

June 2003

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### Recommended Citation

Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 Chi.-Kent L. Rev. 717 (2003).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol78/iss2/9>

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## LIBERALISM AND THE ESTABLISHMENT CLAUSE

STEVEN H. SHIFFRIN\*

In *Zelman v. Simmons-Harris*,<sup>1</sup> Justice Thomas, undeterred by a half century of settled precedent, ventured the suggestion that the Establishment Clause should apply differently to states and localities.<sup>2</sup> In truth, it should be recognized that Justice Black did not seriously canvass that alternative argument when he concluded for the Court in *Everson v. Board of Education*<sup>3</sup> that the Establishment clause applied to the states. Indeed, assuming that one does not give up on the proposition that the Free Exercise Clause binds the states (and Justice Thomas does not propose to do so),<sup>4</sup> the idea that states or localities should be free to establish religions has some attractive aspects.

For one thing, there is something to be said for the notion that a polity might attach some significance to the spirituality of human existence instead of the materialist pursuit of the almighty dollar while dancing to the systemic, bloodless, profit-seeking demands of corporations. Additionally, it presents a diverse alternative to the monotonous regularity of the homogeneous modernistic culture with the golden arches standing as a perennial reminder that everywhere is nowhere. Finally, it promises to broaden liberalism's conception of toleration. Liberal principles already tolerate illiberal practices by private associations. The Catholic Church, for example, may exclude women from the priesthood without any liberal suggestion that government should intervene to stop it. But liberalism entertains a

\* I am grateful for the opportunity to participate in the conference which led to this symposium and am impressed with the extent to which Chicago-Kent is committed to the study of law and the humanities and the quality of the people engaged in that enterprise. Thanks to Cynthia Farina, Sheri Lynn Johnson, and Seana Shiffrin for excellent comments on an earlier draft of the manuscript.

1. 536 U.S. 639 (2002).

2. *Id.* at 676–79 (Thomas, J., concurring).

3. 330 U.S. 1, 15 (1947).

4. *Zelman*, 536 U.S. at 678–80 (Thomas, J., concurring). However, his partner in crime, Justice Scalia, has cut most of the teeth out of this protection. See *Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878–81 (1990) (establishing the general principle that impact on religion is of no constitutional importance when a statute is neutral, not designed to discriminate against religion, and not accompanied by an impact on other constitutionally protected interests).

particular conception of the proper relationship between church and state. Although private religious groups are free to entertain a different conception, they are not free to capture the state. This, liberalism will not tolerate, or so we have thought.

Enter Professor Rosen. Professor Rosen, applying Rawlsian concepts, argues that liberalism, properly conceived, should be understood to be more tolerant still.<sup>5</sup> According to Rosen, representatives of individuals with no knowledge of their vision of the good behind a veil of ignorance would permit a village (or other entity)<sup>6</sup> to establish a church provided: (1) the entity had a religiously homogeneous population at the time of establishment; (2) the number of villages involved did not threaten balkanization;<sup>7</sup> (3) the church would not use its governmental powers to threaten others; (4) the church had no purpose to take over the Federal Government; and (5) the captured village allowed for exit (except in circumstances where it properly jailed an individual for a criminal offense).<sup>8</sup>

Rawls did not arrive at this conclusion, argues Rosen, because he focused on the federal government. He agrees that a federal establishment of religion would wrongly favor one conception of the good over others, but argues that denying the power of religions to capture the state at any level of government wrongly discriminates against those whose conception of the good requires a fusion of church and state. Allowing such establishments in limited circumstances can preserve an equal scheme of liberty and is more neutral and tolerant.<sup>9</sup>

Perhaps it would be helpful to distinguish between a strong claim in opposition to Establishment Clause restrictions and the highly qualified claim put forth by Professor Rosen. The strong claim would simply abolish Establishment Clause restrictions while relying on the Free Exercise Clause to protect religious liberty. Although some maintain that the Establishment Clause is underwritten by a single

5. Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 669 (2003).

6. At the time of the conference, Professor Rosen's paper was unclear about the kinds of actions that a state might be able to engage in that the federal government would not. Perhaps, under his analysis, a state could have multiple establishments. Of the seven states establishing religion at the time of the adoption of the Bill of Rights, none established a single church. They all, in one way or another, provided for multiple establishments. LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* 9–10, 24 (1986).

7. Rosen argues for this limitation in Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1097 (1998).

8. Rosen, *supra* note 5, at 709–11.

9. *Id.* at 705–09.

value, I maintain that the Establishment Clause serves multiple functions. Specifically, it is a prophylactic measure that protects religious liberty;<sup>10</sup> it stands for equal citizenship without regard to religion;<sup>11</sup> it protects churches from the corrupting influences of the state;<sup>12</sup> it protects the autonomy of the state to protect the public interest;<sup>13</sup> it protects taxpayers from being forced to support religious ideologies to which they are opposed;<sup>14</sup> it promotes religion in the private sphere;<sup>15</sup> and it protects against the destabilizing influence of having the polity divided along religious lines.<sup>16</sup>

Although I recognize that some would reject some of these values, I will simply assert that the strong claim would imperil each of these values and that imperiling these values would, for the most part,

10. This aspect of the Establishment Clause is emphasized in JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* 9, 11 (1995), and Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 937–38 (1985–86).

11. This follows from the position articulated by Justice O'Connor that any endorsement of religion is invalid because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); see *Allegheny County v. ACLU*, 492 U.S. 573, 593 (1989); see also William W. Van Alstyne, *What is "An Establishment of Religion"?*, 65 N.C. L. REV. 909, 914 (1987); cf. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994) (applying an equality analysis to free exercise issues).

12. This concern is ordinarily attributed to Roger Williams. See ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* 46–66 (1996); EDMUND S. MORGAN, *ROGER WILLIAMS: THE CHURCH AND THE STATE* 118 (1967); see also Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1181–82 (1988); Van Alstyne, *supra* note 11, at 914. But some contest this reading of his views. See TIMOTHY L. HALL, *SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY* 26–27 (1998); Steven D. Smith, *Separation and the Fanatic*, 85 VA. L. REV. 213, 222 (1999).

13. *Lemon v. Kurtzman*, 403 U.S. 602, 622–23 (1971); see generally Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 808–12 (1999); Marci Hamilton, *The Constitution's Pragmatic Balance of Power Between Church and State*, SD02 ALI-ABA 501 (1998). But see Ira C. Lupu, *Threading Between the Religion Clauses*, 63 LAW & CONTEMP. PROBS. 439, 445–46 (2000).

14. See LEVY, *supra* note 6, at 123–24; Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 376 (1992).

15. This has been an effect of the clause, see ROBERT BOOTH FOWLER & ALLEN D. HERTZKE, *RELIGION AND POLITICS IN AMERICA: FAITH, CULTURE, AND STRATEGIC CHOICES* 23 (1995), but I doubt the workings of this aspect were foreseen, although the framers generally would have welcomed it. See also JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 42–45 (1996) (asserting that religious freedom is protected because religion is a good thing); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 153–56 (1991).

16. *Lemon*, 403 U.S. at 622–24; Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 360 (1996); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992).

be a bad thing. But Rosen is making a highly qualified claim. To what degree would Establishment Clause values be imperiled if his proposal was enacted?

To some extent, the answer depends on Rosen's requirement of homogeneity. Rosen would not permit a village to establish a church in the absence of a religiously homogeneous population.<sup>17</sup> But the very idea of a homogeneous people is itself dubious. Within religions, people disagree about religious mandates, even in a hierarchical religion. Surely, the disagreements within the ranks of Roman Catholics are testimony to that.<sup>18</sup> This complicates Rosen's Rawlsian analysis. A person behind the veil might reason that even if he or she were a person in a dissenting religion, he or she might be a dissenter within the religion. From that vantage, it would be difficult to make any decision. Even accepting the idea of homogeneity, one wonders just how homogeneous it has to be. At one point his article seems to suggest that a village must have unanimous consent to establish a religion, or, at least that a single dissenting nonchurch member could block the desire of a village to establish a church. Once an establishment was in place, however, incoming nonchurch members could not overturn an establishment by relying on the homogeneity requirement. Homogeneity in the Rosen scheme is fixed from the time of the establishment.<sup>19</sup> In any event, any nonchurch member of the established jurisdiction would rightly worry about liberty, equality, and taxpayer freedom. Most serious, I think, would be the likelihood of unprovable religious discrimination in a wide variety of contexts—for example, employment discrimination.

So too, the danger of the polity being divided along religious lines can not be evaded by a homogeneity requirement. Even assuming that a village is homogeneous, the state in which it resides will not be. The possibility of the state trying to take functions away from the village because of religious animosity cannot be ignored and Rosen does not ignore it. He suggests this is just part of the rough and tumble of politics.<sup>20</sup> But there is an historic concern with the polity being divided along religious lines. For my part, I am sympathetic with Rosen's view. I have always found it strange that we might

17. Rosen, *supra* note 5, at 710.

18. For an analysis of the disagreements and an illuminating analysis of what keeps dissenting Catholics in the Church, see generally ANDREW M. GREELEY, *THE CATHOLIC MYTH: THE BEHAVIOR AND BELIEFS OF AMERICAN CATHOLICS* (1990).

19. Rosen, *supra* note 5, at 710–11.

20. *Id.* at 714–15.

entertain a profound national commitment to the proposition that debate on public issues should be uninhibited, robust, and wide-open, but that we somehow want it to be more pallid when people of different faiths disagree. Nonetheless, concerns about the combustible nature of religious disagreement are not pathological or even neurotic.

Perhaps even more intriguing are the questions raised by admirable state regulations that would nonetheless interfere with religious self-government. Rosen would be the first in line championing one of the intrusive regulations. He argues that a well-ordered society requires that citizens be educated in Rawlsian tolerance, or, as he puts it elsewhere, “[c]itizens in the subfederal sovereigns would have to be taught about the political theory that justifies society’s basic structure.”<sup>21</sup> From the perspective of the religious government, this might be deeply problematic because the conception of the person assumed by Rawls (e.g., a person capable of revising his or her conception of the good)<sup>22</sup> might be exactly the kind of person the religion seeks to discourage. Moreover, the religion might regard the Rawlsian constitution as an unjust constitution precisely because it embraces a different conception of the relationship between church and state than that held by the religion. Indeed, the church might properly entertain doubts about the necessity of this intrusion in order to achieve a well-ordered society. It would be hard to demonstrate that every last citizen in the land needs to be exposed to the Rawlsian conception of justice in order for it to succeed. On the other hand, it is hard to understand how a person could be an equal citizen without access to the core political theory.

State intrusions might be justified on a different ground, however. Suppose that the local theocracy requires employment discrimination on the basis of sex, teaches in the schools that the role of women is to serve their husbands and stay at home, and teaches that autonomous moral thinking is immoral. Rawls, on equality grounds, presumably would oppose the discrimination and the teaching about the confined role of women. Rawls, however, does not believe it is appropriate in a liberal society to promote autonomy except to the extent that it is necessary to promote a well-ordered society.<sup>23</sup> Rosen

21. Rosen, *supra* note 7, at 1097.

22. JOHN RAWLS, *POLITICAL LIBERALISM* 19–20 (1993).

23. *Id.* at 199–200.

would agree. Here, I say so much the worse for Rosen and Rawls. In the end their argument is *too* tolerant.

Of course, every political theory tolerates some things and not others.<sup>24</sup> Every political theory promotes a particular kind of person even if it denies it is doing so.<sup>25</sup> But the best liberalism does not confine itself to promoting a Rawlsian-tolerant citizen. Liberalism, like conservatism, has greater ambitions in the socialization of the young. To be sure, liberalism permits, but does not endorse, the conservative passive citizen who gets by paying taxes, voting, obeying the law, obeying her husband, finding her place in the hierarchy, and striving to get ahead. But the best liberalism, call it neo-Millian, promotes a creative, independent, autonomous, engaged citizen and human being who works with others to make for a better society and speaks out against unjust customs, habits, institutions, traditions, hierarchies, and authorities.<sup>26</sup> The best liberalism, to take the worst case, would not stand for government at any level to be handed over to a sexist, homophobic, reactionary religion in the name of tolerance. It is particularly inexcusable that children would be captured in this closed society; surely exit is not a realistic remedy for them. Children need to be taught about other options and encouraged to be independent and autonomous.

Susan Moller Okin asked in a recent essay whether multiculturalism was bad for women.<sup>27</sup> My response is that sometimes it is and that government often has a responsibility to intervene to protect liberal rights and values.<sup>28</sup> Is this liberal vision contestable? Yes, indeed. Will we ever meet the Rawlsian vision of a society in which we are smothered with agreement? No, we will not. A *modus vivendi* is the

24. STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING*, TOO 137 (1994).

25. Most liberal theorists quite explicitly maintain that government should promote virtuous citizens. See generally PETER BERKOWITZ, *VIRTUE AND THE MAKING OF MODERN LIBERALISM* (1999).

26. Although I have called this form of liberalism "neo-Millian," Mill can be criticized for not placing enough emphasis on the role of dissent in combating injustice in his defense of free speech. STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 96-97 (1999).

27. SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* (Joshua Cohen et al. eds., 1999).

28. As the earlier example of the exclusion of women from the priesthood in the Catholic Church suggests, I do not mean that private associations should never be free to reject liberal values. On the values of illiberalism among private associations in a liberal society, see generally NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS* (1998). Moreover, the problem of when governments should intervene is even more complicated in the international sphere.

best we can accomplish.<sup>29</sup> I conclude that we should not give up the liberal faith in the name of tolerance or unreachable agreement.<sup>30</sup>

In some important ways Steven Smith agrees with this perspective, though he is obviously not a liberal.<sup>31</sup> Smith argues that government cannot be neutral in matters of politics, nationalism, religion, or other matters of opinion. He argues that neutrality is not possible and that government must and should stand for something in order to gain the allegiance of its citizens.<sup>32</sup> Smith obviously thinks there is such a thing as truth and that government inevitably will and ought to present its best vision of the truth provided that it does not try to coerce anyone into accepting its views.<sup>33</sup>

I would place some additional limitations on government speech, and the Constitution has long been interpreted to do so. But first I want to address his stance on neutrality. If we bracket religion for the moment, I am not aware of anyone, including Justice Jackson, who believes that government should be neutral on matters of politics, nationalism, or other matters of opinion.<sup>34</sup> As Smith expertly points out, government could not function if it tried to be neutral on such issues.<sup>35</sup>

Although one might emerge with the impression from Smith's paper that some liberals agree with Justice Jackson's eloquent nonsense, the usual suspects do not go quite that far. John Rawls, for example, believes that government should take a political position about the nature of the person, the content of basic rights and liberties, and the nature of the just society.<sup>36</sup> Moreover, he thinks that

29. On the implications of this for public reason, see Steven H. Shiffrin, *Religion and Democracy*, 74 NOTRE DAME L. REV. 1631, 1634–44 (1999).

30. Although I refer to the liberal "faith," I do not believe that there is no moral reality or that moral truth is merely a language game. That the political faith of individuals is contestable does not mean that it is wrong or that it is merely a product of their upbringing or interests. Nor does it mean that the establishment of a "faith" in this sense is an establishment of religion. It does suggest that no knockout reasoning is available to defend a particular vision of the good life, but the absence of knockout reasoning does not equate with the presence of irrationality or arbitrary judgments.

31. Steven D. Smith, Barnette's *Big Blunder*, 78 CHI.-KENT L. REV. 625 (2003).

32. In addition, Smith has little patience for the notion that what the government ought to stand for should be based in something called "consensus." Consensus, he thinks, is a masquerade for the subjective preferences of the decision-maker or for the decision-maker's perception of truth—I am not sure which. See *id.* at 647–51.

33. See generally *id.*

34. I do not criticize Smith for attacking this venerable straw person. I have done it myself. See Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980).

35. Smith, *supra* note 31, at 661.

36. RAWLS, *supra* note 22, at 3–46.

children should be educated to appreciate the perspective of the liberal state to which they owe allegiance.<sup>37</sup> Rawls, however, does not think that the state should endorse a “comprehensive” moral position, such as that of Kant or Mill. Ronald Dworkin also thinks that government should take positions about justice and rights.<sup>38</sup> Unlike the Rawls of *Political Liberalism*, Dworkin believes that liberalism proceeds from a particular vision of the good life,<sup>39</sup> but he maintains that government should be neutral about the “good life.”<sup>40</sup>

Although Rawls and Dworkin do not go as far as Jackson’s dictum, they go quite far. Smith’s position is that any attempt to place limitations on government speech is unprincipled, based on vague definitions and shadowy boundaries.<sup>41</sup> Like Smith today, I argued many years ago that the *Barnette* dictum was far-fetched, that government necessarily and properly play a role in the marketplace of ideas. Unlike Smith, I nonetheless argued that government could and should be limited in some areas. For example, New York state should not be able to raise millions of dollars to re-elect Governor Pataki. For example, partisan interventions to veto particular subsidies to the arts should be regarded as unconstitutional and government subsidy programs of the arts should be structured to prevent such interventions. For example, public universities should not be able to censor classroom communications (even though they are government speech) and academic freedom should be understood as a structural mechanism, functioning to promote diversity.<sup>42</sup> I do not propose to replough that ground again.

When I wrote about government speech, I thought it obvious that the Establishment Clause limits government speech. I still do, although that is what Professor Smith is out to challenge. Smith rightly argues that government frequently takes positions that contra-

37. *Id.* at 199.

38. *Id.* at 200.

39. Ronald Dworkin, *Foundations of Liberal Equality, in EQUAL FREEDOM: SELECTED TANNER LECTURES ON HUMAN VALUES* 190, 192–93 (Stephen Darwall ed., 1995) [hereinafter Dworkin, *Foundation of Liberal Equality*]. Previously Dworkin’s conception of the good life had Kantian antecedents. See Ronald Dworkin, *Philosophy and Politics, in MEN OF IDEAS* 240, 259–60 (Bryan Magee ed., 1978) (“It is absolutely necessary for liberals now . . . to show that the true father of liberalism is not Bentham, who is in fact rather an embarrassment for liberals, but Kant, whose conception of human nature cannot be called impoverished.”). He has moved to a position that resonates more with Aristotle than Kant. See Dworkin, *Foundations of Liberal Equality, supra*, at 305.

40. Dworkin, *Foundations of Liberal Equality, supra* note 39, at 191.

41. See generally Smith, *supra* note 31.

42. See generally Shiffrin, *supra* note 34.

dict religious beliefs.<sup>43</sup> Starting from this undeniable premise, Smith works his way to the conclusion that the Establishment Clause does not prevent government pronouncements on religious speech of any kind, at least as far as I can tell.<sup>44</sup> So, Professor Smith cannot spy a principled difference between the State of Illinois teaching evolution in public school classrooms and the State of Illinois declaring the Catholic Church to be the official church of Illinois.<sup>45</sup> I am reminded of Bernard Williams's smart-mouthed response to Richard Rorty. Williams wrote that Rorty "must Try Harder."<sup>46</sup>

43. Smith, *supra* note 31, at 653–57.

44. The portions of Smith's paper that support this reading include his desire to substitute an "and" for an "or" (effectively collapsing the no prescription prohibition into the no coercion prohibition, *see* Smith, *id.* at 630 n.8, meaning that one could prescribe orthodoxy in religion, but not coerce it); his seeming objection to the abandonment of school prayer, *id.* at 632 n.14, as opposed to stopping the coercion of school prayer; and his statement with apparent approval that the clause "could easily be read to support *Barnette's* prohibition on coercion but not the prohibition on prescription," *id.* at 653 n.64. With respect to the latter, he notices that this interpretation would rob the clause of consequence, but does not seem to regard that as problematic. Indeed he heaps scorn on those who think they must give the clause significant meaning. He says: "But such is the nature of constitutional argument: the clause is there, we suppose, so we have to make it mean *something* of consequence (unless, of course, it is the Third Amendment, or the Contracts Clause, or . . .), and thus we obtain license to make it mean what we would like it to mean." *id.* at 653 n.64. I wonder whether Professor Smith would be prepared to add the Ninth Amendment and the Privilege and Immunities Clause of the Fourteenth Amendment to his list.

Narrowly read, Professor Smith's paper might be merely stating that no matter what position one takes on the Establishment Clause, one will prescribe what is orthodox in matters of religion and that he takes no position on the Establishment Clause. The best support for that reading is note 85, which was added after the conference in response to my commentary. In other words, Smith's paper might be read as a variation of the argument Stanley Fish has been pressing for many years. Certainly many traditional practices take a position on the existence of God, but theoretically they could be abandoned. Nonetheless, however government is structured some religions will be contradicted, and Smith contends that is prescribing what is orthodox in religion. Certainly the sentence can be taken to mean that. On the other hand, as I argue in the text, teaching evolution need not be regarded as teaching religion for purposes of the Establishment Clause. So understood, the no prescription of orthodoxy in religion statement might be regarded as a term of art—but a term of art not far from ordinary usage. That it relies on a contestable interpretation of "religion" need not mean that it is not the best legal interpretation. Given that, I recognize that some religions will be contradicted however government is structured and that there is an ordinary language sense in which government will necessarily prescribe what is orthodox in matters of religion. Clearly, on the narrow reading of his paper, Smith and I are not far apart. In the text, I adopt the broad reading of Smith's paper. Even if I am wrong about Smith's intentions, some of the justices, in my view, come very close to adopting the substantive views implied by the broad reading of his paper. *See Allegheny County v. ACLU*, 492 U.S. 573, 655–79 (1989) (Kennedy, J., concurring in part and dissenting in part). The broad reading of Smith's paper would prohibit coercion but not proselytizing.

45. Smith does not explicitly say this, but it follows from the broad reading of his paper and perhaps the narrow reading as well.

46. Bernard Williams, *Getting It Right*, LONDON REV. BOOKS, Nov. 23, 1989, at 3 (reviewing RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989)).

Smith argues that to teach evolution in science classes is inevitably to imply that fundamentalist Christians are wrong. It, therefore, is to take a religious position.<sup>47</sup> Consider two responses. First, in order to teach the science of evolution one need not make a claim about fundamentalist Christians. One might believe that the best scientific evidence points to the truth of evolution, that the Bible points the other way, and that science is wrong and the Bible is right.<sup>48</sup> I agree, however, that fundamentalist Christians in many circumstances are right to believe that one of their religious beliefs is being contradicted. At the same time, millions of Americans do not regard a belief in evolution as a religious belief. Second, there is a world of difference between teaching that evolution is true and saying that Catholic fundamentalists are wrong. If I attend a bar mitzvah and respond to a question by saying I am a radical Catholic, I logically imply that I think that those of the Jewish faith are wrong about something important. I also imply that Muslims, Hindus, and Buddhists have also missed something important, even if I think—as I do—that there are many paths to the same God. But there is a world of difference between logical entailment and social meaning. Suppose that at the bar mitzvah rather than saying, “I am a Catholic,” I say, “I am a Catholic and I think you of the Jewish faith are wrong.” According to Smith, I will have added nothing of substance. But I will have converted a logical inference into an insult. Smith’s argument ignores the difference in social meaning between the two statements.<sup>49</sup>

Now consider a government naming the Catholic Church as the official church of the state. First, unlike the teaching of evolution, everyone understands the naming of an official church to be a religious position. Second, the social meaning is different. If the state

47. Smith, *supra* note 31, at 655.

48. If a believer thought the best interpretation of the Bible ruled out evolution, then he or she might conclude that the less probable interpretation of the scientific evidence had to be right.

49. *See generally id.* In footnotes 7 and 68, Smith observes that fundamentalists understand the social meaning of the teaching of evolution in the schools to contradict their religion. I conceded that at the conference and am happy to do so again. The alleged logical implication carries social bite. My point is that the spelling out of the logical implication carries substantially more social bite. Imagine how the fundamentalists would react if the science teacher distributed a syllabus with the heading “Why the Fundamentalists are Wrong about Evolution” or “Why the Fundamentalists are Wrong about Evolution and Why the Catholics are Right.” These add nothing more than what has logically been implied (if we leave aside the point that the teaching of evolution does not take into account the extent to which biblical interpretation would cast doubt on the scientific analysis), but they pack quite a bit of social wallop.

declares the Catholic Church to be the right church, it is not just implying that other religions are wrong about a particular doctrine, but it is also implying that they are wrong in general. Moreover, there is a substantial difference between my saying that I believe in the Catholic Church and the state doing so. For the state to say that a church is the official church is to mark out a cultural divide between the insiders and the outsiders. It promotes a culture in which outsiders are at greater risk of being discriminated against. It promotes church lobbying to gain benefits from the state regarding the size of its membership and promotes politician exactions from contributors for religious favors. Politics in which the church corrupts the state and the state corrupts the church are all too familiar in the history of Europe.

But we need not look across an ocean to find religious discrimination. Historically, America has been a Christian country and non-Christians still suffer from discrimination. We have evolved into a country that is officially monotheistic. Proponents of a high wall between church and state, who would remove “under God” from the Pledge of Allegiance, are wishing for a country that does not exist and probably never will. Our Constitution must be interpreted in the light of our evolving traditions—like it or not. So we make compromises and today government can say “In God we trust” on its coins but not “In Christ we trust.”

Despite those compromises, in the overwhelming majority of cases, government does not purport to enter into the question of what God has to say. When government acts, it does so for civic reasons, not because God has something to say about the subject.<sup>50</sup> These actions do not deny the existence of God or that God has something to say about the subjects in question. For many, the Establishment Clause is the price of religious peace. For others, it is necessary to protect religions from demagogic politicians, and for others still it protects religious liberty. These reasons are consistent with religious

50. J. JUDD OWEN, *RELIGION AND THE DEMISE OF LIBERAL RATIONALISM*: 169 (2001). Notice, however, that some religions might say it is theologically required that government take leadership in implementing God’s will. In some circumstances, then, government will violate some religion’s perspective, whatever course it takes. In religions denying a transcendent God, God might nonetheless “speak” through the unfolding of history. But, as David Tracy writes, “[a]ny theological discourse which loses its anchorage to the doctrine of God is no longer theological.” DAVID TRACY, *THE ANALOGICAL IMAGINATION* 52 (2002). From this perspective, the teaching of evolution is not religious even though it contradicts the conclusions of some religious believers. As Professor Smith argues, that may be small comfort to believers who reject evolution on religious grounds.

belief, but they, and other reasons supporting the Establishment Clause, need not be accompanied by religious belief. In the end, however, the Establishment Clause for the most part requires that the question of what God has to say must be bracketed from the governmental agenda.

I agree with Professor Smith that one can convert negative statements into positive statements, that the line between what is explicit and what is implicit is often difficult to draw, and that the invocation of consensus often paints over difference. I agree that there is no principle in the sky that can be invoked in the style of political geometry to resolve difficult questions about church and state. Yet the deconstruction of arguments, however cleverly done, does not justify reading the Establishment Clause out of the Constitution. There are some things worse than logic that fails to satisfy those who impose impossible standards. Bad government would be one of them. And, although I am no fan of Justice Holmes, there are times when experience is worth more than logic. This is one of those times.