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NO EXPRESSLY RELIGIOUS ORTHODOXY: A RESPONSE TO STEVEN D. SMITH

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The Supreme Court's religious freedom decisions are no thing of beauty, and perhaps they will not be a joy forever. It has long been fashionable in the academy to denounce them as a hopeless muddle. Steven D. Smith is right: "Virtually no one is happy with the Supreme Court's doctrines and decisions in this area or with its explanations of those doctrines and decisions."[1]

Much of the law in this area, however, is well settled and uncontroversial. Some important rules are clear, have stayed stable over time, and are likely to remain so. I list some of the most salient areas of clarity and stability, with no claim to completeness.

First of all, "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[2] There is today a hotly contested question on the margins as to whether the state can directly fund religious activity, so long as the principle that determines who gets the funding is not itself religious.[3] But this marginal case should not make us forget the clear core rule that government may not support religion qua religion.[4]

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1. STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM, at v (1995).

2. Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

3. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793 (2000); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

4. There is the possibly embarrassing case of military and prison chaplains, but this exception is limited to cases where government participation is necessary if religious exercise is to be possible at all. Even in this context, denominational discrimination is prohibited. *See* Cruz v. Beto, 405 U.S. 319, 322 (1972). Like many of the exceptions to these general rules, this one is firmly confined to its facts. Any new attempt to put ministers, as such, on the public payroll would certainly be invalidated by the courts.

Second, government may not conduct religious exercises in the public schools.[5] Marginal questions remain here, too: When may student-organized religious groups meet in public schools?[6] Are student-initiated prayers at school events permissible in some circumstances?[7] But, once more, the rule at the core is clear.

Third, religious tests for public office are prohibited. The Constitution bars such tests for federal offices,[8] and the prohibition has been extended to the states.[9]

Finally, to be constitutional, a law must "have a secular legislative purpose."[10] States may not bar the teaching of evolution in the public schools;[11] they may not post the Ten Commandments in every classroom.[12] More generally, states may not defend laws on the basis that they comply with the commandments of some religious source.

This doctrine is necessary in order to preserve the integrity of other areas of constitutional law, notably the Fourteenth Amendment. Virtually every kind of discrimination that is "suspect" under the Fourteenth Amendment has been defended on religious grounds. If there were no secular purpose requirement, a state could invoke divine will as a compelling justification for any discrimination that it chose to practice. Consider, for example, *Romer v. Evans*,[13] in which the Court invalidated a law that authorized any and all forms of discrimination against gay people. Such discrimination could easily have been defended on religious grounds. Absent a secular purpose requirement, the Court would have had to choose between deferring to the state's claims about divine law or investigating and adjudicating those claims. The secular purpose doctrine spares the courts such dilemmas.[14]

Steven Smith's critique of modern religion doctrine claims that it is incoherent, and he seems to imply that each of these rules should

5. Lee v. Weisman, 505 U.S. 577, 587–99 (1992); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222–24 (1963); Engel v. Vitale, 370 U.S. 421, 424 (1962).

6. Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

7. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

8. U.S. CONST. art. VI, cl. 3.

9. Torcaso v. Watkins, 367 U.S. 488, 495–96 (1961).

10. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

11. Epperson v. Arkansas, 393 U.S. 97, 103 (1968).

12. Stone v. Graham, 449 U.S. 39, 41–43 (1980).

13. 517 U.S. 620 (1996).

14. This argument about the importance of the secular purpose requirement is elaborated in Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 155–65 (2002).

therefore be abandoned. His specific target is one sentence in Justice Jackson's opinion in *West Virginia Board of Education v. Barnette*:[15] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[16] This view, Smith writes, "committed the Court (and the judges and lawyers and scholars, and indeed the nation) to a course of massive collective delusion."[17] The idea that government cannot proclaim what is orthodox, Smith argues, "is internally incoherent, practically untenable, and wholly inconsistent with the way government has operated, does operate, and will continue to operate in this or any other country."[18]

Instead, Smith proposes a rule that does not restrict government speech in any way, but only requires government to "refrain from coercing professions of belief from unwilling citizens."[19] This rule would not be violated by any of the practices I just enumerated. Government could, without coercing any profession of belief from anyone, set up a church, pass laws that aid one religion, prefer one religion over another, conduct religious exercises in the public schools, and justify all manner of laws by reference to the teachings of some religion. Religious tests for public office might be a harder case, but even there, perhaps the state could say that no one is compelled to hold public office. Smith's rule would thus revolutionize the law.[20]

15. 319 U.S. 624 (1943).

16. *Id.* at 642.

17. Steven D. Smith, *Barnette's Big Blunder*, 78 CHI.-KENT L. REV. 625, 625 (2003). He similarly claims that Jackson's dictum has spawned "[l]arge, labyrinthine discourses concerned with freedom of speech and religion," *id.* at 626, and that "the 'no orthodoxy' position memorably articulated in *Barnette* has had a beguiling but baneful influence on our First Amendment discourses—and hence on our understanding of our community, and of ourselves." *Id.* at 627.

18. *Id.* at 628.

19. *Id.* at 663.

20. Smith does not, of course, address all of the possible prohibitions created by the Constitution. He does not even claim to offer a complete account of the Establishment Clause. It is possible that the Constitution prohibits some of the practices I have just described, but on some basis other than a prohibition of orthodoxy. On the other hand, it is not clear what this basis would be. When he has offered a positive approach to religious liberty, he has argued that courts should only intervene "where there is significant impairment of religious freedom in some core sense." Steven D. Smith, *Unprincipled Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 497, 505 (1996). Establishment Clause violations do not seem likely ever to reach this threshold, *see id.* at 506–12, though some extreme cases may on his view be contrary to American separationist traditions. *See* Steven D. Smith, *Separation as a Tradition*, 18 J.L. & POL. 215 (2002). Moreover, even if there is some alternate source of constitutional law that

Why does he think this would be a good idea? It is not clear what problem this radical innovation is supposed to solve. Smith never specifies just what the "baneful influence" of *Barnette* has been. The proscription against any government promotion of orthodoxy on any subject, he concedes, "has not been—and indeed *could not* be—consistently implemented."[21] It is, he correctly observes, impossible for government to act in the world without implicitly prescribing what is good and what is bad, and it is impossible for government to give any reasons for its actions without declaring what is good and what is bad. It would be destructive for government to try to avoid orthodoxy in these respects.

But if that is not the law, then what is? Jackson's dictum, to the extent that it describes current law, has been limited in its scope in two ways. It applies only to religion, and not to other possible objects of official orthodoxy. And even with respect to religion, it only prohibits action that explicitly endorses a religious view. In these respects, the law is well settled. The clear cases, enumerated at the beginning of this Comment, are neither "haphazard"[22] nor "law professors' hypotheticals."[23]

These qualifications of Jackson's rule are, of course, among those that Smith considers and rejects as incoherent. Yet, his arguments against the workability of the religion/nonreligion and explicit/implicit distinctions depend on considering each of them in isolation. If they are allowed to operate in combination, as they do in contemporary law, the weaknesses that Smith complains of disappear.

Smith acknowledges the "common view" (which also happens to be the present blackletter law) that the prohibition of official orthodoxy "applies with full force in the realm of religion, but that outside the religious domain only the 'no coercion' prohibition applies."[24] The doctrine thus confined is still incoherent, Smith argues, because "virtually every action taken by government at least tacitly teaches, if not the truth, then the falsity of some religious beliefs."[25] Thus, for example, teaching Darwin in the public schools implicitly contradicts

restricts government's ability to declare religious truth, then all of Smith's objections will probably arise again.

21. Smith, *supra* note 17, at 632.
22. *Id.* at 662.
23. *Id.* at 658.
24. *Id.* at 632.
25. *Id.* at 656.

the views of biblical literalists and six-day creationists.[26] Even the laws against murder contradict the religious beliefs of the Aztecs.

Yet the law on the books is quite coherent, and it achieves this coherence by placing considerable weight on the implicit/explicit distinction. Government may teach Darwin without running afoul of the First Amendment. But it is clear that the amendment would be violated if a science teacher were to say, at the end of the lesson, that "Darwin proves that God doesn't exist." The question of how Darwin is to be integrated into a religious view is not one that the schools are authorized to address. The Supreme Court has made clear that government

> may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.[27]

There are, of course, nice questions on the margin about when a given law crosses the implicit/explicit line. Laws prohibiting the teaching of evolution, or requiring the posting of the Ten Commandments in every classroom in a state, are so obviously theologically-loaded that the Court rightly judges that they go too far. But in the evolution case, unless the science teacher starts denying God's existence, the state is taking no particular religious line. A very wide range of religious views are consistent with Darwin's theory.

Smith attacks the implicit/explicit distinction as well. Any government that really sought to avoid explicit orthodoxy, he argues, would be barred from giving any reasons for anything it did.

Yet, if the restriction on orthodoxy is confined to explicitly religious propositions, then this objection collapses. Look how weak Smith's indictment becomes once it is qualified by the appropriate modifier:

> [I]t is hard to imagine a world in which government manages to act without explicitly affirming the [religious] beliefs on which it acts, at least in many instances. And in any case, such an image is less a

26. Wallace v. Jaffree, 472 U.S. 38 (1985); Epperson v. Arkansas, 393 U.S. 97 (1968).

27. *Epperson*, 393 U.S. at 104. Smith is correct that many aspects of American practice run the other way, but most of his examples are quite old. The "cultural heritage" exception to the Establishment Clause is a substantial one, but it cannot allow the creation of any new instances. *See* Koppelman, *supra* note 14, at 152–54. Moreover, Smith's attack on the public/private distinction notwithstanding, things can be said in a president's inaugural address that cannot be said in a statute. An officeholder making a speech can invoke God, but it is inappropriate and unconstitutional for a legislature to do so in a statute.

> pleasant fantasy than a nightmare, because such a government—one which acts and decides without articulating the [religious] reasons for its actions and decisions—would be contrary to the ideals of openness and public rationality that have been so strenuously cultivated during our history (in due process jurisprudence, for example, or in administrative law).[28]

Of course, government should give reasons for what it does, but it can easily do that without embedding its actions in any particular religious narrative. It is possible to defend the law against murder without saying anything at all about Aztec theology. Perhaps some religious orthodoxy is in some sense implicit in the stop sign at an intersection; at a minimum, it excludes the proposition that God wants you to speed through the intersection without slowing down. But there are many different theologies that can and do coincide in rejecting this proposition. People with radically differing theological views can have adequate reasons for obeying both laws. A secular state is not a state that "stands for nothing."[29] But what it stands for is not associated with any particular religious view.

So, the First Amendment's prohibition of "establishment of religion" is, among other things, a restriction on government speech. It means that the state may not declare articles of faith. The state may not express an opinion about religious matters. It may not encourage citizens to hold certain religious beliefs.[30] These are perfectly coherent rules. They do not prevent government from giving reasons for what it does.

Why would one want an anti-orthodoxy doctrine that is thus narrowly confined? It avoids incoherence, but what else can be said on its behalf?

28. Smith, *supra* note 17, at 645.

29. *Id.* at 641.

30. The Court so held in *United States v. Ballard*, 322 U.S. 78 (1944):

> The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. . . . The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

Id. at 86–87 (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871)).

I have elsewhere noted that this cluster of rules can be understood to derive from the axiom that the state may not declare religious truth. That axiom is rooted in the underlying purposes of the Establishment Clause. Three reasons are typically given for disestablishment of religion; all of them support the restriction on government speech just described.

One classic reason for disestablishment is futility: religion is not helped and may even be harmed by government support. Professor John Garvey notes that this principle has roots in the theological idea that "God's revelation is progressive," so that free inquiry will bring us closer to God.[31] The futility argument can also take the form of a sociological claim that state sponsorship tends to diminish respect for religion,[32] or a skeptical claim that the state does not know enough to justify preferring any particular religious view.[33]

Second, there is an argument based on respect for individual conscience. It states that the individual's search for religious truth is hindered by state interference. This argument is probably parasitic on the idea that the state is incompetent to promote religious truth, but since that idea is powerful, the conscience argument is powerful as well. Both arguments coincide in the conclusion that the state has nothing useful to say about religion, and should therefore shut up.

Finally, there is civil peace. In a pluralistic society, we cannot possibly agree on which religious propositions the state should endorse. The argument for government agnosticism is that, unlike government endorsement of any particular religious proposition, it is not in principle impossible for everyone to agree to it.[34] Under

31. John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 285 (1996).

32. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 608 (1992); Engel v. Vitale, 370 U.S. 421, 431 (1962); Illinois *ex rel.* McCollum v. Board of Ed., 333 U.S. 203, 228 (1948); 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 294–301 (J.P. Mayer ed., George Lawrence trans., 1969) (1835).

33. John Locke provided the earliest example of this claim:

> The one only narrow way which leads to heaven is not better known to the magistrate than to private persons, and therefore I cannot safely take him for my guide who may probably be as ignorant of the way as myself, and who certainly is less concerned for my salvation than I myself am.

JOHN LOCKE, A LETTER CONCERNING TOLERATION 32 (William Popple trans., Patrick Romanell ed., Liberal Arts Press 1950) (1689). James Madison made the similar claim that the idea "that the Civil Magistrate is a competent Judge of Religious Truth" is "an arrogant pretension falsified by the contradictory opinions of Rulers in all ages." James Madison, *A Memorial and Remonstrance*, *in* RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 64, 66 (Michael S. Ariens & Robert A. Destro eds., 1996).

34. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 322 (1996).

conditions of deep religious pluralism, the only hope for common ground is what John Rawls calls an "overlapping consensus"[35]: a set of political principles that can be supported by many different religious and other comprehensive views, but that does not particularly depend on any one of them.

This argument is distinct from the claim, ably refuted by Smith in the past, that the Establishment Clause aims at preventing any citizen from feeling alienated.[36] That is an impossible aspiration. There will indeed be some alienation, whatever we do. But it matters whether the state officially declares some religions correct and some incorrect. So long as it refrains from doing that, the question whether any particular religious group is estranged from the state is one they will have to answer for themselves. The state itself will not have barred them from being reconciled with the established secular order. It has not officially declared their religious beliefs to be false. It is different if some people not only feel like outsiders, but are officially declared to be outsiders, for example by a declaration of an official religion. In religiously diverse societies, Charles Taylor has observed,

> [b]oth the sense of mutual bonding and the crucial reference points of the political debate that flow from it have to be accessible to citizens of different confessional allegiances, or of none. If the people in this sense were to be confessionally defined, then non-members would be excluded in fact from full participation in self-rule. Not only would they be defined outside the bonded group, but their alternative outlook and perspectives would be by definition accorded

35. *See* JOHN RAWLS, POLITICAL LIBERALISM 133–72 (1993).

36. Smith is the most articulate critic of this as a criterion for Establishment Clause violations, *see* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987) [hereinafter Smith, *Symbols*]; so it is surprising that in this article he takes alienation as the sine qua non of a violation. See Smith, *supra* note 17, at 635, 640, 646–47, 652. Smith has noted that the focus on endorsement in Justice O'Connor's jurisprudence is idiosyncratic, transforming the Establishment Clause from a prescription about institutional arrangements into a kind of individual right, a right not to feel like an "outsider." Smith, *Symbols*, *supra*, at 300. Smith explains:

> Under existing establishment doctrine, the evil to be prevented is improper governmental support for, or entanglement with, religion. Thus, the clause is primarily concerned with maintaining proper institutional relations. O'Connor's analysis, by contrast, reconceives the purpose of the establishment clause as individual rather than institutional. Her proposal aims to prevent . . . messages which make some citizens feel like "outsiders" because of their nonadherence to particular religious beliefs.

Id. at 299–300. In recent years, Justice O'Connor appears to have forgotten that this political alienation was the original concern of her endorsement test. She now makes that test turn on the perceptions of a fictitious "objective observer," who is unfazed by state actions that may intensely alienate many actual human beings. *See* Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713, 717–26 (2001). So it is not clear who now relies exclusively on the anti-alienation rationale.

> a lesser legitimacy. They would not be full members of the sovereign.[37]

The condition Taylor describes is not a mere subjective feeling of alienation. It is an official declaration of the second-class status of nonbelievers.[38] Smith argues that "what makes us *persons*—and the particular persons we are—is not so much our 'interests' as our central, constitutive beliefs, and that a community that neglects or ignores this dimension of our personhood will have at best a weak claim on our respect."[39] But if religious beliefs are unusually likely to be central and constitutive for many persons, this provides a powerful reason for doing what Smith says we must not do: "insisting that among all of the families of contestable beliefs it is *only* religious beliefs that are automatically and a priori disqualified from participating in a public orthodoxy."[40]

In light of our deep disagreement about religious matters and the obvious fact that religion can and does thrive without state support, there is no need for the state to declare any official religious line, and there is danger in letting it try. Smith's rule against coercion, without more, would leave the state free to do much too much.

It is true that the rules of law that prevail in the United States have produced considerable alienation among some people. Smith emphasizes that some conservative Christians have abandoned American politics.[41] It has become clear that they will not be able to declare America a Christian nation, restore prayer to the public schools, criminalize abortion and homosexual sex, and discourage women from working outside the home. But you can't please everybody. The prospects of civil peace are enhanced when people who were vigorously lobbying to turn the country into an intolerant theocracy give up and go home. Even these people's loyalty to the community hardly seems to have been undermined.[42] Smith's attack on the principle that government may not declare religious truth

37. Charles Taylor, *Modes of Secularism*, *in* SECULARISM AND ITS CRITICS 31, 46 (Rajeev Bhargava ed., 1998).

38. On the moral seriousness of second-class citizenship, see ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 57–76 (1996); Andrew Koppelman, *On the Moral Foundations of Legal Expressivism*, 60 MD. L. REV. 777 (2001).

39. Smith, *supra* note 17, at 641. Taylor has argued for a similar view of personhood. *See* Charles Taylor, *What is Human Agency?*, *in* 1 PHILOSOPHICAL PAPERS: HUMAN AGENCY AND LANGUAGE 15 (1985).

40. Smith, *supra* note 17, at 657.

41. *Id.* at 641–42.

42. As Smith suggests. *Id.* at 657.

bears some resemblance to communitarian criticisms of liberalism, which claim that the abstract egalitarian state is precisely one that "stands for nothing"[43] and so cannot elicit the loyalties that less deracinated communities call forth. But liberalism can produce loyalties of its own. The vision of a community dedicated to respecting everyone's rights, abstracting away from their religious disagreements, has been a powerful one.[44] It seems to have some grip even on Smith, who draws the line at coercing professions of belief from unwilling citizens.[45] I suspect that his reasons for drawing the line there have something to do with considerations of futility, respect for individual conscience, and civil peace. But then, he needs to explain why those considerations do not also justify the settled rules he attacks, which have served us well for a long time.

43. *Id.* at 641.

44. See 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 108–13 (1988).

45. Other critics have noted Smith's tendency inadvertently to rely on the very liberal concepts that he officially repudiates. *See* Christopher L. Eisgruber & Lawrence G. Sager, *Unthinking Religious Freedom*, 74 TEX. L. REV. 577, 591–92 (1996).