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FIGHTING THE NEW WARS OF RELIGION: THE NEED FOR A TOLERANT FIRST AMENDMENT

Leslie C. Griffin

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FIGHTING THE NEW WARS OF RELIGION: THE NEED FOR A TOLERANT FIRST AMENDMENT

Leslie C. Griffin*

I. INTRODUCTION

Religious wars have broken out around the country about the legality of gay marriage, the consequences of gay ordination for property ownership, the funding of faith-based organizations and the placement of crosses and Ten Commandments (but not Seven Aphorisms) on public land. To resolve such impassioned disputes, Americans traditionally look to the Religion Clauses of the First Amendment, which state “Congress shall make no law respecting an *establishment* of religion or prohibiting the *free exercise* thereof.”¹ Unfortunately, the Court’s modern decisions interpreting those clauses have shed more heat than light on the discussion and have provoked ongoing controversy instead of any settled resolution of the issues. In modern Establishment Clause jurisprudence, for example, the Court for many years identified “separation of church and state” as its guiding principle and frequently applied “strict scrutiny” to laws that burdened the right of Free Exercise.² Over time, however, dissatisfaction erupted with separationism’s perceived hostility to religion, and the Court sought more neutral approaches to the Religion Clauses. On the establishment side, it gradually allowed more funding of religion, most notably permitting parents of religious schoolchildren to use vouchers and upholding aid that was neutrally given to religious and non-religious schools alike.³ The Court also adopted a more neutral theory of the Free Exercise Clause, holding in the controversial 1990 case of *Employment Division v. Smith* that, because all citizens are subject to “neutral laws of general applicability” and no citizen is above the law, strict scrutiny does not apply to laws that unintentionally burden free exercise.⁴ Meanwhile, as long as Justice Sandra Day O’Connor remained on the Court, the test for public displays such as the Ten Commandments and for government religious speech and prayer was whether a reasonable observer would conclude that the government was *endorsing* religion in its actions.⁵

Although the new neutral Establishment Clause decisions have been politically popular for directing government resources to religious citizens, *Smith* and free exercise law have been less accepted. In response to the lobbying of many

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1. U.S. CONST. amend. I (emphasis added).

2. See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Sherbert v. Verner*, 374 U.S. 398 (1963).

3. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000).

4. 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring)).

5. See *Lynch v. Donnelly*, 465 U.S. 668, 687-93 (1984) (O’Connor, J., concurring).

religious groups, Congress immediately rejected *Smith*, passing a Religious Freedom Restoration Act (RFRA),⁶ which initially applied to both the federal government and the states until the Supreme Court ruled that Congress lacked the power to apply RFRA to the states.⁷ RFRA still applies to the federal government. Thereafter Congress failed to pass the Religious Liberty Protection Act (RLPA),⁸ but succeeded with the Religious Land Use and Institutionalized Persons Act (RLUIPA),⁹ an unprecedented federal intervention into local zoning decisions.¹⁰ The state and federal courts have also had a difficult time interpreting *Smith*, which the Supreme Court has not revisited since 1990, as well as the federal and state RFRA's that undermine *Smith*. On the endorsement front, in 2005 the Justices split on the Ten Commandments cases, allowing a monument to remain on display on the Texas state capitol grounds while ordering the removal of a Ten Commandments display from a Kentucky courthouse.¹¹

With the Religion Clauses jurisprudence in a jumble and subject to varying degrees of political and popular support, it is no surprise that cases about public prayer and the Ten Commandments, property and religious freedom, continue to be filed, and that citizens dispute the appropriate role of religion in passing laws about gay marriage and funding faith-based organizations (FBOs). The environment now mistakenly favors religion instead of religious liberty and fosters wars of religion instead of peaceful tolerance. To reinvigorate the ideal of religious liberty, this Article advocates a return to the roots of the First Amendment in the principle of religious tolerance or toleration.¹² I argue that the First Amendment is misinterpreted whenever its roots in tolerance are neglected, as they have been in the Court's Religion Clauses cases as well as in contemporary politics.

A focus on tolerance offers three important reminders about the appropriate role of religion in American democracy. First, because toleration is a political and legal principle, toleration is skeptical about religious truth-claims and accordingly denies the state the power to enforce religious "truth" through force or law. Second, tolerance protects the individual against the power of both church and state. Third, toleration must extend beyond the diversity among Christian sects of old Europe and the young United States and stretch in directions not anticipated by the Framers. The United States is now the "world's most religiously diverse nation."¹³ As in the past, acceptance of diversity is more likely to begin with a principle of toleration rather than with alternative theories of respect for persons, equality, or liberty of conscience.

In Part II, I describe the theory of tolerance that undergirds the First Amendment and sheds light on its interpretation in modern surroundings. Part II-A

6. 42 U.S.C. § 2000bb (2006).

7. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

8. Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999).

9. 42 U.S.C. § 2000cc (2006).

10. See Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311 (2003).

11. *McCreary County v. ACLU*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005).

12. Note: I use the words "tolerance" and "toleration" interchangeably throughout the Article.

13. DIANA ECK, *A NEW RELIGIOUS AMERICA: HOW A "CHRISTIAN COUNTRY" HAS BECOME THE WORLD'S MOST RELIGIOUSLY DIVERSE NATION* (2002).

examines toleration's roots in St. Augustine's belief that heretics could be compelled to faith and in the European Wars of Religion in the 16th and 17th centuries. From the truce of the Wars of Religion arose the new philosophical principles of tolerance of Pierre Bayle and John Locke that are described in Part II-B. Locke influenced the Framers of the U.S. Constitution, who developed a government of constitutional tolerance, which is described in Part II-C. Part II-D then employs the philosophy of John Rawls to develop a modern theory of constitutional tolerance that is based on legal and political rather than philosophical and religious principles.

The subsequent parts of the Article illustrate the three claims about tolerance. In Part III, I explore the debate over gay marriage in order to argue that a tolerant theory of law and public culture requires legislators and citizens to base their votes on political not religious reasons. Toleration's first lesson, that religious truth should not be imposed by force of law, was repeatedly violated during the California campaign about Proposition 8, a voter initiative that banned gay marriage.¹⁴

In Part IV, I identify several areas of the law where the courts currently protect religious organizations at the expense of individuals. Part IV-A uses examples from tort, property, and employment law to demonstrate that many courts have forgotten that constitutional tolerance protects individuals from the powers of the church. Part IV-B argues that a tolerant First Amendment does not allow the government to fund religious practice or employment discrimination within faith-based organizations, but permits it to give some aid to religious organizations according to the same criteria met by nonreligious providers.

In Part V, I use two monuments cases—*Summum* and *Buono*—to delineate a tolerant theory of public monuments that is more inclusive of minority religions like Summum and Buddhism than the current Establishment Clause tests. The Summum religion, which was founded in Utah in 1975 and describes itself as a form of Gnostic Christianity, teaches that God originally gave Moses the Seven Aphorisms.¹⁵ The Supreme Court recently ruled against the Summum religion in *Pleasant Grove City, Utah v. Summum*, in which Summum argued that a Utah city must place a Seven Aphorisms monument alongside the Ten Commandments in a public park.¹⁶ The Court has also granted certiorari in *Salazar v. Buono* in order to resolve a longstanding controversy about the presence of a Latin cross at a California veterans' memorial,¹⁷ where the National Park Service once denied a request to build a "stupa" (a dome-shaped Buddhist shrine) alongside the cross.¹⁸ A tolerant First Amendment imposes two requirements that the Court has ignored: first, it recognizes that crosses and the Ten Commandments retain their *religious*

14. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (upholding voter initiative banning gay marriage).

15. Summum.org, About Summum, <http://www.summum.org/about.shtml>; Summum and Freemasonry, <http://www.summum.us/philosophy/freemasonry.shtml>; The Teachings of the Summum are the Teachings of Gnostic Christianity, <http://www.summum.us/philosophy/gnosticism.shtml> (last visited Aug. 28, 2009).

16. 129 S. Ct. 1125 (2009).

17. *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008), *cert. granted*, *Salazar v. Buono*, 129 S. Ct. 1313 (U.S. Feb. 23, 2009, No. 08-472).

18. *Buono v. Kempthorne*, 502 F.3d 1069, 1072-73 (9th Cir. 2007).

character and are not secular; second, it allows such religious displays to stand only if they are surrounded by other *religious* monuments and symbols, e.g., the Summum Aphorisms, the Buddhist stupa, the Jewish Star of David, the Muslim crescent and star, or the Wiccan pentacle.

In Part VI, I conclude that the current religious diversity of the United States is reminiscent of the days of the Framers of the Constitution, when the original states contained established churches from varying sects. Although all those dominant churches were Christian, the Framers recognized that the states' political union could not be based on Christian belief but required a principle of constitutional tolerance. Today the nation is more diverse than the Framers could have envisioned. The percentage of Christians in the population continues to decline and the "Nones"—non-theist and no-religion groups—show the largest net increase in numbers.¹⁹ In such circumstances, "[i]t is safer to trust the consequences of a right principle than reasonings in support of a bad one," as James Madison suggested.²⁰ Following Madison's guidance, current First Amendment jurisprudence should abandon the current intolerant wars of religion and return to the principle of constitutional tolerance, which protects religious liberty instead of religion.

II. THE PRINCIPLE OF TOLERANCE

Tolerance contains the three components of *objection*, *acceptance*, and *rejection*: we object to something (or someone) because it is false or bad; we nonetheless accept it, not because it loses its negative qualities, but because other circumstances give us reason to accept or tolerate it; and at some stage, we reach the limits of tolerance and therefore reject the idea or person in question.²¹ Considered in that way, judgments about toleration are complex, requiring individuals to weigh competing principles and values, as well as negative, always beginning with a sense of objection to something inferior. "Toleration is always *mere* toleration. It is less than equality just as it is distinct from liberty, and it is sharply at variance with fraternity. For these reasons toleration is far from an ideal policy; it is contaminated, so to speak, by that very implication of evil which its meaning contains."²² Because of tolerance's negative connotations, it is frequently rejected as a political principle in favor of loftier ideals of equality, liberty, or respect. James Madison rejected the negative-sounding tolerance in favor of free exercise when he drafted the Virginia Bill of Rights and the First Amendment. Nonetheless, I argue that the First Amendment is misinterpreted if its roots in tolerance are neglected. Accordingly in this section I explain the modern history of toleration and the *religious*, *philosophical*, *political*, and *legal* arguments about

19. See Barry Kosmin & Ariela Keysar, American Religious Identification Survey 2008, <http://www.americanreligionsurvey.org/> (last visited Aug. 28, 2009).

20. Edwin S. Gaustad, *Religious Tests, Constitutions, and "Christian Nation,"* in RELIGION IN A REVOLUTIONARY AGE 218, 235 (Ronald Hoffman and Peter J. Albert eds., 1994) (quoting Madison's "Detached Memoranda," WM. & MARY Q., 3d ser.3, 554-56 (Elizabeth Fleet ed. 1946)).

21. Rainer Forst, *Pierre Bayle's Reflexive Theory of Toleration*, in TOLERATION AND ITS LIMITS: NOMOS XLVIII 78, 79 (Melissa S. Williams & Jeremy Waldron, eds., 2008).

22. Maurice Cranston, *Toleration*, in 8 THE ENCYCLOPEDIA OF PHILOSOPHY 143 (Paul Edwards ed., 1972) (emphasis in original).

toleration that provided background to the First Amendment and should guide its interpretation today. From that history I develop three principles that are then illustrated in the rest of the Article. First, in the constitutional setting, toleration is a political and legal principle that is skeptical about religious truth-claims and accordingly denies the state the power to enforce religious “truth” through force or law. Second, tolerance protects the individual against the power of *both* church *and* state. Third, although toleration arose primarily from the diversity among Christian sects in Europe and the young United States, the United States is now the “world’s most religiously diverse nation,”²³ encompassing Muslims, Buddhists, Sikhs, Hindus, Atheists, and increasing numbers of nonreligious, as well as Jews and Christians.²⁴ Tolerance is more able to accept the new diversity than traditional interpretations of free exercise and establishment.

A. The Wars of Religious Intolerance

In European history, the modern principle of toleration developed in reaction to Europe’s background culture of “coercive uniformity” of Christian church and state and the 16th and 17th century Wars of Religion among the Christian churches.²⁵ That “coercive uniformity” can be explained by considering the religious argument of the great Christian theologian, Saint Augustine of Hippo, who wrote in a famous fifth-century letter that force could be used to convert individuals to the Christian faith: “You are [mistakenly] of opinion that no one should be compelled to follow righteousness; and yet you read that the householder said to his servants, ‘Whomsoever you shall find, *compel them to come in*.’”²⁶

The notorious words “compel them to come in” are from a parable in the New Testament’s Gospel of Luke, where Jesus speaks of a man who invited many guests to his banquet. After the invited guests sent excuses,

[T]he householder in anger said to his servant, “Go out quickly to the streets and lanes of the city, and bring in the poor and maimed and blind and lame.”

And the servant said, “Sir, what you commanded has been done, and still there is room.” And the master said to the servant, “Go out to the highways and hedges, and *compel people to come in*, that my house may be filled.

For I tell you, none of those men who were invited shall taste my banquet.”²⁷

Although Augustine’s exegesis of the scriptural text may be questionable, the “compel them to come in” language—which to modern ears sounds unacceptably intolerant—was influential in Christian history. The logic of Augustine’s position was that if Christianity is *true*, and therefore leads the individual to the highest good of eternal salvation, then it is good for individuals to be brought to the truth by any means, including the use of force. Therefore the *state* should employ its

23. ECK, *supra* note 13.

24. Cathy Lynn Grossman, *Most Religious Groups in USA Have Lost Ground, Survey Says*, USA TODAY, Mar. 9, 2009, http://www.usatoday.com/news/religion/2009-03-09-american-religion-ARIS_N.htm.

25. JAMES H. HUTSON, *CHURCH AND STATE IN AMERICA: THE FIRST TWO CENTURIES* 11 (2008).

26. St. Augustine, Letter 93 to Vincentius, <http://www.newadvent.org/fathers/1102093.htm> (last visited Aug. 28, 2009) (emphasis added).

27. *Luke* 14:21-24 (emphasis added).

force of arms to impose the *church's* truth, precisely because the City of Man is subordinate to the City of God and temporal health is inferior to spiritual. In the intolerant, pre-Wars of Religion Europe, as well as in the American colonies founded in that era, the “governing metaphor in church-state relations” was thus for the “civil magistrate to establish a close, even proprietary relationship with the church and authorized him to employ force to promote the church’s doctrinal and material interests.”²⁸ In other words, the state promoted the church’s truth and was intolerant of all other religions and philosophies.

Increasing divisions among Christians about who possessed the truth—the Catholic Church or the Protestant Reformers—led to the bitter and brutal 16th and 17th century Wars of Religion, when European states fought to the death for the sake of religious truth. The exhaustion from those wars eventually persuaded states to accept their neighbors rather than kill them and a *political* principle of toleration emerged.²⁹ Although for *religious* reasons all sides wanted their vision of the truth to govern, the death and destruction eventually persuaded nations to build a political peace that offered an end to warfare. As a leading historian of the English Civil Wars explained, by 1660 “[t]he conviction had gained strength in English thought that the ends of national life in the modern world could not be attained until the divisive and destructive energies of religious conflict had been tamed by toleration.”³⁰ Thus the belief that one religious truth could govern all nations and citizens gave way to religious pluralism. The political reality demanded toleration of conflicting truths.

B. From Religious Intolerance to Philosophical Tolerance

New philosophical accounts of tolerance arose in response to the political and religious situation in Europe and challenged the old Augustinian framework. French Protestant Pierre Bayle provided a different interpretation of the “compel them to come in” passage that had previously justified intolerance. Arguing that Scripture does not command immoral behavior, Bayle provided a moral reading of the gospel according to which the “compel them to come in” text is properly read to mean that unbelievers must be given arguments about faith, but if they refuse the message there is nothing more that Christians can do.³¹ Common morality, rather than religious doctrine, provided the basis for toleration; according to Bayle, “[b]ecause we have a common morality, there is a vantage point from which everyone, whatever their religious views, can see the justification for toleration.”³²

English philosopher John Locke gave a principled basis to the new ideal of tolerance; his ideas were influential in the English colonies and later in the framing of the U.S. Constitution. Locke’s famous *A Letter Concerning Toleration* focused

28. HUTSON, *supra* note 25, at 11. See also Forst, *TOLERATION*, *supra* note 21, at 85 (an account of Augustine’s “compel them to come in”).

29. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT 1* (Erin Kelly ed., 2001) (hereinafter “RAWLS, JUSTICE”).

30. W.K. JORDAN, *IV THE DEVELOPMENT OF RELIGIOUS TOLERATION IN ENGLAND: ATTAINMENT OF THE THEORY AND ACCOMMODATIONS IN THOUGHT AND INSTITUTIONS (1640-1660)*, at 467 (1940).

31. J.B. Schneewind, *Bayle, Locke, and the Concept of Toleration*, in *PHILOSOPHY, RELIGION, AND THE QUESTION OF INTOLERANCE* 3, 7 (Mehdi Amin Razavi & David Ambuel eds., 1997).

32. *Id.*

on the individual conscience, arguing contra Augustine that the individual must not be compelled to religious truth but should freely choose it.³³ According to Locke, “no other human being or institution has any authority regarding the relation between an individual and God: each one stands alone before God, on the basis of his own conviction and conscience.”³⁴ That emphasis on the freedom of the individual conscience led Locke to be suspicious of both states and churches that attempted to coerce the individual conscience to believe.³⁵ Thus in Locke’s view, the old coercive uniformity of church and state had to give way to the freedom of the individual conscience.

On this point of liberty of conscience, Locke’s thought was theological and Protestant, focusing on the religious reasons for honoring the ideal of free conscience over the claims of church or state. From such theological beliefs, however, developed political and legal principles: Because the individual holds the right to religious freedom, states and churches may not use force to impose “the truth” upon the citizenry. Focusing on the claims of individual conscience made Locke more skeptical of the truth claims of the churches, leading to the conviction that “[n]o side has good reasons to declare its own convictions the only ‘truth’ and impose it on others by legal or political means.”³⁶ There were limits to Locke’s tolerance, however. Locke did not tolerate Catholics or atheists,³⁷ arguing “those are not at all to be tolerated who deny the being of a God.”³⁸

C. From Philosophical to Constitutional Tolerance

Locke’s philosophy and his interpretation of the liberty of conscience influenced the Framers of the U.S. Constitution.³⁹ The Framers initially distinguished themselves from the old states of Europe when they drafted the U.S. Constitution, whose only mention of religion was the text of Article VI: “[N]o Religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”⁴⁰ That groundbreaking language marked a shift from prior practice in Europe and the states. At the time of the Constitution’s drafting, eleven states had religious qualifications for government officials, following the pattern in Britain, where monarchs were required to be members of the Church of England.⁴¹ Although critics of the Constitution feared that the

33. JOHN LOCKE, A LETTER CONCERNING TOLERATION (William Popple trans., 1689), available at <http://www.constitution.org/jl/tolerati.htm>.

34. Forst, TOLERATION, *supra* note 21, at 85.

35. Alex Tuckness, *Locke’s Political Philosophy*, in STANFORD ONLINE ENCYCLOPEDIA OF PHILOSOPHY, (Edward N. Zalta ed., 2005), <http://plato.stanford.edu/entries/locke-political/>.

36. Forst, TOLERATION, *supra* note 21, at 90. See also Tuckness, *supra* note 35.

37. LOCKE, *supra* note 33. See also Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 856 (1985/1986) (“If the Founders’ generation truly sought freedom for religious beliefs, however, I find no evidence that they were equally concerned with freedom for irreligion.”).

38. LOCKE, *supra* note 33. See also Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 376 (2002) (explaining that Locke’s toleration didn’t extend to atheists (or to other Christians)). See also Kurland, *supra* note 37.

39. Feldman, *supra* note 38, at 354.

40. U. S. CONST. Art. VI.

41. AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 166 (2005).

absence of God and religion from a text that lacked prayers, invocations or a reference to Christianity would undermine the government and even permit “deists, atheists, &c.” to govern, the secular Constitution was ratified.⁴² One reason for the success of a secular Constitution was that “as a practical matter, many delegates recognized that distinctive historical traditions, colony by colony, region by region, even decade by decade, made any unifying [religious] assertion highly problematic.”⁴³

When James Madison was involved in drafting the religious liberty clause of the Virginia Bill of Rights, which was a precursor to the First Amendment, he rejected George Mason’s proposal to include the word “toleration” in the clause.⁴⁴ Instead, the Virginia Bill protected “the full and free exercise of religion.”⁴⁵ “Madison objected on the ground that the word ‘toleration’ implies an act of legislative grace, which in Locke’s understanding it was.”⁴⁶ Madison, whose suspicion of the state led him to draft a Constitution that created a government of limited and enumerated powers, focused on the individual’s right to religious freedom against the state, not on the state’s decision to honor religious freedom.⁴⁷

Although Madison originally believed that a Bill of Rights was unnecessary because the Constitution gave the government no power over religion, he participated in drafting the original amendments in order to secure the Constitution’s ratification. His early drafts of the First Amendment repeatedly recognized the “equal rights of conscience,” but the conscience language disappeared during the House and Senate conferences, and the final language of the First Amendment became “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . .”⁴⁸

Madison’s arguments about religious liberty in Virginia and in Congress should not be interpreted as opposition to tolerance. The Free Exercise Clause protected liberty of conscience as an individual right and not as a gift of the government. That interpretation of liberty arose from the old European concept of toleration that kept the peace among warring factions.⁴⁹ According to the late constitutional scholar Philip Kurland, the Establishment Clause then provided a “new concept” that protected and extended toleration, namely the separation of church and state:

[T]he separation clause had a greater function than the assurance of toleration of

42. Gaustad, *supra* note 20, at 225-26.

43. *Id.* at 225.

44. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1443 (1990).

45. *Id.*

46. *Id.* See also *City of Boerne*, 521 U.S. at 555-56 (O’Connor, J., dissenting) (explaining Mason’s and Madison’s approaches to the First Amendment).

47. *City of Boerne*, 521 U.S. at 556 (O’Connor, J., dissenting). See also SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* 492 (1970) (noting that Madison objected to the word “toleration” as belonging to “a system where was an established Church, and where a certain liberty of worship was granted, not of right, but of grace”).

48. MICHAEL S. ARIENS & ROBERT A. DESTRO, *RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY* 75-89 (2d ed. 2002). See also THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986).

49. Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 4 (1961).

dissenting religious beliefs and practices. To suggest but two lessons of the evils resulting from the alliance of church and state, there was abundant evidence of the contributions of the churches to the warfare among nations as well as the conflict within them and equally obvious was the inhibition on scientific endeavor that followed from the acceptance by the state of church dogma. . . . Limited powers of government were not instituted to expand the realm of power of religious organizations, but rather in favor of freedom of action and thought by the people.⁵⁰

Thus in the American setting, the principle of toleration developed into an individual constitutional right of religious liberty that set limits on both state and church, the appropriate lesson from the legacy of Europe, where the union of church and state had constrained religious freedom.

Although Locke influenced the Framers, their work should not be confused with his.⁵¹ We must distinguish constitutional toleration (i.e., the political and legal principles found in the Constitution) from the religious and philosophical arguments that support it. The Framers drafted a Constitution, not a philosophical treatise.

Revulsion at continued bloodshed, belief in a right to form one's own religious opinion, appreciation of diversity, the thought that God leads us by different paths—any of these reasons might move people toward acceptance [of the principle of tolerance]. We need no agreement on reasons for accepting the principle. What we ask of those who accept toleration is only a public political commitment.⁵²

The meaning of that public political commitment is examined in the next section.

D. Understanding Contemporary Tolerance

Ironically it was the late philosopher John Rawls, the author of *Political Liberalism*, whose theory provided a basis for modern politics that is neither philosophical nor religious. Rawls's political theory provides a fuller explanation of constitutional tolerance in a manner that clarifies the importance of interpreting the First Amendment to require tolerance rather than a free exercise right to rule by religion. Four of Rawls's key concepts shed light on current religious disputes. Just as many religious groups today insist that their Christian theology must establish the law, the Warriors of Religion in Europe believed their religion was true, so they fought to establish it as the religion of the state or prince. First, and in contrast to the one-true view, Rawlsian liberals, like the Framers, accept pluralism among people's comprehensive beliefs;⁵³ in the modern era, no single comprehensive doctrine compels the allegiance of all citizens. Pluralism is an abiding feature of our lives and will not fade. Second, a political conception of justice must therefore be found that does not impose one comprehensive doctrine

50. *Id.*

51. See, e.g., DAVID A. J. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986); DAVID A. J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS* (1993) (for a Lockean interpretation of the Constitution).

52. Schneewind, *supra* note 31, at 13.

53. JOHN RAWLS, *POLITICAL LIBERALISM* 24-25 n.27 (1993).

(like Catholicism, Kantianism, Mormonism, Secular Humanism, or Islam) on one's fellow citizens.⁵⁴ Third, the political conception of justice will be based on an overlapping consensus in which citizens can agree on the political and constitutional essentials of their society, even though they disagree about their comprehensive doctrines.⁵⁵ Fourth, decisions within the overlapping consensus should be made only on the basis of reasons that appeal to all citizens, and so citizens must employ public reason.⁵⁶ Public reason means that citizens should not appeal to comprehensive religious and philosophical doctrines but to arguments that their fellow citizens may "reasonably be expected to endorse."⁵⁷ Endorse is the key word here; I may *understand* why a faithful Catholic would vote the Pope's teachings into law, but, as a non-Catholic, I cannot be expected to *endorse* government according to a faith I do not share. A Christian should not ask her fellow citizens to be governed by the Bible because all citizens cannot endorse the Bible as a source of law.

These four features of political liberalism explain both the tension between religion and democracy as well as why toleration is required in a liberal democracy. Believers instinctively want their own comprehensive perspective to govern all aspects of life, including legal details about marriage and the family. Yet pluralism renders this desire impossible unless force is used to impose one's views on another. Instead of inflicting their views on others, citizens should meet on the common ground of political justice, an independent "module" shared by all. Although in the 17th century, philosophers like Pierre Bayle believed that "common morality" could unite all citizens to a tolerant perspective, in the pluralist 21st century Americans share no common morality and therefore must be united on political and legal grounds.

The tolerant citizen recognizes that she may not impose her religious truth on others, and therefore asks if constitutional principles such as liberty and equality support a proposed law or not. The discussion should always *begin* with political and legal principles. That is not to say that constitutional or political principles provide easy or determinate solutions in every situation. They should, however, provide the premises of the argument from which the debate starts. To consider this point in another context, an analysis of women's rights that *begins* with biblical texts is less likely to support women's equality than one that starts with the Equal Protection Clause of the U.S. Constitution. Religious traditions have different values from the constitutional tradition; the former should not replace the latter.

From this history, I take three claims about tolerance that are illustrated in the next three parts of the Article. First, because toleration is a political and legal principle, toleration is skeptical about religious truth-claims and accordingly denies the state the power to enforce religious truth through force or law. Second, tolerance protects the individual against the power of both church and state. Third, toleration must extend beyond the diversity among Christian sects in old Europe and the young United States and stretch in directions not anticipated by Locke or

54. *Id.* at 12.

55. *Id.*

56. *Id.* at 64.

57. *Id.* at 225-26.

the Framers. The United States is now the “world’s most religiously diverse nation.”⁵⁸ As in the past, acceptance of diversity is more likely to begin with a principle of toleration rather than with alternative theories of respect for persons, equality or liberty of conscience.

In Part III, I explain why the first claim, that religious truth must not be enforced by law, is confirmed by the recent constitutional controversies surrounding gay marriage.

III. RELIGIOUS TRUTH MUST NOT BE ENFORCED BY LAW

The intensity of recent debates about the legality of gay marriage confirms that modern wars of religion can be fought at the ballot box as well as on the battlefield. Toleration’s first lesson, that religious truth should not be imposed by force of law, was repeatedly violated during the California campaign about Proposition 8, a voter initiative that banned gay marriage in response to the California Supreme Court’s ruling that gay marriage was required by the state constitution’s equal protection clause.⁵⁹ In contrast to religious citizens who *begin* their analysis of gay marriage with a *theological* question—is it justified by the Bible, or the Elders, or Mormon or Catholic Theology, or Papal Teaching—the tolerant citizen recognizes that she must not impose her religious truth on others and therefore asks if constitutional principles such as liberty and equality support gay rights or not. The discussion should always *begin* with political and legal principles. The following pages describe the intolerant circumstances in California (in Part III-A) and explain (in Part III-B) why a theory of tolerance is necessary to correct the situation and restore the constitutional order.

A. The Religious Debate over Proposition 8

In one television advertising campaign, two actors portraying Mormon missionaries forced their way into the well-kept home of a married lesbian couple.

“Hi, we’re here from the Church of Jesus Christ of Latter-day Saints,” one says:

“We’re here to take away your rights,” says his partner.

The missionaries then rip the wedding rings from the women’s fingers and ransack their house until they find the women’s marriage license, which they destroy.

“Hey, we have rights,” one of the women says.

“Not if we can help it,” answers the missionary.⁶⁰

The ad, depicted above, captured the tone of the debate about Proposition 8, an initiative to amend the state constitution to recognize “[o]nly marriage between a man and a woman” in response to the California Supreme Court’s ruling that the equal protection clause of the California Constitution required the state to legalize gay marriage.⁶¹ During the campaign, several Christian groups, led by the Church of Jesus Christ of Latter-day Saints, vocally supported the proposition and

58. ECK, *supra* note 13.

59. Strauss, 207 P.3d 48.

60. Jessica Garrison & Joanna Lin, *Prop. 8 Protestors Target Mormon Temple in Westwood*, L.A. TIMES, Nov. 7, 2008, <http://www.latimes.com/news/local/la-me-protest7-2008nov07,0,3827549.story>.

61. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

contributed large amounts of money to its passage, while gay rights groups criticized the numerous faith-based attempts to influence the vote. One No-on-8 group created a website to keep track of Mormon contributions to the Yes-on-8 drive and estimated that Mormons had contributed \$20 million toward passage of the initiative. A pro-8 spokesman decried the website and the “despicable” ad:

“I am appalled at the level of Mormon-bashing that went on during the Proposition 8 campaign and continues to this day,” “If this activity were directed against any other church, if someone put up a website that targeted Jews or Catholics in a similar fashion for the mere act of participating in a political campaign, it would be widely and rightfully condemned.”⁶²

The complaints of Mormon-bashing were then rebutted with arguments that the gay rights supporters were debating politics, not religion, and were appropriately criticizing the political activity of the Mormon Church.

Although the Mormon support for Proposition 8 received much of the media’s attention, the Mormons were only part of a broad coalition of religious groups who joined to protectmarriage.com. The campaign for Proposition 8 was “one of the most ambitious interfaith political organizing efforts ever attempted in the state,” as Catholics and evangelical Christians participated in large numbers and members of the Protect Marriage Coalition also “reach[ed] out to Jews, Muslims, Sikhs and Hindus.”⁶³ “Moreover, political analysts say, the alliances across religious boundaries could herald new ways of building coalitions around political issues in California. ‘Pan-religious, faith-based political action strategies . . . I think we are going to see a lot more of [this] in the future,’” predicted one professor.⁶⁴ The Religious Left eventually responded to the Religious Right with videos showing priests and rabbis explaining their faiths’ support for gay marriage.⁶⁵ The situation is reminiscent of the post-Reformation arguments about religious *truth*, with Right and Left arguing that their perspectives on the morality of gay marriage were true and therefore should be imposed as law.

Post-election news stories explained that Proposition 8 passed because of support from religious voters. “Californians voted their religion, not their political party, when they pushed Proposition 8 to victory and banned same-sex marriage in the state ‘What the exit polls say is that religion trumps party affiliation when it comes to social issues,’ said Mark DiCamillo, director of the Field Poll.”⁶⁶

In response to Proposition 8’s success, tens of thousands of protesters picketed Mormon institutions around the country, from California to New York.⁶⁷ About 2000 protesters chanted complaints against the church at the Westwood Mormon

62. Garrison & Lin, *supra* note 60.

63. Jessica Garrison, *California Churches Plan a Big Push Against Same-Sex Marriage*, L.A. TIMES, Aug. 24, 2008, <http://articles.latimes.com/2008/aug/24/local/me-faith24>.

64. *Id.*

65. *Id.*

66. John Wildermuth, *The Voters: Majority of Blacks, Catholics, Who Supported Obama, Backed Measure*, SAN FRANCISCO CHRON., Nov. 6, 2008, at A18.

67. Ben Arnoldy, *Gay Activists Protest Mormon Church*, CHRISTIAN SCI. MONITOR, Nov. 13, 2008, <http://www.csmonitor.com/2008/1113/p03s07-uspo.html>; *New Yorkers Protest Gay Marriage Ban Outside Mormon Church*, FoxNews.com, Nov. 13, 2008, http://www.foxnews.com/printer_friendly_story/0,3566,451446,00.html.

Temple near Los Angeles,⁶⁸ they shouted “bigots” and “shame on you” at men near the temple.⁶⁹ Gay marriage supporters also created a new website, invalidateprop8.org; “[f]or every \$5 donated, . . . a postcard will be sent to the president of the Mormon church condemning ‘the reprehensible role the Church of Latter-day Saints leadership played in denying all Californians equal rights under the law.’”⁷⁰ “No More Mr. Nice Gay” adorned a placard in San Francisco;⁷¹ “Did you cast a ballot or a stone?”, “Latter Day H8,” and “Church of Mormon” with an X drawn over the second M to read “Moron” appeared in New York.⁷² The New York protesters warned religious groups against taking similar legal action against gay rights there; they feared success in California would “embolden the religious right” to “train their eye on other states” such as New York.⁷³

In addition to the picketing, numerous Proposition 8 opponents called for the revocation of the Mormons’ tax-exempt status, arguing that the church had lobbied for legislation in violation of the tax code.⁷⁴ The California Fair Political Practices Commission investigated the contributions of religious groups to the Yes-on-8 campaign in order to see if the amounts were accurately reported; the Secretary of State released the figures to the public.⁷⁵ With the lists of contributors publicly available, gays and lesbians then boycotted businesses whose owners or employees had contributed to the pro-8 cause.⁷⁶

The Proposition 8 supporters then rejoined that they are entitled to “exercis[e] their constitutional right to freedom of religion” by supporting moral policies consistent with that faith.⁷⁷ They also argued that the tax laws support their right to speak publicly about moral issues without losing their exemption.⁷⁸ One of their most visible responses was a full-page ad in the *New York Times* criticizing the actions of the gay rights groups as a “mob veto,” accusing the Proposition 8 opponents of practicing “violence and intimidation” against the Church of Jesus Christ of Latter-day Saints and other religions in order to “cow [their] opponents into submission,” and identifying the demonstrators as “mobs, seeking not to

68. Karen Grigsby Bates, *Gay-Marriage Ban Protesters Target Mormon Church*, NAT’L. PUB. RADIO, All Things Considered, Nov. 7, 2008, <http://www.npr.org/templates/story/story.php?storyId=96756702>.

69. Garrison & Lin, *supra* note 60.

70. *Id.*

71. Arnoldy, *supra* note 67.

72. *New Yorkers Protest Gay Marriage Ban*, *supra* note 67.

73. *Id.*

74. Aurelio Rojas, *State to Probe Allegation of Mormon Church Role in Prop 8*, SACRAMENTO BEE, Nov. 25, 2008, at 3A, available at <http://www.sacbee.com/capitolandcalifornia/story/1425577.html>.

75. CAL. SECRETARY OF STATE, List of “Yes on 8” Contributors,, http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1303282&view=received&psort=FILED_DATE&session=2007.

76. *Mormon Church Lists More Proposition 8 Expenses*, SignonSanDiego.com, Jan. 1, 2009 (recounting changes in figures); Karen Grigsby Bates, *Backers of California Gay Marriage Ban Face Backlash*, NAT’L. PUB. RADIO, Mar. 5, 2009, <http://www.npr.org/templates/story/story.php?StoryId=101460517>.

77. Bates, *supra* note 68.

78. John Cadiz Klemack, Patrick Healy & Jon Lloyd, *Prop 8 Protesters March into Night*, NBCLOSANGELES.COM, Nov. 7, 2008, http://www.nbclosangeles.com/news/local/Protestors_Signal_Battle_over_Same_Sex_Marriage_Not_Over.html.

persuade but to intimidate.”⁷⁹ NoMobVeto.org warned that “[r]eligious wars are wrong; they are also dangerous. Those who fail to condemn or seem to condone that intimidation are at fault as well. Consciously or not, they are numbing the public conscience, which endangers all of us.”⁸⁰ And the NoMobVeto group pledged:

Therefore, despite our fundamental disagreements with one another, we announce today that we will stand shoulder to shoulder to defend any house of worship—Jewish, Christian, Hindu, whatever—from violence, regardless of the cause that violence seeks to serve. Furthermore, beginning today, we commit ourselves to exposing and publicly shaming anyone who resorts to the rhetoric of anti-religious bigotry—against any faith, on any side of any cause, for any reason.⁸¹

Meanwhile, some gay activists chided themselves for not anticipating the strength of the religious pro-8 vote and confronting the Mormons more directly and explicitly on the basis of their religious dogma: “‘We should have been much stronger in pointing out the LDS positions: barring women from positions of power, opposing stem cell research, opposing reproductive choice, contraception, their historic exclusion of black people from their church until 1978.’”⁸²

At the end of the day, complaints of intolerance were lodged against all sides, with the religious groups accused of intolerance and bigotry against gays and the gay groups accused of intolerance and bigotry against religion.⁸³

This situation illustrates my argument that it is dangerous to rip free exercise from its roots in toleration. The purpose of the First Amendment was to provide an environment in which everyone’s liberty of conscience was protected and tolerated, not to authorize citizens to identify their own free exercise as a reason to limit the constitutional rights of others. Whenever free exercise becomes a justification for freely imposing one’s religious beliefs on others, religious belief becomes a weapon rather than a right. Recalling free exercise’s roots in toleration undermines the contemporary argument that religious citizens have a free exercise right to impose their religious beliefs on their fellow citizens. Tolerance offers a different approach than free exercise to the issue of gay marriage.

B. How Tolerance Differs from the Religious Approach to Gay Marriage

As noted above, a central lesson in the history of toleration, from St.

79. NoMobVeto.org, Text of Our New York Times Ad, <http://nomobveto.org/nytad.php> (last visited Aug. 28, 2009).

80. *Id.*

81. *Id.*

82. *Latter Day Education: When, Why, and How Do We Proceed?*, GoodAsYou.org, Feb. 12, 2009, http://www.goodasyou.org/good_as_you/2009/02/latter-day-education-when-why-and-how-do-we-proceed.html.

83. See <http://www.protectmarriage.com/tell> (last visited Aug. 28, 2009) (“For your steadfast support of traditional marriage, the No on 8 campaign has called you ‘intolerant’ and ‘offensive.’ But a recent string of attacks on Yes on 8 supporters shows that opponents of traditional marriage are anything but tolerant and respectful of others.”); Kathryn Jean Lopez, *Pastoring in Pragmatism*, NAT’L. REV., Dec. 29, 2008 (“Yes, I know: The conventional wisdom has it that the opponent of gay marriage is the intolerant one. But can ‘tolerant’ really be the right word to describe this excerpt from a recent *Newsweek* cover story on religious conservatives and the gay-marriage debate?”).

Augustine's "compel them to come in" to the European Wars of Religion, is that "government should not use force to try to bring people to the true religion."⁸⁴ The battle of religious truth is unending, and, as NoMobVeto suggests, may turn violent.⁸⁵ In Europe, the principle of toleration required all sides in the religious wars to stop coercing one another to follow the "truth" and to accept—not to like or agree with—their religious differences. As my first principle holds, toleration is skeptical about religious truth-claims and accordingly denies the state the power to enforce religious truth through force or law. When citizens use the force of law to impose their religious beliefs on their fellow citizens, they violate the principle of toleration.

In the Proposition 8 discussion, it is indisputable that the Church of Jesus Christ of Latter-day Saints based its opposition to gay marriage on purely religious reasons and sources, primarily the Christian Bible and Mormon theology, and therefore sought to use the power of the law to enforce religious truth. The religious grounds for Proposition 8 are explained in detail on the Mormon website about "The *Divine* Institution of Marriage":

Marriage is sacred, ordained of God from before the foundation of the world. After creating Adam and Eve, the Lord God pronounced them husband and wife, of which Adam said, "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh." [Genesis 2:24.] Jesus Christ cited Adam's declaration when he affirmed the divine origins of the marriage covenant: "Have ye not read, that he which made them at the beginning made them male and female, and said, For this cause shall a man leave father and mother, and shall cleave to his wife: and they twain shall be one flesh? Wherefore they are no more twain, but one flesh." [Matthew 19:4-6.]⁸⁶

In 1995, "The Family: A Proclamation to the World" declared the following unchanging truths regarding marriage:

We, the First Presidency and the Council of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints, solemnly proclaim that marriage between a man and a woman is ordained of God and that the family is central to the Creator's plan for the eternal destiny of His children The family is ordained of God. Marriage between man and woman is essential to His eternal plan. Children are entitled to birth within the bonds of matrimony, and to be reared by a father and a mother who honor marital vows with complete fidelity.

The Proclamation also teaches, "Gender is an essential characteristic of individual premortal, mortal, and eternal identity and purpose." The account in Genesis of Adam and Eve being created and placed on earth emphasizes the creation of two distinct genders: "So God created man in his own image, in the image of God created he him; male and female created he them." [Genesis 1:27].⁸⁷

The church urged its members to donate their time and energy to preserve the

84. Tuckness, *supra* note 35.

85. NoMobVeto.org, *supra* note 79.

86. LDS Newsroom, *The Divine Institution of Marriage*, Aug. 13, 2008, <http://newsroom.lds.org/ldsnewsroom/eng/commentary/the-divine-institution-of-marriage> (emphasis added).

87. *Id.*

“sacred nature of marriage.”⁸⁸

In contrast, the gay rights groups relied predominantly on arguments about *equality* and *liberty*, which are legal values enshrined in the U.S. and California Constitutions and not dependent upon theological reasoning. As noted above, however, liberal religious groups also filled the airwaves with theological defenses of gay marriage. The 2008 election revealed, moreover, that some political liberals are religious conservatives; just like the Mormons, Barack Obama refused to support equal protection for gay marriage because he believes that marriage is sacred and gay marriage is prohibited by the Bible. Although Obama did not endorse Proposition 8, he observed “that marriage, in the minds of a lot of voters, has a religious connotation. I know that’s true in the African-American [religious] community, for example.”⁸⁹ That was true in California as the African-American religious voters sent Obama to the White House and Proposition 8 to victory.⁹⁰

Obama’s explicit references to his own Christian faith and faith-based policies on the campaign trail were consistent with the recent trend for Democrats of faith, who, disappointed by their losses to the more Republican Religious Right in the 2000 and 2004 elections, have recently sought to attract voters by emphasizing their own religious values.⁹¹ The gay marriage issue, however, which put Obama on the same side as the Mormons defending sacred marriage instead of equal protection, is a stark reminder that neither liberal nor conservative religion—no religion of any sort—is the appropriate basis of the law in a tolerant society. Tolerance must challenge all attempts of both Religious Right and Left to provide the content of the law. A tolerant society does not base its laws on religious truth of any flavor.

On the question of gay marriage, the stance of political justice and public reason is easy to identify. Unlike Obama or the Mormons, Catholics, or evangelical Christians of protectmarriage.com, who *begin* their analysis of gay marriage with a *theological* question—is it justified by the Bible, or the Elders, or Mormon or Catholic Theology, or Papal Teaching—the tolerant citizen recognizes that she may not impose her religious truth on others, and therefore asks if constitutional principles such as liberty and equality support gay rights or not. The discussion should always *begin* with political and legal principles. That is not to say that constitutional or political principles provide easy or determinate solutions in every situation. They should, however, provide the premises of the argument from which the debate starts. To consider this point in another context, an analysis of women’s rights that *begins* with biblical texts is less likely to support women’s equality than one that starts with the Equal Protection Clause of the U.S. Constitution. Religious traditions have different values from the constitutional tradition; the former should not replace the latter.

This point explains why Obama was mistaken to argue in *The Audacity of Hope* “[w]hat our deliberative, pluralistic democracy does demand is that the religiously motivated *translate* their concerns into universal, rather than religion-

88. *Id.* (emphasis added).

89. Tracy Baim, *Obama Changed Views on Gay Marriage*, WINDY CITY TIMES, Jan. 14, 2009, at 6.

90. Farhad Manjoo, *Props to Obama: Did He Help Push California’s Gay-Marriage Ban Over the Top?*, SLATE, Nov. 5, 2008, <http://www.slate.com/id/2203912/>.

91. RAY SUAREZ, *THE HOLY VOTE: THE POLITICS OF FAITH IN AMERICA* 280-99 (2006).

specific, values.”⁹² The gay marriage debate demonstrates the futility and dishonesty of the translation enterprise. If Obama and Governor Mitt Romney both oppose gay marriage because it violates Christian or biblical principles, nothing is gained if Obama translates the Bible into political language while Romney openly cites church elders. It is still the rule of religion instead of the rule of law, with concealed instead of open faith. The Wars of Religion never end if religious groups work incessantly to turn or translate their theology into law. Religion-based politics will always give us the back-and-forth of Proposition 8, as groups angrily seek to make the law consistent with their own religion instead of democratically seeking the sphere of consensus.

Obama himself contributed to the suspicion and instability that accompany religion-based policies when it was discovered after the presidential election that as a state candidate in 1996 he unequivocally supported gay marriage and promised to “fight efforts to prohibit such marriages.”⁹³ The report raised questions about why he changed his position.⁹⁴ “In a January 2004 interview . . . , Obama clearly stated that lack of support for full marriage equality was a matter of strategy rather than principle, but in even more recent comments, it appears he is backing off even further, saying it is more of a religious issue, and also a ‘state’ issue, so he favors civil unions. Both are compromises most gays do not support.”⁹⁵ Religious, political, and strategic all merge into one, which leads to suspicion that religion is driving policy or being used as a political prop, and shows the inadequacy of Obama’s “translation” policy.

Whether faith is hidden or open, the legacy of liberal tolerance is the understanding that democracies cannot be governed by religious principles; the clash in California illustrates that legal controversies cannot be settled on religious grounds unless one religion is imposed upon citizens who do not share that faith. Accordingly, democratic citizens must oppose efforts to turn religious convictions into law and to re-Christianize our public discourse. Part III-C of this Article explains why free exercise does not justify the rule of religious beliefs.

C. Free Exercise Does Not Justify Intolerance

The recommendation to base the law on constitutional principles will appear harsh to some believers who feel “bracketed” or excluded from, or trivialized in, the public square because of their religion. Originally it was conservative religious groups who argued that the secularism of modern politics unfairly marginalized

92. BARACK OBAMA, *THE AUDACITY OF HOPE* 219 (2006) (emphasis added).

93. Alex Koppelman, *Revealed: Obama Used to Support Same-Sex Marriage*, Salon.com, Jan. 13, 2009, http://www.salon.com/politics/war_room/2009/01/13/obama_marriage/. (In a response to a *Windy City Times* questionnaire, Obama stated, “I favor legalizing same-sex marriages, and would fight efforts to prohibit such marriages.”).

94. *See id.* (“The most obvious answer, of course, is politics. Maybe Obama just realizes (correctly) that same-sex marriage is a political non-starter, while civil unions are relatively popular, so he chooses to publicly support the feasible position.”). *See also* Timothy Stewart-Winter, *Putting Obama’s Questionnaire in Context*, Jan. 14, 2009, WINDY CITY TIMES, 2009, at 7, available at <http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=20525> (In 1996, “Obama was an unlikely candidate, up against a progressive incumbent in a very progressive district, who needed all the help he could get.”).

95. Baim, *supra* note 89.

and derided religious conviction and undermined their religious freedom.⁹⁶ Now both conservatives and liberals, led by President Obama, have discovered political religion:

Surely secularists are wrong when they ask believers to leave their religion at the door before entering the public square; Frederick Douglass, Abraham Lincoln, William Jennings Bryan, Dorothy Day, Martin Luther King, Jr.—indeed the majority of great reformers in American history—not only were motivated by faith but repeatedly used religious language to argue their causes. To say that men and women should not inject their “personal morality” into public-policy debates is a practical absurdity; our law is by definition a codification of morality, much of it grounded in the Judeo-Christian tradition.⁹⁷

Obama neglects to mention that the starting point for our law and politics is precisely the morality that has already been codified into the state and federal constitutions. Emphasizing its “Judeo-Christian” nature is intolerant of the Muslims, Sikhs, Buddhists and Hindus who populate the United States. Moreover, there is no “Judeo-Christian tradition” to govern us; the term conflates Judaism with Christianity. Judaism and Christianity are two separate religions with their own traditions. Americans share the constitutional tradition and not a Judeo-Christian or any other religious tradition. The United States is different from Christian Europe, where Pierre Bayle could hope for a common morality that would unite all citizens. The American citizenry is religiously and philosophically diverse and does not share belief in any Judeo-Christian tradition.

Frederick Douglass, Abraham Lincoln, and Martin Luther King, Jr., did not impose their version of Christianity upon their fellow citizens; instead they sought to apply the guarantees protected in the Constitution to everyone. Many of the Christian churches of their eras supported slavery. As David Richards has explained, the abolitionist dissent was not successful because it was religious, but due to its moral independence:

[T]he interpretive understanding of the role of public reason in such abolitionist dissent is no more its religious or irreligious character than its scientific or anti-scientific character, but its critical moral independence in all domains (including science and religion) in forging arguments of public reason in opposition to the role that both dominant established science and religion played in the defense of slavery and racism.⁹⁸

The tolerant democracy does not start every discussion anew with the religious and philosophical commitments of its citizens; instead, it brackets everyone’s convictions so that peace may reign. A Kantian Californian should not vote the categorical imperative; a Rawlsian Californian should not vote the difference principle; a Mormon should not vote the divine teaching on marriage. Although these are not legal restrictions that can be enforced at the ballot box, a tolerant society cannot survive without a tolerant culture as well as a tolerant law, where

96. See, e.g., RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984).

97. OBAMA, *supra* note 92, at 218-19.

98. David A.J. Richards, *Public Reason and Abolitionist Dissent*, 69 CHI.-KENT L. REV. 787, 835 (1994).

individuals choose to be tolerant of their fellow citizens. Ideally their religions and philosophies will motivate them to be tolerant instead of to enforce their religions on others through their votes. A free exercise that lacks tolerance becomes a principle of injustice rather than a right of liberty.

Tolerant voting will not excite many passions because toleration is unsatisfactory in so many ways; as T.S. Eliot remarked, “‘The Christian does not wish to be tolerated.’”⁹⁹ Many tolerated religions echo Eliot because “[t]oleration is always mere toleration. It is less than equality just as it is distinct from liberty.”¹⁰⁰ Maurice Cranston interpreted Eliot’s comment to mean that “[t]he Christian wanted something better—to be respected, honored, and loved.”¹⁰¹ Within the Proposition 8 debate, even the Mormon church’s definition of *tolerance* was Christian and biblical, distinguishing itself from the legal and political definition of toleration and seeking to replace toleration with the theological and biblical principle of *Christian love*. Addressing charges that its stance toward gay marriage was intolerant, the church argued that the gay

appeal for “tolerance” advocates a very different meaning and outcome than that word has meant throughout most of American history and a different meaning than is found in *the gospel of Jesus Christ*. The Savior taught a much higher concept, that of *love*. “Love thy neighbor,” He admonished. [Matt. 19:19.] Jesus loved the sinner even while decrying the sin, as evidenced in the case of the woman taken in adultery: treating her kindly, but exhorting her to “sin no more.” [John 8:11.] *Tolerance as a gospel principle means love and forgiveness of one another, not “tolerating” transgression.*

In today’s secular world, the idea of tolerance has come to mean something entirely different. Instead of love, it has come to mean condone—acceptance of wrongful behavior as the price of friendship. Jesus taught that we love and care for one another without condoning transgression. But today’s politically palatable definition insists that unless one accepts the sin he does not tolerate the sinner.

As Elder Dallin H. Oaks has explained,

Tolerance obviously requires a non-contentious manner of relating toward one another’s differences. But tolerance does not require abandoning one’s standards or one’s opinions on political or public policy choices. Tolerance is a way of reacting to diversity, not a command to insulate it from examination.¹⁰²

This extended quotation about the inadequacy of toleration from a religious perspective reinforces my point that the seemingly negative principle of toleration may protect more rights than her lofty sisters—love, equality, and even religious freedom. Where Christian love forbids gay love, toleration accepts it. Without a basis in toleration, free exercise may become the exercise of religious truth in a coercive manner. Without toleration, free exercise may limit liberty rather than enhance it. Without toleration, equality may not extend to sinners. Without toleration, religious adherents will focus on religious truth and try to impose that truth on their neighbor in the name of love, rather than accepting that the parties

99. Cranston, *supra* note 22, at 143 (quoting T.S. Eliot).

100. *Id.*

101. *Id.*

102. LDS Newsroom, *supra* note 86 (internal citation omitted).

will always disagree about religious truth and therefore seeking to *object* and then *accept*.

Michael Walzer explained the inevitable discomfort of some religious groups with tolerance, observing that although they can tolerate minority religious freedom,

they have no tolerance for personal liberty outside the house of worship. If sectarian communities aim to control the behavior of their own people, the more extreme members of religious majorities aim to control everyone's behavior—in the name of a supposedly common (Judeo-Christian, say) tradition, of “family values,” or of their own certainties about what is right and wrong. This is surely an example of religious intolerance. It is a sign of the partial success of the regime of toleration, however, that antagonism is not directed against particular minority religions but rather against the ambience of freedom that the regime as a whole creates.¹⁰³

Walzer's point was well-illustrated in the debate over Proposition 8, where the minority religions were recruited to join the coalition to limit social freedoms.

Throughout the Proposition 8 debate, some supporters asserted “if this proposition had not passed, religious groups could have been forced to conduct same-sex weddings.”¹⁰⁴ Really? A tolerant First Amendment does not go so far; it objects to the church's opposition to gay marriage but accepts its free exercise right not to be coerced into religious rituals. With Locke, constitutional toleration does not believe in state-enforced, coercive faith. Although divorce is legal, for example, Christian churches are not legally required to offer communion or remarriage to the divorced. Ideally and tolerantly, the states will offer nonreligious marriage to all citizens and the churches will make their theological decisions about which marriages deserve church approval.

This point about the liberty of churches suggests that a tolerant society respects the autonomy of churches to make their own decisions about religious matters. In Part IV, I argue that tolerance sets some limits on religious organizations because constitutional tolerance must protect individuals against the power of both church and state.

IV. TOLERANCE PROTECTS INDIVIDUALS AGAINST THE POWER OF BOTH CHURCH AND STATE

The Free Exercise Clause arose from the Framers' desire to protect individual liberty of conscience. The Supreme Court has repeatedly held that the religious freedom to *believe* is absolute,¹⁰⁵ thus confirming the inviolability of the individual conscience, which may not be forced into belief by either church or state.

While recognizing the absolute freedom of religious beliefs, however, the Court has also recognized that the law may regulate religious *acts*.¹⁰⁶ In an early ruling, the Court held that a Mormon did not have a free exercise right to practice

103. MICHAEL WALZER, ON TOLERATION 70 (1997).

104. *A Mormon Responds to Proposition 8*, VANITY FAIR, Nov. 17, 2008, <http://www.vanityfair.com/online/politics/2008/11/a-mormon-responds-to-proposition-8.html>.

105. *United States v. Ballard*, 322 U.S. 78, 86-88 (1944).

106. *Id.* at 86.

polygamy;¹⁰⁷ more recently, the Court held that a Native American did not have a free exercise right to use peyote in violation of the drug laws.¹⁰⁸ The peyote case, *Employment Division, Department of Human Resources v. Smith*, set the current standard for interpretation of the Free Exercise Clause. According to *Smith*, religious citizens are not above the law but, like everyone else, are subject to “neutral laws of general applicability.”¹⁰⁹ The rule of *Smith* prohibits discrimination on the basis of religion but does not exempt religious believers from nondiscriminatory laws.¹¹⁰

Although *Smith* was roundly criticized for eviscerating free exercise,¹¹¹ its holding is consistent with a tolerant reading of the First Amendment. The issue of the range of the government’s power to regulate religious acts can be reworded as a question about the limits of tolerance. Although we dislike or disagree with our fellow citizens’ religious actions, we tolerate them unless . . . what? What are the limits to toleration?

The classic *philosophical* response to that question comes from John Stuart Mill’s *On Liberty*. According to Mill, “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”¹¹² A Millian reading of the Constitution favors the principle of autonomy and finds in the no-harm principle the appropriate limit of tolerance. Some scholars have recommended interpreting the First Amendment from Mill’s perspective because doing so provides a “thick” theory that fully protects religious liberty. Professor Beattie, for example, has argued that Locke’s notion of toleration protects only religious belief, not acts, and is consistent with *Smith*.¹¹³ Beattie prefers Mill, whose principles protect both belief and acts *unless they harm others*, and whose philosophy is more consistent with the Supreme Court’s, pre-*Smith*, *Sherbert* line of cases, which held that laws substantially burdening free exercise must be subjected to strict scrutiny.¹¹⁴

According to the political and legal theory of the Constitution spelled out in Part III, however, citizens may not privilege their philosophical or religious theories of the Constitution and impose them on others. A Millian is subjected to the same restrictions as a Mormon. Mill’s principles of autonomy and no-harm cannot provide a shared interpretation of the First Amendment. The best way to avoid privileging a religious or philosophical reading of the Constitution is to hold all citizens to the same law, as *Smith* requires. Having a religious law for some but not others undermines the peace and stability of the tolerant community. Thus the free exercise protected by the Constitution is not a general principle of autonomy from the law’s regulation but an effort to identify a law that is shared by all.

107. *Reynolds v. United States*, 98 U.S. 145 (1878).

108. 494 U.S. at 890.

109. *Id.* at 879 (quoting *U.S. v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

110. *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531 (1993).

111. *See, e.g., Michael W. McConnell, Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

112. JOHN STUART MILL, *On Liberty*, in *ON LIBERTY AND OTHER ESSAYS* 14 (John Gray ed., 1991).

113. James R. Beattie, Jr., *Taking Liberalism and Religious Liberty Seriously: Shifting Our Notion of Toleration from Locke to Mill*, 43 CATHOLIC LAWYER 367, 407-08 (2004).

114. *Id.*

In the name of free exercise, and even post-*Smith*, some courts and scholars have defended a theory of the First Amendment that protects not only Millian personal autonomy but also “church autonomy,” which is “a constitutionally protected interest in managing their own institutions free of government interference.”¹¹⁵ This theory is even more troubling than a personal autonomy interpretation of free exercise because the history of tolerance recognizes the dangers that churches may pose to individual religious freedom. A tolerant First Amendment is wary of the power of churches to oppress individuals and therefore insists that the First Amendment allows no “citizen [or church] to become a law unto himself.”¹¹⁶ In contrast to that rule, in tort (Part IV-A(1)), property (Part IV-A(2)) and employment law (Part IV-A(3)), the courts have too frequently allowed the churches to become a law unto themselves in a manner that violates individual liberty. Thus they choose a standard that tolerance abhors, namely one that protects institutional churches from legal accountability to their members in the name of religious freedom.

The ability of churches to undermine individual religious liberty is enhanced when the government provides funding to the churches to do so, as described in Part IV-B.

A. Church Autonomy

The Texas Supreme Court recently ignored the lessons of tolerance when it defended church autonomy to injure a teenage girl during an exorcism.

1. Torts

Laura Schubert was a seventeen-year-old member of the Pleasant Glade Assembly of God, a Christian church that “believes in the literal teachings of the Bible with respect to spirits, demons, demon possession, and the ‘casting out’ of demons.”¹¹⁷ During a weekend spent at her church, while her parents were out of town, Schubert attended a worship service on Sunday morning, and then collapsed during a Sunday evening service.¹¹⁸

After her collapse, several church members took Laura to a classroom where they “laid hands” on her and prayed. According to Laura, church members forcibly held her arms crossed over her chest, despite her demands to be freed. According to those present, Laura clenched her fists, gritted her teeth, foamed at the mouth, made guttural noises, cried, yelled, kicked, sweated, and hallucinated. The parties sharply dispute whether these actions were the cause or the result of her physical restraint.

Church members, moreover, disagreed about whether Laura’s actions were a ploy for attention or the result of spiritual activity. Laura stated during the episode that Satan or demons were trying to get her. After the episode, Laura also allegedly began telling other church members about a “vision.” Yet, her collapse and

115. See, e.g., Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

116. *Smith*, 494 U.S. at 879.

117. *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 3 n.1 (Tex. 2008).

118. *Id.* at 3-4.

subsequent reaction to being restrained may also have been the result of fatigue and hypoglycemia. Laura had not eaten anything substantive that day and had missed sleep because of the spiritual activities that weekend. Whatever the cause, Laura was eventually released after she calmed down and complied with requests to say the name "Jesus."

[. . .]

On Wednesday evening, Laura attended the weekly youth service presided by Rod Linzay. According to Linzay, Laura began to act in a manner similar to the Sunday evening episode. Laura testified that she curled up into a fetal position because she wanted to be left alone. Church members, however, took her unusual posture as a sign of distress. At some point, Laura collapsed and writhed on the floor. Again, there is conflicting evidence about whether Laura's actions were the cause or result of being physically restrained by church members and about the duration and force of the restraint. According to Laura, the youth, under the direction of Linzay and his wife, Holly, held her down. Laura testified, moreover, that she was held in a "spread eagle" position with several youth members holding down her arms and legs. The church's senior pastor, Lloyd McCutchen, was summoned to the youth hall where he played a tape of pacifying music, placed his hand on Laura's forehead, and prayed. During the incident, Laura suffered carpet burns, a scrape on her back, and bruises on her wrists and shoulders.¹¹⁹

Afterward, Schubert suffered from depression, suicidal tendencies, anger, weight loss, and sleeplessness.¹²⁰ She dropped out of high school and, after being diagnosed with post-traumatic stress disorder due to the church events, collected disability payments.¹²¹ Laura's father, Tom, complained to the church's senior pastor, Lloyd McCutchen, who decided not to discipline the parties involved.¹²² Laura and her parents then sued the church, but the Texas Supreme Court disallowed her tort recovery on the grounds that the First Amendment protected the church from liability.¹²³

In the name of the First Amendment and a theory that constitutional scholars have labeled "church autonomy,"¹²⁴ the courts have frequently protected churches against the legal claims of their members,¹²⁵ thus allowing the churches to do what they wish to members like Laura Schubert. In contrast, a tolerant First Amendment questions church autonomy because it recognizes the dangers that both state and church may pose to individual religious freedom. A tolerant First Amendment is wary of the power of churches to oppress individuals and therefore insists that the First Amendment allows no "citizen [or church] to become a law unto himself."¹²⁶ In other words, both churches and their members must obey the law.

The courts, however, have frequently decided cases by a standard that tolerance abhors, namely one that protects institutional churches from legal

119. *Id.*

120. *Id.* at 4-5.

121. *Id.*

122. *Id.* at 4.

123. *Pleasant Glade Assembly of God*, 264 S.W.3d at 13.

124. See, e.g., Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

125. See Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 CARDOZO L. REV. 225 (2007).

126. *Smith*, 494 U.S. at 879.

accountability to their members in the name of religious freedom.¹²⁷ The *Schubert* case is a prime example. The Schuberts sued the church, the senior pastor, the youth minister, and other members of the church for negligence, gross negligence, professional negligence, intentional infliction of emotional distress, false imprisonment, assault, battery, loss of consortium, and child abuse. After a first round of appeals,¹²⁸ the so-called “religious” claims—gross negligence, professional negligence, intentional infliction of emotional distress, and loss of consortium—were dismissed and the “secular” ones—assault, battery, and false imprisonment—went to the jury, which awarded Laura \$300,000 in compensatory damages plus \$142,438.30 in prejudgment interest against the church defendants.¹²⁹

The Texas Supreme Court took away Laura’s verdict.¹³⁰ Although Pleasant Glade Assembly of God had conceded in its first appeal that liability was appropriate for the “secular” torts, in its second appeal the church contested the jury’s verdict on First Amendment grounds.¹³¹ With some convoluted reasoning, the Court ruled the church was not estopped from challenging the verdict because it had really been arguing all along that it was liable for *physical injury* only.¹³² Because Schubert’s case included testimony about emotional harm, the Court ruled, damages were not permitted under the First Amendment, even for false imprisonment.¹³³

Consider first the reasons given for barring the “religious” claims—negligence, gross negligence, professional negligence, intentional infliction of emotional distress, and loss of consortium. The church convinced the appeals court that because the dispute with Schubert involved the “laying on of hands” it was purely theological and

would involve a searching inquiry into Assembly of God beliefs and the validity of such beliefs, an inquiry that is barred by the First Amendment. . . . Regarding negligent and intentional infliction of emotional distress, the First Amendment gives Pleasant Glade the right to engage in driving out demons—intangible or emotional harm cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for religious practices.¹³⁴

The court employed the mix of arguments that recurs in tort lawsuits involving religious organizations, namely that there is no possible legal standard of care for religious professionals because identifying such a standard would involve the courts in doctrinal judgments that belong to the church.¹³⁵ The Supreme Court of Texas majority believed that any discussion of exorcism would involve theological disputes about what an exorcism is, how it is properly performed, and whether the

127. Hamilton, *supra* note 125.

128. *In re Pleasant Glade Assembly of God*, 991 S.W.2d 85 (Tex. App. 1998).

129. *Schubert v. Pleasant Glade Assembly of God*, No. 141-173273-98, 2002 WL 33966445 (Tex. Dist. Ct. May 23, 2002).

130. *Pleasant Glade Assembly of God*, 264 S.W.3d at 1.

131. *Id.* at 7.

132. *Id.* at 8.

133. *Id.* at 9-10.

134. *In re Pleasant Glade*, 991 S.W.2d at 89.

135. *Id.* at 89-90.

Assembly of God performs exorcisms on its members or not.¹³⁶

Similar arguments have prevented other courts from recognizing a tort of clergy malpractice and have freed clergy of liability for inappropriate counseling of (i.e., sexual advances toward) married persons and minors.¹³⁷ Such reasoning enables bad conduct by churches that tort law would otherwise penalize, a worry that was confirmed by the appeals court's overbroad statement in *Schubert* that "[a]lthough the freedom to act is subject to regulation, this regulation only burdens purely secular activities that are nonreligious in motivation."¹³⁸

The ruling on religious negligence allows a sick teenager who was faint, hungry, or hypoglycemic from a sleepless night with friends to be negligently treated by a religious group as long as they call it an exorcism.¹³⁹ In a similar manner, parents are frequently not prosecuted for child abuse when they fail to provide their children with medical care for religious reasons.¹⁴⁰

The Texas Supreme Court's ruling on the "secular" intentional torts—false imprisonment, assault, and battery—even more completely missed the mark. The trial court was able to keep evidence about the church's beliefs about exorcism out of the trial, and the jury was free under tort law to conclude that Laura had consented to her church members' conduct and find no liability.¹⁴¹ Instead, the jury awarded her damages. Nonetheless, the majority ruled that church and state would become too entangled if the courts attempted to assess Schubert's emotional harm "because the religious practice of 'laying hands' and church beliefs about demons are so closely intertwined with Laura's tort claim, assessing emotional damages against Pleasant Glade for engaging in these religious practices would unconstitutionally burden the church's right to free exercise and embroil this Court in an assessment of the propriety of those religious beliefs."¹⁴²

A better rule, defended by the dissenting justices in *Schubert*, is that "'under the cloak of religion, persons may [not], with impunity,' commit intentional torts upon their religious adherents. . . . Unfortunately, this is precisely what the Court's holding allows."¹⁴³ The majority's holding suggests that religious persons leave the law outside when they enter the church building, an intolerant standard not only for adults but especially for minors who have not consented to religious harm. This "permits characterizing churches as utterly different from other societal institutions and thus marks churches as alien."¹⁴⁴ The majority's standard does not even respect John Stuart Mill's principle that behavior is legitimately limited when harm

136. *Pleasant Glade Assembly of God*, 264 S.W.3d at 11.

137. See, e.g., *Langford v. Roman Catholic Diocese of Brooklyn*, 677 N.Y.S.2d 436 (N.Y. Sup. Ct. 1998) (court cannot review conduct of priest who told woman God can heal her multiple sclerosis and then makes sexual advances); *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991) (sexual advances by church pastor on twelve-year-old girl not justiciable).

138. *In re Pleasant Glade*, 991 S.W.2d at 88-89.

139. See generally *id.*

140. See generally SHAWN FRANCIS PETERS, *WHEN PRAYER FAILS: FAITH HEALING, CHILDREN, AND THE LAW* (2008).

141. *Schubert*, 264 S.W.3d at 5.

142. *Id.* at 11.

143. *Id.* at 15 (Jefferson, Green, & Johnson, JJ., dissenting).

144. Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 55 *FORDHAM L. REV.* 335, 339 (1986) (applying alien concept to property, not tort, disputes).

to others occurs. Religious tolerance should not require deference to the decisions of a church to harm its members.

2. Property

Deference to churches also predominates in intrareligious property disputes, which in the past few years have filled the courts as local Episcopal communities try to leave the national church because of disagreement over gay ordination while maintaining title to local property. On this subject the courts' odd deference to church hierarchies ignores toleration's legitimate skepticism of church authority and its rule that churches, like secular organizations, must be subject to the law.

Consider a hypothetical posed by Justice William Rehnquist in a 1976 church property case:

Suppose the Holy Assembly . . . had a membership of 100; its rules provided that a bishop could be defrocked by a majority vote of any session at which a quorum was present, and also provided that a quorum was not to be less than 40. Would a decision of the Holy Assembly attended by 30 members, 16 of whom voted to defrock [the bishop], be binding on civil courts . . . ?¹⁴⁵

Rehnquist said no, it would not, but he wrote those words in his dissent in *Serbian Eastern Orthodox Diocese v. Milivojevich* against the majority who overturned a decision of the Illinois Supreme Court supporting the defrocked bishop against the church's hierarchy.¹⁴⁶ Justice William Brennan's majority opinion relied on the "church polity" rule that defers to the leadership of a hierarchical church:

For where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.¹⁴⁷

A different rule applies to congregational churches, which are treated like voluntary associations and held to majority rule and other fair procedures.¹⁴⁸ To date, the Supreme Court has identified only two polities, hierarchical and congregational, and leaves it to judges to determine which church fits which model.¹⁴⁹

Justice Brennan added the following remarkable comment to his *Serbian Orthodox* ruling:

[I]t is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by

145. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 727 (1976) (Rehnquist, C.J., dissenting).

146. *Id.* at 698.

147. *Id.* at 709.

148. KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 270 (2006).

149. See *id.* Greenawalt and others, have written that the polity rule must be unconstitutional because it involves the courts in defining what counts as hierarchical and congregational.

objective criteria. Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.¹⁵⁰

Similar to the *Schubert* ruling, the remark suggests that individuals lose their legal rights when they walk through the church's front door and that churches are "alien" institutions with standards unlike other American organizations. "In a country that extols democracy, most citizens would find it permissible but curious if all members of hierarchical churches engaged in complete submission to authority,"¹⁵¹ and many members of hierarchical churches would be surprised to find that they had abandoned their legal rights when they joined the church.

No wonder Justice Rehnquist objected to Brennan's *Serbian* ruling and the hierarchical polity rule in colorful language:

A casual reader of some of the passages in the Court's opinion could easily gain the impression that the State of Illinois had commenced a proceeding designed to brand Bishop Dionisije as a heretic, with appropriate pains and penalties. But the state trial judge in the Circuit Court of Lake County was not the Bishop of Beauvais, trying Joan of Arc for heresy; the jurisdiction of his court was invoked by petitioners themselves, who sought an injunction establishing their control over property of the American-Canadian Diocese of the church located in Lake County. The jurisdiction of that court having been invoked for such a purpose by both petitioners and respondents, contesting claimants to Diocesan authority, it was entitled to ask if the real Bishop of the American-Canadian Diocese would please stand up.¹⁵²

Rehnquist used the strong language of "arbitrary lawlessness," "blind deference," and "rubber-stamp" to condemn the hierarchical approach:

If the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, they can easily be converted into handmaidens of arbitrary lawlessness.

[. . .]

Such blind deference, however, is counseled neither by logic nor by the First Amendment. To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would, in avoiding the free exercise problems petitioners envision, itself create far more serious problems under the Establishment Clause.¹⁵³

Since 1979, when the Supreme Court identified the "neutral principle of law" approach to property disputes in *Jones v. Wolf*,¹⁵⁴

courts must choose between deferring to a group's hierarchy or using neutral principles of law, that is, relying on documents that do not require choosing between controverted interpretations of doctrines or practices. The basic stance is one of noninvolvement: government may not resolve internal problems by criteria

150. *Serbian*, 426 U.S. at 714-15.

151. *Sirico*, *supra* note 144, at 352.

152. *Serbian*, 426 U.S. at 725-26 (Rehnquist, C.J., dissenting).

153. *Id.* at 727, 734.

154. 443 U.S. 595 (1979).

that have a religious character. This basic stance reflects the limited competence of secular courts, and it serves the autonomy of religious organizations.¹⁵⁵

Because the Supreme Court has not decided a religious property case since 1979, the state courts have been left to resolve the recent cases involving the Episcopal churches around the country, where many local congregations seek to leave the national diocese because of their disapproval of the national church's support for gay ordination.¹⁵⁶

The cases have had different results. Eleven Virginia local church congregations who split from the Episcopal Church won their lawsuit when a Fairfax County judge ruled that Virginia law allowed them to depart from the church with their property.¹⁵⁷ The law is a Civil War-era law unique to Virginia; it awards property ownership to the majority in the local church, even in a hierarchical church.¹⁵⁸ The Episcopal Diocese plans to appeal on First Amendment grounds, arguing that the Virginia statute impinges on the freedom of churches to govern themselves.¹⁵⁹

In contrast, in California, the California Supreme Court found for the national church using the neutral principles of law standard:

Although the deeds to the property have long been in the name of the local church, that church agreed from the beginning of its existence to be part of the greater church and to be bound by its governing documents. These governing documents make clear that church property is held in trust for the general church and may be controlled by the local church only so long as that local church remains a part of the general church. When it disaffiliated from the general church, the local church did not have the right to take the church property with it.¹⁶⁰

The court observed that in response to U.S. Supreme Court decisions, especially *Jones v. Wolf*, the Episcopal Church adopted Canon I.7.4, which recites an express trust in favor of the general church.¹⁶¹ The court rejected the local church's argument that it had never expressly ratified this canon,¹⁶² explaining that "[r]equiring a particular method to change a church's constitution—such as requiring every parish in the country to ratify the change—would infringe on the free exercise rights of religious associations to govern themselves as they see fit. It would impose a major, not a 'minimal,' burden on the church governance [in violation of *Jones v. Wolf*]."¹⁶³

In a concurring and dissenting opinion, Justice Kennard agreed with the result

155. GREENAWALT, *supra* note 148, at 261–62.

156. *Seceded Episcopalians Lose Calif. Land Case*, WASH. POST, Jan. 6, 2009, at A05, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/05/AR2009010503142.html>.

157. *In re Multi-Circuit Episcopal Church Prop. Litig.*, No. CL 2007-0248724, 2008 Va. Cir. Lexis 161 (Va. Cir. Ct. Dec. 19, 2008).

158. VA. CODE ANN. § 57-9 (2007) ("How Property Rights Determined on Division of Church or Society").

159. Matthew Barakat, *Conservatives Win Court Case in Virginia Church Dispute*, ABCNews.com, Dec. 19, 2008, <http://abcnews.go.com/us/wirestory?id=6497014>.

160. *Episcopal Church Cases*, 198 P.3d 66, 70–71 (Cal. 2009).

161. *Id.* at 72.

162. *Id.* at 80.

163. *Id.*

but questioned the use of the neutral principles of law approach because “[n]o principle of trust law exists that would allow the unilateral creation of a trust by the declaration of a nonowner of property that the owner of the property is holding it in trust for the nonowner.”¹⁶⁴ Instead, she wrote, the polity approach allowed judgment on behalf of the hierarchical national church.¹⁶⁵

The breakaway local groups also lost in New York, which applied the neutral principles of law approach in favor of the national church.¹⁶⁶ The Court of Appeals explained that in 1979—in response to *Jones v. Wolf*—the national church had adopted the Dennis Canons, which state that the real and personal property of the parishes is held in trust for the national church.¹⁶⁷ Although the property deeds were unclear about ownership, the court relied on the church’s constitution as dispositive.¹⁶⁸

Such reliance on church documents as the final word has troubled some scholars, who have proposed that courts rely only on secular documents in making their judgments about property divisions.¹⁶⁹ Although this would force the churches to prepare legal documents, it is a better alternative than automatically letting the courts rubber-stamp whatever hierarchical churches desire.

Speaking of New York, its Religious Corporations Law includes separate articles for Protestant Episcopal Parishes or Churches, Apostolic Episcopal Parishes or Churches, the Holy Orthodox Church, the American Patriarchal Orthodox Church, Presbyterian Churches, Roman Catholic Churches, Christian Orthodox Catholic Churches of the Eastern Confession, Ruthenian Greek Catholic Churches, Churches of the Orthodox Church in America, Reformed Dutch, Reformed Presbyterian and Lutheran Churches, Baptist Churches, Churches of the United Church of Christ, Congregational Christian and Independent Churches, the Ukrainian Orthodox Churches of America, and many more, including the Assemblies of God churches.¹⁷⁰ Such state laws appear tolerant because they try to allow different denominations to pick the legal structure that is most consistent with its theology. They run the risk, however, of letting churches become a law unto themselves and of undermining the common law enforcement necessary in the tolerant rule of law.

A tolerant First Amendment embraces the words of Justice Rehnquist’s *Serbian* dissent: “The rule . . . is that the government may not displace the free religious choices of its citizens by placing its weight behind a particular religious belief, tenet, or sect.”¹⁷¹ It does that when it protects institutions instead of individuals, as it also does, not only in tort and property law, but also in employment law.

164. *Id.* at 85 (Kennard, J., concurring and dissenting).

165. *Id.*

166. *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 923-25 (N.Y. 2008).

167. *Id.* at 922-23.

168. *Id.* at 924-25.

169. See generally Sirico, *supra* note 144.

170. See NY CLS Relig. Corp. §§ 1-455 (2009), available at <http://law.justia.com/newyork/codes/religious-corporations>.

171. 426 U.S. at 733 (Rehnquist, J., dissenting).

3. Employment

Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of religion, race, color, sex, or national origin, contains an exemption for religious organizations from lawsuits for religious discrimination.¹⁷² The common sense of the exception is that Baptists may favor Baptists in their hiring just as Democratic groups favor Democrats and Planned Parenthood's members are pro-choice. Congress considered but did not pass legislation that barred religious organizations from all lawsuits; therefore religious organizations can be sued for discrimination on the basis of race, color, sex, or national origin. "Employment discrimination unconnected to religious belief, religious doctrine, or the internal regulations of a church is simply the exercise of intolerance, not the free exercise of religion that the Constitution protects."¹⁷³

Because Title VII technically would allow women to sue churches that do not ordain women for sex discrimination, the courts have read a "ministerial exception" into the statute.¹⁷⁴ The exception is supposed to serve the valid tolerant goals of keeping the state from interpreting religious dogma, intruding on church autonomy, and imposing clergy on the churches.¹⁷⁵ In practice, however, the ministerial exception has extended far beyond that point and become a grant of immunity blocking lawsuits against churches and allowing them to become a law unto themselves.¹⁷⁶ Despite the name of the exception, the cases have not been limited to ministers and priests. Female or gay high school teachers, secretaries, university professors, organists, and choir directors, among others, have had their discrimination lawsuits dismissed because of the churches' religious freedom to hire as they wish without court interference.¹⁷⁷ In other words, antidiscrimination law is not the same for religious as it is for secular organizations.

Consider the case of Lynette Petruska, who became the first female chaplain in Roman Catholic Gannon University's history.¹⁷⁸ Because of that all-male history, at the time of her appointment, Petruska asked if she would be replaced as soon as a male priest returned from Rome or another male candidate became available.¹⁷⁹

172. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-1 (2003). The religious exemption is usually referred to as Section 702, and was amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

173. *Petruska v. Gannon Univ.*, 448 F.3d 615, 620, No. 05-1222, 2006 U.S. App. LEXIS 13135, at *2 (3d Cir. 2006) (withdrawn on grant of rehearing June 20, 2006).

174. See Shawna Meyer Eikenberry, *Thou Shalt Not Sue the Church: Denying Court Access to Ministerial Employees*, 74 IND. L.J. 269, 269 (1998) (citing cases from the Fourth, Fifth, and Seventh Circuits).

175. *Id.* at 269.

176. See *id.* at 281 ("For example, instead of allowing an individual to 'become law unto himself,' the ministerial exception allows a *church* to become a law unto itself. . . . Thus, in allowing a church to escape scrutiny for possible discriminatory actions, courts give religious organizations free reign to discriminate for any reason.").

177. These cases are collected in LESLIE C. GRIFFIN, *LAW AND RELIGION: CASES AND MATERIALS* 274-81 (2007); SUPPLEMENT (2009). See, e.g., *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006).

178. *Petruska v. Gannon Univ.*, 462 F.3d 294, 300 (3d Cir. 2006).

179. *Id.*

She was assured that the job was hers to keep.¹⁸⁰ Then the university president faced charges of sexual harassment, and Petruska served on the Sexual Harassment committee.¹⁸¹ As the controversy unfolded, Petruska alleged that “she opposed limiting the time frame during which a Gannon employee could file a sexual harassment grievance with the university; helped prepare a report criticizing the university’s sexual harassment policies; played a pivotal role in notifying [the provost and bishop that the president] had sexually harassed a Gannon employee for several years; and opposed [the bishop’s] decision to allow a former Gannon priest, who had been terminated for sexual misconduct toward students, to enter the university’s campus.”¹⁸²

In the second Third Circuit opinion about Petruska’s lawsuit, Judge Smith dismissed the Title VII lawsuit for gender discrimination and retaliation using a simple but misguided argument that, because the ministerial exception protects “a religious institution’s right to select who will perform particular spiritual functions,” Petruska’s lawsuit should be dismissed.¹⁸³ That analysis missed the point, as was shown by the first Third Circuit opinion, written by Judge Becker with Smith in dissent, which was withdrawn because Judge Becker died as the opinion was circulating.¹⁸⁴ Although a religious organization might fire someone for genuinely religious reasons (because she did not hold the proper faith or perform the ritual correctly), Judge Becker insisted that “a religious institution might also fire a woman because the individuals making the decision are, simply put, sexist. Religious doctrine and internal church regulation play no role in such a decision.”¹⁸⁵ According to Judge Becker, the facts of Petruska’s case involved the latter situation. Title VII prohibits such sex discrimination, and to give churches immunity for such suits protects churches at the expense of the civil rights of individuals.

Gannon University believed that women could be chaplains. It offered no religious rationale for firing Petruska. Nonetheless, her Title VII claim was dismissed. As Judge Becker wrote, “Employment discrimination unconnected to religious belief, religious doctrine, or the internal regulations of a church is simply *the exercise of intolerance*, not the free exercise of religion that the Constitution protects.”¹⁸⁶ The churches’ exercise of intolerance is then magnified when courts protect churches’ power instead of individuals’ constitutional rights and exempt churches from the laws that govern everyone else. A tolerant First Amendment must protect individuals against churches as well as against the lethal combination of church and state.

Recent ministerial exception cases confirm that Petruska’s case is not unique. Although churches are not exempt from *racial* discrimination under the statutory language of Title VII, courts continue to dismiss racial discrimination cases without

180. *Id.*

181. *Id.* at 300 n.2.

182. *Petruska*, 2006 U.S. App. LEXIS 13135, at *50 n.40.

183. *Petruska*, 462 F.3d at 307.

184. *Petruska*, 2006 U.S. App. LEXIS 13135, at *57-78.

185. *Id.* at *21-22.

186. *Id.* at *2 (emphasis added).

even looking at the facts.¹⁸⁷ In one case, a Methodist minister alleged racial discrimination against his superintendent as well as retaliation—blocking him from getting a new job—because he had complained about racial discrimination. The court barred both claims.¹⁸⁸

Age discrimination claims by teachers in religious schools are repeatedly dismissed although considerations of age bear no relationship to religious doctrine.¹⁸⁹ Such rulings “effectively extend[] a free pass to religious schools to discriminate against their lay employees.”¹⁹⁰ The free pass extends to disability rights as well. Cheryl Perich taught kindergarten for five years at Hosanna-Tabor Evangelical Lutheran School until she became “suddenly ill” and went on disability leave until her doctors diagnosed narcolepsy.¹⁹¹ Although Perich provided a doctor’s certification of her readiness to return to work, the school board repeatedly asked her to resign.¹⁹² When she challenged the denial of a teaching position, she was fired for her “insubordination and disruptive behavior.”¹⁹³ The school board also observed that Perich’s threats of a disability lawsuit “damaged beyond repair” her working relationship with Hosanna-Tabor.¹⁹⁴ Although the church made no claim that there were religious reasons to refuse to hire teachers suffering from narcolepsy, both her Americans with Disabilities Act and retaliation claims were dismissed.¹⁹⁵ The ministerial exception placed the church above the law at the expense of church members.

The success of religious plaintiffs’ employment claims is not guaranteed; like all employment discrimination plaintiffs, they should bear the burden of proof. In contrast, the ministerial exception allows cases to be dismissed without any consideration of the facts or without any specific evidence that the religious employer’s free exercise was implicated in the employment decision. Gannon University did not have a doctrine of sexual harassment, nor did Hosanna-Tabor espouse a religion of disability discrimination. Nonetheless, the courts protected their freedom to discriminate for no religious reason. As Judge Becker wrote, “Employment discrimination unconnected to religious belief, religious doctrine, or the internal regulations of a church is simply *the exercise of intolerance*, not the free exercise of religion that the Constitution protects.”¹⁹⁶ As the Framers knew, individuals need to be protected from the powers of the church.

These three examples from tort, property, and antidiscrimination law illustrate the problems with a vision of religious freedom that neglects its roots in toleration.

187. *McCants v. Ala.-W. Fla. Conference of the United Methodist Church, Inc.*, No. 08-0686-KD-C, 2009 WL 1537868, Slip Op. at *1, *6 (S.D.Ala. June 1, 2009).

188. *Id.*

189. *See Coulee Catholic Schs. v. Labor & Indus. Review Comm’n*, 768 N.W.2d 868 (Wis. 2009); *Temple Emanuel of Newton v. Mass. Comm’n Against Discrimination*, No. 09-1950, 2009 WL 1668550 (Mass. Super. June 2, 2009).

190. *Coulee Catholic Schs.*, 768 N.W.2d at 893 (Crooks, J., dissenting).

191. *Equal Employment Opportunity Comm’n v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 582 F. Supp. 2d 881, 883 (E.D. Mich. 2008).

192. *Id.* at 885.

193. *Id.* at 885-86.

194. *Id.* at 885.

195. *Id.* at 892.

196. *Petruska*, 2006 U.S. App. LEXIS 13135, at *2.

The Framers drafted the First Amendment in order to protect a constitutional right to religious freedom and to protect individuals from the powers of church and state. Instead, the Free Exercise Clause has been transformed into a standard that protects religious organizations from complying with the laws at the expense of their members. Recognizing the dangers of religious wars among churches that seek to impose their own truth, tolerance establishes a system of the same law for everyone. Instead, the courts have offered religious organizations special protections from the law's application.

That problem is exacerbated when government funding helps religious organizations to attain their goals at the expense of individual freedom, as described in Part IV-B.

B. GOVERNMENT FUNDING OF RELIGION

Q. Mr. Lyons, what did IFI teach as to what you needed to do to get off drugs and stay off drugs?

A. Drug addiction was recognized as a sin. And all we had to do was seek—confess that sin, repent of that sin, and just start doing things differently from that point forward.

Q. And what did IFI teach the cure for substance abuse problem was?

A. Well, I would say it was—again, if you've confessed your sin and you have—you were forgiven, then you were no longer bound by that sin, so therefore you could go ahead and move on. You were freed from that addiction. You were released from that addiction.¹⁹⁷

IFI is the InnerChange Freedom Initiative, a Christian prison ministry founded by Watergate convict Charles Colson, which teaches that prisoners' lives can be healed by becoming Christian: "If these felons never want to wind up behind bars again, they are told, they must accept the 'life-transforming power of Jesus Christ.'" ¹⁹⁸ In this "Bible boot camp," prisoners spend sixteen-hour days in classes, in an environment of prayer, Bible reading, and hymn singing, all with the goal of that "inner change" that gives the program its name.¹⁹⁹

The questions and answers quoted above were testimony in a lawsuit against the Iowa Department of Corrections, which sponsored an InnerChange program in its state prisons. Other prisoners' comments about the program are equally illuminating. One Catholic prisoner used his own Catholic Bible for the Bible workshop but found out that it did not provide him with the "correct" answers. When he told Bruce, the IFI staff member, that he wanted to use the program to learn more about Catholicism, the IFI staff member revealed Bruce saying "that's not what they was going to be teaching, and their program consisted of a seven-day, 24-hour a day type religion, still not letting me know exactly what kind of religion they was going to be teaching, but was letting me know, basically, mine

197. WINNIFRED FALLERS SULLIVAN, *PRISON RELIGION: FAITH-BASED REFORM AND THE CONSTITUTION* 48 (2009).

198. Hanna Rosin & Terry M. Neal, *Converting Convicts to Christians: Texas Blesses Use of Strict 'Christ-Centered' Agenda at Small Prison*, WASH. POST, Nov. 27, 1999, at A01.

199. Jonathan Aitken, *Stop Punishing Criminals, It Doesn't Work*, SUNDAY TIMES (London), Apr. 25, 2004, at News Review 9.

was taking a second seat to what they was going to teach.”²⁰⁰

A federal district court ruled that the state sponsorship of the program violated the Establishment Clause.²⁰¹ The prison experience illustrates the numerous constitutional questions about the increased government support for faith-based organizations [FBOs] that began during the Clinton administration, grew during George W. Bush’s presidency, and is now backed by President Obama.²⁰² Although the government aid programs claim to support equality, neutrality, and free exercise, many of the programs are not tolerant.²⁰³ A tolerant First Amendment insists that the government may not fund religious practice or foster discrimination against individuals. Unfortunately, even under President Obama, the federal government has not yet made the commitment to such tolerance for all religions.

Debates about government aid to religion are as old as the nation. When the citizens of the fledgling American republic worried that public morality was declining in colonial Virginia, they proposed an assessments bill to fund churches.²⁰⁴ A tax to fund teachers of religion would be imposed on every citizen, each of whom would then choose which Christian denomination should receive the money.²⁰⁵ A list of the citizens’ churches of choice would be maintained in the courthouse.²⁰⁶ The churches could choose to spend the money either on building places of worship or paying ministers’ salaries.²⁰⁷ An exception was made for the Quakers and the Mennonites, who had neither buildings nor clergy, and were therefore allowed to use their money as they saw fit.²⁰⁸ Money from taxpayers who did not belong to a church would go to the local schools.²⁰⁹

A prominent opponent of the legislation wrote the following words of criticism:

Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?²¹⁰

200. SULLIVAN, *supra* note 197, at 34-35 (italics in original).

201. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 940-41 (S.D. Iowa 2006).

202. Amy Sullivan, *Obama Tries to Renew Faith in a Faith-Based Office*, TIME, Feb. 5, 2009, available at <http://www.time.com/time/nation/article/0,8599,1877283,00.html>.

203. See, e.g., *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007).

204. A Bill Establishing a Provision for Teachers of the Christian Religion (Va. Dec. 24, 1784) available at <http://candst.tripod.com/assessb.htm>. (the bill never reached the House floor).

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. For background on the Memorial and Remonstrance, see THOMAS E. BUCKLEY, S.J., *CHURCH AND STATE IN REVOLUTIONARY VIRGINIA 1776-1787* (1977); Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison’s Memorial and Remonstrance*, 87 CORNELL L. REV. 783 (2002).

210. James Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶ 3, available at

Those are the famous words of James Madison's *Memorial and Remonstrance Against Religious Assessments*, which was written in 1784 in opposition to Patrick Henry's Bill Establishing a Provision for Teachers of the Christian Religion.²¹¹ Madison, with the help of Virginia's Baptists and other dissenters, won the argument, and instead of the assessments bill, the State of Virginia passed Thomas Jefferson's Bill for Establishing Religious Freedom, which stated that no one could be compelled to "support any religious worship, place, or ministry whatsoever."²¹²

Memorial and Remonstrance provided numerous arguments against Henry's bill, including one that mentions intolerance and draws an analogy between the bill and the Spanish Inquisition.²¹³ According to Madison:

the legislation degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last *in the career of intolerance*. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy in their due extent, may offer a more certain repose from his Troubles.²¹⁴

Memorial and Remonstrance reminds us that the status of government funding of religious organizations has been a vexing problem since the nation's origins. The Bill Establishing a Provision for Teachers of the Christian Religion demonstrates that sometimes the government is tempted to promote morality by supporting religion. The Virginia Bill for Establishing Religious Freedom²¹⁵ suggests there is a venerable American tradition of believing that the liberty of the individual conscience is best protected when individuals are not compelled to support religion and may freely choose their own worship.

In the 20th century, many religious groups argued that the rise of the welfare state, where the government funds everything, requires a different perspective on funding religion than that taken by Madison.²¹⁶ They believe free exercise, equal protection, and neutrality *require* the funding of religion. That argument is overstated. A tolerant First Amendment does not allow the government to fund religious teaching, which is the goal of programs like InnerChange. Tolerance sees through the free exercise argument that churches have a right to public funding as well as the equal protection and neutrality arguments that churches must receive equal funding to other social services providers. Instead, the history of tolerance teaches that church and state must not join forces to influence individual liberty of conscience by, for example, proposing the Bible as a cure to alcohol addiction.

http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html.

211. *Id.*

212. BUCKLEY, *supra* note 209, at 190-91.

213. Madison, *supra* note 210, at ¶ 9.

214. *Id.* (emphasis added).

215. Bill for Establishing Religious Freedom (1779), available at <http://teachingamericanhistory.org/library/index.asp?document=23>. The bill was enacted in Virginia in 1786. See MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 69-70 (2002).

216. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 161 (1992).

Providing government aid to institutions that are allowed to discriminate in hiring,²¹⁷ moreover, is not tolerant. Just as the Wars of Religion taught that religious truth should not be the basis of the laws, so too the government should never *fund* religious truth; a tolerant First Amendment allows religions to pursue the truth without government funding and supports the non-religious programs that they offer under the same conditions as secular providers.

Religion-based social services organizations like Catholic Charities, Lutheran Social Services, the Salvation Army, and the Jewish Federation have received government funding for many years.²¹⁸ In 1996, for example, Catholic Charities, the largest such organization, received \$1.3 billion in government aid.²¹⁹ These groups, however, are the separately-incorporated, secular affiliates of the churches and synagogues. Catholic Charities, for example, is a separate legal entity from its sponsor, the Roman Catholic Church.²²⁰ The provision of government aid to the secular affiliates, and not to the churches themselves, was consistent with the Supreme Court's long tradition of church-state no-aid separation, which did not allow the states to fund religious practices or "pervasively sectarian" institutions.²²¹

In August 1996, Congress passed welfare reform legislation that included a "charitable choice" amendment introduced by Missouri Senator John Ashcroft.²²² Ashcroft, the son of a Pentecostal minister, was influenced by Marvin Olasky's writings about the success of religious groups in solving social ills.²²³ Although the primary focus of the welfare legislation was on state involvement and the privatization of welfare, Senator Ashcroft quietly and successfully included the charitable choice amendment, whose purpose was to make the states' contracts available to religious organizations *without any compromise of their religious identity*.²²⁴

Then-Texas Governor George W. Bush, who successfully stopped drinking after he was born again to Christian faith, was ahead of the federal Charitable Choice movement; three months earlier, he had founded an FBO task force. Bush

217. See *infra* notes 235-47 and accompanying text.

218. See Stanley Carlson-Thies, *Faith-Based Institutions Cooperating With Public Welfare: The Promise of the Charitable Choice Provision*, in WELFARE REFORM AND FAITH-BASED ORGANIZATIONS 29, 36 (Derek Davis & Barry Hankins, eds., 1999). See also STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY (1996); Sharon Daly, *Common Sense and the Common Good: Helping the Poor and Protecting Religious Liberty*, in WELFARE REFORM & FAITH-BASED ORGANIZATIONS 139 (Derek Davis & Barry Hankins, eds., 1999).

219. Steven K. Green, *Charitable Choice and Neutrality Theory*, 57 N.Y.U. ANN. SUR. AM. L. 33, 36 (2000).

220. See generally Catholic Charities U.S.A., <http://www.catholiccharitiesusa.org/NetCommunity/Page.aspx?pid=1408> (last visited Sept. 11, 2009).

221. *Contrast* Hunt v. McNair, 413 U.S. 734 (1973) and *Bowen v. Kendrick*, 487 U.S. 589, 590 (1988) with *Mitchell v. Helms*, 530 U.S. 793, 829 (2000).

222. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [PRWORA], 42 U.S.C. § 604a (2003).

223. LEWIS D. SOLOMON, IN GOD WE TRUST?: FAITH-BASED ORGANIZATIONS AND THE QUEST TO SOLVE AMERICA'S SOCIAL ILLS 134 (2003).

224. Michele Estrin Gilman, "Charitable Choice" and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses, 55 VAND. L. REV. 799, 807 (2002).

was also one of the first governors to welcome InnerChange to state prisons.²²⁵ Like Governor Bush and other advocates of FBOs, Senator Ashcroft believed that directing government aid to secular affiliates undermined the churches' religious identity and discriminated against churches that did not want to create the separate organizations.²²⁶ Ashcroft's goal was to get the money to the churches themselves without compromise of religious identity.²²⁷

The argument and the Charitable Choice amendment's language came from University of Missouri Professor Carl Esbeck, whose research made two substantive points that are important for understanding President Bush's faith-based reforms. First, Esbeck believed that faith-based organizations should be able to receive funding without employing the secular affiliate status employed by many religious social agencies, i.e., by keeping their religious identities without any dilution.²²⁸ Second, Esbeck argued that the old system discriminated against religious in favor of secular providers, especially by requiring religions to secularize in order to receive aid.²²⁹ Accordingly, the legislation allowed churches to receive contracts, vouchers or other forms of funding:

[O]n the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.²³⁰

Government funds could not be used for "sectarian worship, instruction, or proselytization."²³¹ Religious providers did not have to remove religious art and symbols from their buildings or dismiss religious personnel from their governing boards.²³² The religious groups retained their exemption from civil rights statutes that prohibit discrimination on the basis of religion in *hiring*,²³³ but were forbidden to discriminate against aid *recipients* on the basis of religion.²³⁴ Secular alternatives had to be available to the recipients, although the law did not require notification to beneficiaries of those alternatives.²³⁵ Finally, the religious groups were allowed to keep the contract money in a separate account so that the rest of their finances would not be audited.²³⁶

As noted above, in 1996 the primary focus of government officials was on welfare reform and not charitable choice, and President Clinton's administration did little to implement the legislation. Indeed, one important book on FBO suggests that some Democrats voted for the amendment because they were sure

225. Texas Freedom Network, *Faith Based Initiative Timeline*, <http://www.tfn.org/site/PageServer?pagename=txtimeline> (last visited Sept. 11, 2009).

226. Gilman, *supra* note 224, at 807-08.

227. *Id.*

228. Carl H. Esbeck, *Charitable Choice and the Critics*, 57 N.Y.U. ANN. SUR. AM. L. 17, 19 (2000) (discussing a "safeguard" for the "religious character" of faith-based organizations as the main purpose of charitable choice).

229. *Id.* at 18.

230. 42 U.S.C. § 604a(b) (2003).

231. *Id.* at § 604a(j).

232. *Id.* at § 604a(d).

233. 42 U.S.C. § 2000e-1 (2003); 42 U.S.C. § 604a(f) (2003).

234. *Id.* at § 604a(g).

235. *Id.* at § 604a(e).

236. *Id.* at § 604a(h)(2).

Clinton would never enforce it.²³⁷ President Bush was a different story. He sponsored FBO legislation from his first days in the White House.²³⁸ After the failure of all his proposed congressional FBO bills, George Bush enacted his entire FBO policy by executive order.²³⁹

Bush's FBO legislation failed because it included provisions allowing religious employers to hire and fire employees based on religious beliefs.²⁴⁰ House Democrats, led by Representatives Bobby Scott of Virginia and Chet Edwards of Texas, focused on this issue of employment discrimination and rallied opposition to expanded charitable choice on that basis.²⁴¹ As we learned in Part IV-A(2), Title VII, the landmark civil rights legislation of the 1960s, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin, contains an exemption for religious organizations from the ban on religious discrimination.²⁴² That exemption makes a certain intuitive sense; it permits Baptist organizations to hire Baptists, Catholic groups to hire Catholics, and so forth, just as environmental groups employ pro-environmental workers and Planned Parenthood's counselors are pro-choice.²⁴³ The religious hiring point is usually made most forcefully about the ministry: surely, the argument goes, the Catholic Church may "discriminate" by hiring Catholics, and only Catholics, to be priests, and Baptist ministers must be Baptist.²⁴⁴

Many churches refuse to hire women and gays even though Title VII prohibits gender discrimination and some state and local antidiscrimination laws protect sexual orientation. As a technical matter of statutory interpretation, those churches should be subject to suit for gender and sexual orientation discrimination in these circumstances because their exemption is for religious discrimination only. But, as we saw in Part IV, the ministerial exception keeps the cases from getting into

237. AMY E. BLACK, DOUGLAS L. KOOPMAN & DAVID K. RYDEN, *OF LITTLE FAITH: THE POLITICS OF GEORGE W. BUSH'S FAITH-BASED INITIATIVES* 61 (2004).

238. Hanna Skandera, *Bush's Armies of Compassion Are Inching Forward*, HOOVER INST., STANFORD U., May 26, 2003, available at <http://www.hoover.org/pubaffairs/dailyreport/archive/2849036.html>.

239. Exec. Order No. 13,199, 3 C.F.R. 752 (2002); Exec. Order No. 13,198, 3 C.F.R. 750 (2002); Exec. Order No. 13,280, 3 C.F.R. 262 (2003); Exec. Order No. 13,342, 3 C.F.R. 180 (2005); Exec. Order No. 13,397, 3 C.F.R. 216 (2007), possibly overruled by new Obama Orders, see www.whitehouse.gov. See Carrie Johnson, *Obama Cautious on Faith-Based Initiatives; Activists Cite Campaign Pledge, but President Is Slow to Break With Bush Policies*, WASH. POST, Sept. 15, 2009, at A06.

240. DAVID KUO, *TEMPTING FAITH: AN INSIDE STORY OF POLITICAL SEDUCTION* 163 (2006).

241. See Melissa Rogers, *Federal Funding and Religion-Based Employment Decisions, in SANCTIONING RELIGION? POLITICS, LAW AND FAITH-BASED PUBLIC SERVICES* 105, 108 (David K. Ryden & Jeffrey Polet, eds., 2005); CARL H. ESBECK, STANLEY W. CARLSON-THIES & RONALD J. SIDER, *THE FREEDOM OF FAITH-BASED ORGANIZATIONS TO STAFF ON A RELIGIOUS BASIS* (2004); Steven K. Green, *Religious Discrimination, Public Funding and Constitutional Values*, 30 HASTINGS CONST. L.Q. 1 (2002).

242. 42 U.S.C. §§ 2000e-2000e-2 (2003). The religious exemption is usually referred to as Section 702, and was amended by the Equal Employment Opportunity Act of 1972. Pub. L. No. 92-261, 86 Stat. 103, 104 (1972).

243. See Jeffrey Rosen, *Religious Rights: Why the Catholic Church Shouldn't Have to Hire Gays*, NEW REPUBLIC, Feb. 26, 2001, at 16.

244. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (1964). See also Green, *supra* note 219, at 3; Rogers, *supra* note 241, at 108.

court.²⁴⁵ In other words, antidiscrimination law is not the same for religious as it is for secular organizations.

Concerns about discrimination thwarted Bush's FBO legislation in Congress. The exemption of religious employers from religious discrimination laws sounds straightforward and reasonable at first glance, as rabbis should be Jewish, imams Muslim, and so forth. Allowing churches to hire their own ministers is part of the appropriate church autonomy recognized in Part IV-A.

The FBO context, however, raises a different set of issues. Jewish taxpayers' money, for example, might go to organizations that refuse to hire Jews, wish to convert Jews, or whose theology casts Jews as the murderers of Jesus Christ.²⁴⁶ Churches that disapprove of homosexuality or women's equality could fire gay workers or refuse to hire "unmarried pregnant women,"²⁴⁷ while receiving government funds. In 2001 and 2002, the Democrats hammered away at the discrimination theme, insisting that the Republican House bill gave federal funds to groups that violated the antidiscrimination laws. Their point was reinforced in July 2001, when the *Washington Post* broke a story that the Salvation Army had promised to support the FBO initiative in return for a pledge from Bush political adviser Karl Rove that the organization would be exempt from state and local antidiscrimination laws, specifically any laws requiring the organization, which opposes gay rights, to be subject to domestic partnership laws.²⁴⁸

Thus, in the funding of FBOs reappear the intolerance issues of Part III, where religious groups used Proposition 8 to enact their religious opposition to homosexuality into law and now wish to use government funds to support that intolerance.²⁴⁹ In the FBO context, such tolerance becomes intolerant as religious groups expect taxpayers' money to fund their religious truth.

Senator Obama seemed to understand this point during the presidential campaign. "Obama clearly singled out the policy during a campaign speech in July, declaring that 'if you get a federal grant, you can't use that grant money to proselytize to the people you help and you can't discriminate against them—or against the people you hire—on the basis of their religion.'"²⁵⁰ When President Obama announced the opening of his White House Office of Faith-based and

245. Green, *supra* note 219, at 108.

246. For an explanation of why many Jewish Americans feel protected by a no-aid-to-religion policy, see Gregg Ivers, *American Jews and the Equal Treatment Principle*, in EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY 158 (Steven V. Monsma & J. Christopher Soper, eds., 1998). See also Thomas B. Edsall, *Jewish Leaders Criticize "Faith-Based" Initiative*, WASH. POST, Feb. 27, 2001, at A04; David Saperstein, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353 (2003).

247. See Rosen, *supra* note 243, at 17 (arguing that it would be permissible to fire nonmarried pregnant woman).

248. Mike Allen & Dana Milbank, *Rove Heard Charity Plea on Gay Bias*, WASH. POST, July 12, 2001, at A01; BLACK ET AL., *supra* note 237, at 210; Dana Milbank, *Story of Charity Plea Changes Again*, WASH. POST, July 13, 2001, at A02; Hanna Rosin, *Charity's Image Shaken by Gay Bias Flap*, WASH. POST, July 15, 2001, at A05. Although later reports challenged the accuracy of the stories, see BLACK ET AL., *supra* note 237, at 213, the political damage was done.

249. See *supra* Part III.

250. Peter Wallsten & Duke Helfand, *Obama Upholds Bush Faith Policy*, L.A. TIMES, Feb. 6, 2009, available at <http://articles.latimes.com/2009/feb/06/nation/na-obama-faith6>.

Neighborhood Partnerships, however, he left the Bush hiring policies in place.²⁵¹ Robert Scott, the Virginia representative who had blocked Bush's FBO legislation because it allowed for discrimination in hiring, stated, "'Based on what he said, we thought the issue had been resolved, . . . You'll have to ask them why they think it's all right to discriminate.' . . . [T]he issue carried 'racial implications' because 'most churches are either 100% white or 100% black. . . . If you allow religious discrimination, then racial discrimination is essentially unenforceable[.]'"²⁵²

Meanwhile, religious leaders were happy with Obama's decision.

As the prison testimony suggests, discrimination in hiring is not the only difficult issue surrounding government aid to FBOs. If religious programs believe that faith solves social problems like alcoholism or drug addiction, then the government is funding faith whenever it aids those providers, a combination of church and state that promotes intolerance and undermines individual religious liberty. When the government promotes the Protestant Bible over the Catholic Bible in state prisons, it has forgotten the tolerant roots of the First Amendment. Empirical studies about FBOs demonstrate that government funding is less likely to wind up in the pockets of smaller religious groups—a reminder of the last point about tolerance, that it is more equipped to welcome new religions and philosophies to the American climate than current free exercise and establishment jurisprudence.

V. TOLERANCE ACCEPTS THE NEW DIVERSITY

The Summum religion is based on seven principles: psychokinesis, correspondence, vibration, opposition, rhythm, cause and effect, and gender.²⁵³ Summum, which was founded in Utah in 1975 and describes itself as a form of Gnostic Christianity, teaches that God originally gave Moses the Seven Aphorisms.²⁵⁴ After the Israelites were unprepared to receive the aphorisms, however, Moses destroyed those first tablets and later replaced them with a second set of tablets containing the simpler Ten Commandments.²⁵⁵ The Supreme Court recently refused Summum's request to place a Seven Aphorisms monument in a Utah park that already contained a Ten Commandments display.²⁵⁶ The result reflects the current intolerance of the Court's public displays jurisprudence toward minority religions.

To date, the Supreme Court's intolerant First Amendment jurisprudence has allowed Christian monuments—crosses and Ten Commandments—to remain in

251. Press Release, National Association of Evangelicals, NAE Welcomes President Obama's Commitment to Faith-Based Initiative (Feb. 11, 2009), *available at* <http://www.nae.net/index.cfm> (follow hyperlink for "News & Events," then follow hyperlink to the article).

252. Wallsten & Helfand, *supra* note 250.

253. Seven Summum Principles, <http://summum.us/philosophy/principles.shtml> (last visited October 2, 2009).

254. About Summum, <http://summum.org/about.shtml> (last visited Oct. 2, 2009); Summum and Freemasonry, <http://summum.us/philosophy/freemasonry.shtml> (last visited Oct. 2, 2009); The Teachings of the Summum Are the Teachings of Gnostic Christianity, <http://summum.us/philosophy/gnosticism.shtml> (last visited Oct. 2, 2009).

255. Summum and Freemasonry, *supra* note 254.

256. *Summum*, 129 S. Ct. at 1138.

public settings while requests for equal space by minority religions like Summum and Buddhism are denied. This result is intolerant because the state's power is used to enforce and favor one religious truth—Protestant Christianity—over others.²⁵⁷ A tolerant First Amendment imposes two requirements that the Court has ignored: first, it recognizes that crosses and the Ten Commandments retain their *religious* character and are not secular; second, it allows such religious displays to stand only if they are surrounded by other *religious* monuments and symbols, such as, the Summum Aphorisms, the Buddhist stupa, the Jewish Star of David, the Muslim crescent and star, or the Wiccan pentacle.

Instead, the Court has employed a “tyranny of labels”²⁵⁸—free speech, public forum, nonpublic forum, government and private speech, establishment—to rule against the minority religions, and in doing so has neglected the tolerant core of the First Amendment. This intolerance is most evident in the four most recent Supreme Court cases about displays, not only *Summum*, but also the two Ten Commandments cases, as well as a California case, recently granted *certiorari*, about a Latin cross and a Buddhist shrine or *stupa*.²⁵⁹

Pioneer Park in Pleasant Grove City, Utah, contains a Ten Commandments monument donated to the city in 1971 by the Fraternal Order of Eagles.²⁶⁰ Summum offered a Seven Aphorisms monument to the park, but the city rejected it on the grounds that, unlike the other monuments in the park, Summum's display either did not relate to the history of Pleasant Grove or was not donated by a group with “long-standing ties” to the city that had made “valuable civic contributions to our city for many years”²⁶¹—presumably a reference to the Eagles. Summum reasonably challenged those two post hoc justifications for the denial because the Ten Commandments monument was quite distinctive compared to the other Utah-based monuments in the park:

- Old Bell School (oldest known school building in Utah)
- First City Hall (original Pleasant Grove Town Hall)
- Pioneer Winter Corral (historic winter sheepfold)
- First Fire Station (facade of city's first fire station with plaque)
- Nauvoo Temple Stone (artifact from Mormon Temple in Nauvoo, Illinois)
- Pioneer Log Cabin (replica, built in 1930)
- Pioneer Water Well (donated by Lions Club in 1946)
- Pioneer Granary (built in 1874, donated by Nelson family)
- Ten Commandments Monument (donated by Fraternal Order of Eagles in 1971)
- September 11 Monument (project of local Boy Scouts)
- Pioneer Flour Mill Stone (used in first flour mill in town, donated by Joe

257. All the Ten Commandments cases that have gone to the Supreme Court involved the King James version of the Commandments.

258. Transcript of Oral Argument at 35, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1138 (2009) (No. 07-665) (a reference made by Justice Kennedy).

259. *Buono*, 527 F.3d 758.

260. Joint Appendix at 15, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1138 (2009) (No. 07-665).

261. *Id.* at 61.

Davis).²⁶²

Summum challenged the denial on First Amendment speech grounds. Following the terminology of free speech jurisprudence, the district court originally ruled for the city because the park was a nonpublic forum in which the government could control the content of its own message.²⁶³ The Tenth Circuit, however, ruled for Summum on the grounds that the park was a traditional public forum that the government had opened to private speakers, where the government may not discriminate on the basis of the monument's content.²⁶⁴ In the U.S. Supreme Court, the parties debated whether the monuments in the park were government or private speech.²⁶⁵ If the former, the government has the freedom under First Amendment law to control its own message. If the latter, the government is not permitted to discriminate when it opens a forum for private speakers.

With the focus on speech, not religion, the city's lawyers identified the drastic implications of the Tenth Circuit's ruling in *Summum* that the park was a public forum: "If the authorities place a statue of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee."²⁶⁶ "In short, accepting a Statue of Liberty does not compel a government to accept a Statue of Tyranny."²⁶⁷ Judge Michael McConnell, who dissented from the Tenth Circuit's denial of rehearing en banc, lamented:

This means that Central Park in New York, which contains the privately donated Alice in Wonderland statue, must now allow other persons to erect Summum's "Seven Aphorisms," or whatever else they choose (short of offending a policy that narrowly serves a "compelling" governmental interest). Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter. . . . A city that accepted the donation of a statue honoring a local hero could be forced, under the panel's rulings, to allow a local religious society to erect a Ten Commandments monument—or for that matter, a cross, a nativity scene, a statue of Zeus, or a Confederate flag.²⁶⁸

Despite its religious facts and the case's implications for establishment and free exercise, *Summum* was not litigated under the Religion Clauses. At the oral argument, even the Supreme Court justices appeared confused that the case was about free speech, not religion; Justice Anthony Kennedy derided the "tyranny of labels" that left the Court speaking about nonpublic and public fora, government and private speech,²⁶⁹ and the Chief Justice warned the city that "the more you say that the monument is Government speech to get out of the first, free speech—the

262. *Id.* at 98-102.

263. *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1050 (10th Cir. 2007) (discussing the district court's oral ruling and the standard the district court used in its analysis).

264. *Id.* at 1050-52.

265. *Summum*, 129 S. Ct. at 1138.

266. Brief for the U.S. as Amicus Curiae Supporting Petitioners at 20, *Summum*, 129 S. Ct. at 1125 (citing *People for the Ethical Treatment of Animals v. Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005)).

267. Brief for the Petitioner at *2, *Pleasant Grove City v. Summum*, 2008 WL 2445506 (No. 07-065).

268. *Summum*, 499 F.3d at 1175 (McConnell, J., dissenting from denial of rehearing en banc).

269. Transcript of Oral Arguments, *supra* note 258, at 35-37.

Free Speech Clause, the more it seems to me you're walking into a trap under the Establishment Clause."²⁷⁰

When the Court issued its unanimous ruling for the city, however, the labeling was straightforward; Justice Samuel Alito concluded "although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies."²⁷¹ In other words, the government cannot ban Summum's members from reading the Seven Aphorisms aloud in the park while allowing other private speakers to read the Ten Commandments, but the government may choose one monument over another because the government speaks through the monument.

Although the Court's ruling appears practical and unsurprising—would the justices dare authorize the Statues of Tyranny and Zeus?—in effect the Court protected the Protestant Ten Commandments at the expense of other religions. Earlier precedents did not help Summum; the Supreme Court's and Tenth Circuit's case law made it nearly impossible to litigate Summum's challenge on religious grounds. The Court has decided numerous cases allowing public religious displays containing crèches, menorahs, and the Ten Commandments. In *Lynch v. Donnelly*,²⁷² Chief Justice Warren Burger wrote that the public display of a crèche in a holiday display that also included "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that reads 'SEASONS GREETINGS'" did not violate the Establishment Clause.²⁷³ Justice O'Connor's concurrence introduced her influential endorsement test, which asked whether a reasonable observer would believe the government endorsed religion in the display.²⁷⁴ Endorsement "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."²⁷⁵

In a later crèche case,²⁷⁶ Justice O'Connor concurred in a decision that a Christian Nativity scene on the Grand Staircase of the Allegheny County Courthouse violated the Establishment Clause, but an eighteen-foot Chanukah menorah or candelabrum, located outside the City-County Building and next to the city's 45-foot decorated Christmas tree and a "salute to liberty" sign, did not.²⁷⁷ O'Connor again relied upon the endorsement standard, concluding that the crèche conveyed a message of exclusion to non-Christians, while the combined display of menorah and Christmas tree did not send a message of endorsement of Judaism or Christianity.²⁷⁸ O'Connor's solution, which was widely criticized, suggested that

270. *Id.* at 4.

271. *Summum*, 129 S. Ct. at 1129.

272. 465 U.S. 668 (1984).

273. *Id.* at 671-72.

274. *Id.* at 687-94.

275. *Id.* at 688.

276. *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573 (1989).

277. *Id.* at 623-37.

278. *Id.* at 637.

the best way to cure a possible Establishment Clause problem is to surround authentically religious symbols with as many secular symbols as possible, including teddy bears, clowns, and elephants.²⁷⁹

In *Lynch*, the dissenting Justices (Brennan, Marshall, Blackmun, and Stevens) correctly and tolerantly objected to the majority's depiction of the nativity scene as a secular, holiday symbol, insisting on the "clear religious import of the crèche" and "its inherent religious significance."²⁸⁰ Tolerance recognizes religion as religion and does not attempt to secularize it. This religious-secular distinction had legal significance in Tenth Circuit history as well; in 1973 the Court ruled in *Anderson v. Salt Lake City* that a Ten Commandments monument at a county courthouse was secular, not religious.²⁸¹ That precedent kept Summum's potential claim of religious discrimination from being litigated; if the commandments were secular, the Utah cities could not violate the Establishment Clause by allowing the Ten Commandments but not the Seven Aphorisms. In subsequent litigation against the City of Ogden, Utah, Summum conceded in 2002 that it could not win an Establishment Clause challenge to another Ten Commandments display without an en banc reconsideration of *Anderson*, and it placed its hopes on free speech.²⁸²

Then in 2005 the Supreme Court decided two conflicting Ten Commandments cases. In *McCreary County v. ACLU*, Justice David Souter's opinion invalidated a display of the commandments in a Kentucky county courthouse because it lacked a secular purpose.²⁸³ In contrast, in *Van Orden v. Perry*,²⁸⁴ Chief Justice William Rehnquist wrote that "the nature of the monument and [] our Nation's history" allow Texas to display a Ten Commandments monument on state capitol grounds in a park that also includes":

Heroes of the Alamo, Hood's Brigade, Confederate Soldiers, Volunteer Fireman, Terry's Texas Rangers, Texas Cowboy, Spanish-American War, Texas National Guard, Ten Commandments, Tribute to Texas School Children, Texas Pioneer Woman, The Boy Scouts' Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, Soldiers of World War I, Disabled Veterans, and Texas Peace Officers.²⁸⁵

Justice Antonin Scalia pushed further, arguing that the First Amendment allows the government to prefer monotheism and to erect such monuments, and noting with approval that 97.7 percent of the population believes in the Ten Commandments.²⁸⁶ Justice John Paul Stevens sparred with Justice Scalia over the nature of the commandments, trying to teach him "[t]here are many distinctive versions of the Decalogue, ascribed to by different religions and even different

279. *Id.* at 633, 635.

280. *Id.* at 705-06.

281. *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 34 (10th Cir. 1973).

282. *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997); *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002).

283. 545 U.S. 844, 881 (2005).

284. 545 U.S. 677 (2005).

285. *Id.* at 686, 681 n.1.

286. *See McCreary County*, 545 U.S. at 886-87, 893-94 (Scalia, J., dissenting). This statistic is called into question by recent surveys of American religion. *See American Religious Identification Survey 2008*, <http://www.americanreligionsurvey-aris.org>.

denominations within a particular faith; to a pious and learned observer, these differences may be of enormous religious significance. . . . In choosing to display this version of the Commandments, Texas tells the observer that the State supports this side of the doctrinal religious debate.”²⁸⁷ Scalia intolerantly rejected Stevens’s reasoning with the rejoinder: “The sectarian dispute regarding text, if serious, is not widely known. I doubt that most religious adherents are even aware that there are competing versions with doctrinal consequences (I certainly was not). In any event, the context of the display here could not conceivably cause the viewer to believe that the government was taking sides in a doctrinal controversy.”²⁸⁸ But the Court took sides in a religious controversy; the appropriate text of the Ten Commandments has been widely contested in Jewish and Christian history, and it is only Protestant versions of the commandments that have been upheld in the Supreme Court. Justice Scalia also seemed unaware that “nonreligion” is now gaining more adherents than the traditional religious faiths.²⁸⁹

Because of Justice O’Connor’s influential endorsement test and her usual role as swing voter in Religion Clauses cases, Court observers were surprised when Justice Stephen Breyer, not O’Connor, became the swing voter who maintained the Texas Ten Commandments monument. Alone among the Justices, Breyer mentioned tolerance at the beginning of his analysis; because there is no “simple and clear” test of the Religion Clauses, he wrote:

One must refer instead to the basic purposes of those Clauses. They seek to “assure the fullest possible scope of religious liberty *and tolerance for all*.” . . . They seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.²⁹⁰

Those sentences were consistent with Breyer’s general theory of constitutional interpretation, which looks to the purpose of the constitutional text in order to resolve difficult questions.²⁹¹

Breyer also wrote that context mattered in this “borderline” case; within the setting of the Texas capitol, surrounded by monuments about Texas history, he found the Ten Commandments were more secular than religious, more concerned with moral edification than religious indoctrination, a conclusion supported (in his opinion) by their uncontested presence on state grounds for forty years.²⁹² As a final point, Breyer worried about the cost of removing the monuments from the park because a holding against the state “might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.”²⁹³ In other words, the *removal* of longstanding religious monuments was *intolerant* in

287. *Van Orden*, 545 U.S. at 717-18 (Stevens, J., dissenting) (citation omitted).

288. *McCreary County*, 545 U.S. at 909 n.12 (Scalia, J., dissenting).

289. See American Religious Identification Survey 2008, <http://www.americanreligionsurvey.org/> (last visited Oct. 1, 2009).

290. *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring) (citations omitted & emphasis added).

291. See generally STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

292. *Van Orden*, 545 U.S. at 700-03 (Breyer, J., concurring).

293. *Id.* at 704 (citation omitted).

Justice Breyer's eyes, even if the monuments were no longer very religious.

Breyer's Establishment Clause analysis replicated the Free Exercise Clause mistake diagnosed in the earlier section of this essay about gay marriage, where free exercise improperly offered an excuse to impose one religion through force of law rather than to be tolerant of all religions. Contradicting the core of the Establishment Clause, Breyer's analysis allowed the Court to favor one majority religion that has been here longer than others—Protestant Christianity—in the name of tolerance. Despite recognizing the proper purpose of the First Amendment—*tolerance for all*—Justice Breyer, like Justice Scalia, privileged traditional religion. Breyer's flawed analysis confirms Professor Kurland's point that the Framers understood that establishment—the separation of church and state—was necessary to protect toleration. Without separation, in the name of tolerance the majority religion will always be preferred.

Justice Breyer's opinion seemed to offer constitutional protection to Eagles Ten Commandments monuments around the country, and it sounded the death knell for the Society of Separationists' challenge to the Ten Commandments monument in *Pleasant Grove City*.²⁹⁴ If *Van Orden* precluded the Establishment Clause challenges, then *Summum* was left with free speech only, and it brought that issue to the Court, where the justices remain undecided about the interaction of free speech and establishment.

Although *Summum* was litigated as a free speech and not an establishment case, the justices acknowledged during oral argument and in the opinion that establishment lurked in the background. Justice Scalia preemptively announced that *Summum* could not win a future Establishment Clause challenge, warning litigants and encouraging cities that there was no Establishment Clause violation in Pioneer Park because it was “virtually identical” to the display in Austin, Texas:

The city ought not fear that today's victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire. Contrary to respondent's intimations, there are very good reasons to be confident that the park displays do not violate any part of the First Amendment. . . .

The city can safely exhale. Its residents and visitors can now return to enjoying Pioneer Park's wishing well, its historic granary—and, yes, even its Ten Commandments monument—without fear that they are complicit in an establishment of religion.²⁹⁵

This strong conclusion on an unbriefed issue was consistent with Scalia's argument in the Ten Commandments cases that the government may prefer religion over irreligion, and monotheism to polytheism: “With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in

294. In a different lawsuit, the Society of Separationists, represented by the same trial counsel as *Summum*, had brought an Establishment Clause challenge to *Pleasant Grove's* display of the Ten Commandments monument. See *Society of Separationists v. Pleasant Grove City*, 416 F.3d 1239 (10th Cir. 2005) (remanding in light of *Van Orden*, 545 U.S. at 677, and *McCreary County*, 545 U.S. 844). That litigation was dismissed, with prejudice, on remand. See Order Granting Plaintiffs' Motion for Voluntary Dismissal Under FED. R. CIV. P. 41(a), *Soc'y of Separationists v. Pleasant Grove City*, No. 2:03-CV-839 BSJ (D. Utah Feb. 15, 2006).

295. *Summum*, 129 S. Ct. at 1139–40 (Scalia, J., concurring) (emphasis removed).

unconcerned deities, just as it permits the disregard of devout atheists.”²⁹⁶

The other justices were not so conclusory about the Establishment Clause. Justice Alito mentioned the Clause in his opinion for the Court.²⁹⁷ Justices Stevens and Ginsburg suggested it would apply in future cases and warned against allowing the new government speech doctrine to undermine establishment restrictions.²⁹⁸ Oddly enough, Justice Breyer failed to mention the Establishment Clause, not even responding to Justice Scalia’s conclusion that the Utah problem was “virtually identical” to the Texas monument spared by Breyer in *Van Orden*.²⁹⁹ Justice Souter, who was usually an ardent proponent of the separation of church and state, addressed the establishment issue in the most detail, musing over the unanswered questions about the interaction of “government speech doctrine” and religion that *Summum* engendered:

The case shows that it may not be easy to work out. After today’s decision, whenever a government maintains a monument it will presumably be understood to be engaging in government speech. If the monument has some religious character, the specter of violating the Establishment Clause will behoove it to take care to avoid the appearance of a flat-out establishment of religion, in the sense of the government’s adoption of the tenets expressed or symbolized. In such an instance, there will be safety in numbers, and it will be in the interest of a careful government to accept other monuments to stand nearby, to dilute the appearance of adopting whatever particular religious position the single example alone might stand for. As mementos and testimonials pile up, however, the chatter may well make it less intuitively obvious that the government is speaking in its own right simply by maintaining the monuments.

If a case like that occurred, as suspicion grew that some of the permanent displays were not government speech at all (or at least had an equally private character associated with private donors), a further Establishment Clause prohibition would surface, the bar against preferring some religious speakers over others. . . . But the government could well argue, as a development of government speech doctrine, that when it expresses its own views, it is free of the Establishment Clause’s stricture against discriminating among religious sects or groups. Under this view of the relationship between the two doctrines, it would be easy for a government to favor some private religious speakers over others by its choice of monuments to accept.³⁰⁰

Justice Souter accurately identified the difficult problems that the Court’s opinions have created; indeed *Summum* shows that cities already find ways “to favor some private religious speakers over others by its choice of monuments to accept.”³⁰¹ The monuments accepted and protected are Christian and the rest are not.

A tolerant First Amendment responds to Justice Souter’s concerns by recognizing that religious symbols retain their religious identity in any setting and that existing symbols may continue to stand only if they are surrounded by other

296. *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting).

297. *Summum*, 129 S. Ct. at 1132.

298. *Id.* at 1139 (Stevens, J., concurring).

299. *Id.* at 1140-41 (Breyer, J., concurring); *id.* at 1139 (Scalia, J., concurring).

300. *Id.* at 1141-42 (Souter, J., concurring) (citation omitted).

301. *Id.* at 1142.

religious symbols. Unlike the endorsement theory, which secularizes religious symbols by surrounding them with teddy bears and balloons, tolerance commonsensically recognizes that religious symbols are religious. The Ten Commandments are religious in nature, as are the Seven Aphorisms, as befits their source in God's gift to human beings. Unlike the Scalia monotheism theory, which allows the government to promote the religion of the Founders and of the majority,³⁰² toleration does not allow any one religion—or any one version of a religion—to be recognized as true, as occurs when Protestant translations of the Ten Commandments fill the public square. Unlike the Breyer borderline tolerance theory, which worries about possible intolerance toward the majority religion and religion in general,³⁰³ a tolerant First Amendment requires attention to all religions, and should require new religious monuments to balance the old.

Consider as a model the City of Mission Viejo, California, which added a Muslim holiday display to an intersection that already contained Jewish and Christian decorations. The following year officials at first cancelled the display because so many religious groups wanted to participate, but later found a park large enough to accommodate displays from the *ten to fifteen* groups that applied to mount their own distinctive *religious* symbols.³⁰⁴ The tolerant approach, of either removing official religious symbols or surrounding them with other religious symbols, could help the government to avoid the disingenuous arguments of Pleasant Grove City and Austin, who insisted that the Ten Commandments related to Utah and Texas history the same way that Pioneer Winter Corral, Pioneer Log Cabin, Pioneer Water Well, Pioneer Granary, Pioneer Flour Mill Stone, Pioneer Woman, and Heroes of the Alamo did.

Frank Buono, the plaintiff in the California cross case now before the U.S. Supreme Court,³⁰⁵ appears to be a tolerant man. As a Roman Catholic, Buono does not find the cross *offensive*; it is the core of his own religion. Instead, he filed a lawsuit because he was “personally confronted with, and offended by, the government’s favoritism of the cross over other symbols, religious or otherwise, and he sues to redress his own offense.”³⁰⁶

Salazar v. Buono involves a Latin cross originally erected in 1934 (and replaced several times over the years) on Sunrise Rock in the Mojave National Preserve in San Bernardino County, California, by the Veterans of Foreign Wars as part of a war memorial. The cross now sits on federal land. The federal district court and the Ninth Circuit repeatedly ruled that because the cross is indisputably a religious symbol—it represents Christianity and no other religion—it violates the Establishment Clause and therefore must be removed.³⁰⁷

After the courts’ rulings of unconstitutionality, the National Park Service [NPS] made plans to remove the cross, until Congress made several efforts to stop

302. *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring).

303. *Id.* at 700-04 (Breyer, J., concurring).

304. Wade Clark Roof, *Pluralism as a Culture: Religion and Civility in Southern California*, 612 ANNALS AM. ACAD. POL. & SOC. SCI. 82, 82-83 (2007).

305. *Buono*, 129 S. Ct. 1313.

306. Respondent’s Brief in Opposition to Petition for Writ of Certiorari at 13, *Kempthorne v. Buono*, 502 F.3d 1069 (2007) (No. 08-472).

307. *Kempthorne*, 502 F.3d 1069.

the Service's actions. First, Congress blocked NPS from funding the removal of the cross.³⁰⁸ Then Congress passed legislation trading the land under the cross to the Veterans of Foreign War in exchange for other VFW property.³⁰⁹ This transfer of religious symbols from public to private land is not unique; in another *Summum* case, the City of Duchesne twice transferred a Ten Commandments monument to private hands to avoid the request to display the Seven Aphorisms.³¹⁰ During that same time period, "NPS received a request from an individual seeking to build a 'stupa' (a dome-shaped Buddhist shrine) on a rock outcropping at a trailhead located near the cross. NPS denied that request, citing the Code of Federal Regulations as prohibiting the installation of a memorial without authorization."³¹¹ A hand-written note on the denial letter warns that "[a]ny attempt to erect a stupa will be in violation of Federal Law and subject you to citation and/or arrest."³¹²

The Supreme Court has granted certiorari on the question whether the establishment violation can be avoided by transferring the property from governmental to private hands.³¹³ The Solicitor General has defended Congress's actions along the Breyer thesis; it is intolerant to *remove* the cross.³¹⁴ As in the Ten Commandments cases, the government's creative energy has gone entirely to finding a way to preserve Christian symbols rather than to worry about the exclusion of groups like the Buddhists or the offense to Catholics like Buono.³¹⁵

Like *Summum*, *Buono* threatens to succumb to the "tyranny of labels" as the Court once again debates what is private and what is governmental without looking at the underlying religious issues.³¹⁶ If the government can transfer and therefore relabel its monuments as private speech, it can avoid the Establishment Clause and keep the country populated with religious monuments—of one religion.

Another labeling issue threatens Frank Buono, the plaintiff in the California case, as the government contends he lacks standing to bring the case because "he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols."³¹⁷

The philosophical father of tolerance, John Locke, questioned extending toleration to Catholics (because their allegiance to the Pope made them dangerous to the state) and atheists (because "[p]romises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist").³¹⁸ It is also doubtful

308. *Id.* at 1073.

309. Department of Defense Appropriations Act of 2004 § 8121(a), 16 U.S.C. § 410aaa-56 (West, Westlaw through 2009).

310. *Summum v. Duchesne City*, 482 F.3d 1263, 1266-67 (10th Cir. 2007).

311. The regulation provides that: "The installation of a monument, memorial, tablet, structure, or other commemorative installation in a park area without the authorization of the Director is prohibited." 36 C.F.R. § 2.62(a) (2009).

312. *Buono*, 502 F.3d at 1072-73.

313. *Buono*, 129 S. Ct. 1313.

314. Petition for Writ of Certiorari at 9-10, *Buono*, 502 F.3d 1069 (2008) (No. 05-55852).

315. *See generally id.*

316. *Buono*, 502 F.3d at 1069.

317. Petition for Writ of Certiorari, *supra* note 314, at 1.

318. LOCKE, *supra* note 33.

that the Founding Fathers desired to protect atheists.³¹⁹ But the tolerance of the U.S. Constitution extends far beyond Locke's and the Framers' limits. Although the principle remains the same, it must be applied to new facts and circumstances. "[T]he intolerance of late 18th-century Americans towards Catholics, Jews, Moslems [sic], and atheists cannot be the basis of interpreting the Establishment Clause today,"³²⁰ explained Justice Harry Blackmun in his opinion for the Court in *Allegheny County*, the crèche and menorah case:

Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." It is settled law that no government official in this Nation may violate these fundamental constitutional rights regarding matters of conscience.³²¹

The jurisprudence of public displays, unfortunately, does not match Justice Blackmun's words, as the influential Catholic Justice Scalia's analysis tells Summum that the courts do not have to tolerate atheists, or polytheists, or even, apparently, Gnostic Christianity.³²² In the public displays area, the Court still intolerantly promotes one true version of one true religion.

VI. CONCLUSION

As in the Framers' era, today the religious pluralism of the United States makes it impossible to identify a shared religion that all citizens can reasonably be expected to endorse. As the intense debates about gay marriage described in Part III confirmed, attempts to establish government according to religious principles are divisive, a modern American form of the European Wars of Religion. No religious or philosophical principle can resolve the controversies of a pluralist society. Instead, today as in the 18th century, the best option is a legal and political order based on constitutional tolerance.

The need for toleration arises in situations of pluralism, where citizens disagree about essential truths. Citizens have a choice. They can insist that their compatriots accept "the truth" and live according to it, or they can agree to disagree about religious and philosophical truths and take the time to build a stable political order built upon tolerance.

The principle of toleration has normative bite. In this essay, I identified three claims about toleration that are missing from current First Amendment law and politics. First, because toleration is a political and legal principle, toleration is

319. Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 856 (1985/1986) ("If the Founders' generation truly sought freedom for religious beliefs, however, I find no evidence that they were equally concerned with freedom for irreligion.").

320. *County of Allegheny*, 492 U.S. at 590 n.39 (citing Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 919-20 (1986)).

321. *Id.* at 589-90 (citations omitted).

322. *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting).

skeptical about religious truth claims and accordingly denies the state the power to enforce religious truth through force or law. Second, tolerance protects the individual against the power of both church and state. Third, toleration must extend beyond the diversity among Christian sects of old Europe and the young United States and stretch in directions not anticipated by the Framers.

Following these standards modifies current law and politics. Under the principle of tolerance, contentious issues like gay marriage are resolved according to constitutional principles of liberty and equality rather than religious norms of Christian love. Churches and religious organizations are held to neutral laws of general applicability and not allowed special privileges to harm their members. Government funding of religion is not permitted. Public Christian displays are supplemented with the signs and symbols of other religions and philosophies. The end result is less intolerant religion and more religious liberty.