called *Lemon* test).

* * * * *

In my judgment, the nonestablishment norm does not stand in the way of citizens or legislators or other policymakers banning or otherwise disfavoring conduct on the basis of a religiously grounded belief that the conduct is immoral, even if the belief lacks plausible, independent secular grounding.⁴³

43. This is not to deny that the free exercise norm forbids government to discriminate against religion, including religious conduct. Whatever else it may be, the free exercise norm is an antidiscrimination norm, as I have explained elsewhere. See Perry, *Freedom of Religion*, *supra* note 5, at 297-302.