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## RESPONSE

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### EXCLUDING RELIGION: A REPLY

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NELSON TEBBE<sup>†</sup>

In response to Thomas C. Berg, Response, *Religious Choice and Exclusions of Religion*, 157 U. PA. L. REV. PENNUMBRA 100 (2008); Richard W. Garnett, Response, “*Excluding Religion*”: *A Response*, 157 U. PA. L. REV. PENNUMBRA 113 (2008); Steven D. Smith, Response, *Playing Around with Religion’s Constitutional Joints*, 157 U. PA. L. REV. PENNUMBRA 123 (2008).

Disputes concerning exclusions of religion have continued to flare up during the last year. A school district in New Jersey was sued for prohibiting devotional religious music in its holiday programs,<sup>1</sup> and six Virginia State Police troopers resigned their voluntary positions as chaplains after the state disallowed denominational prayers at the department’s public events.<sup>2</sup> Sometimes, the results of these disputes seemed to be in tension with one another, at least on the surface. While a city was permitted to exclude sectarian legislative prayers,<sup>3</sup> a state was prohibited from limiting a scholarship program to colleges that were not pervasively sectarian.<sup>4</sup> And while one local legislature

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<sup>1</sup> *Stratechuk v. Bd. of Educ.*, S. Orange-Maplewood Sch. Dist., 577 F. Supp. 2d 731, 739, 741 (D.N.J. 2008) (describing and upholding the policy).

<sup>2</sup> Anita Kumar, *Under Ban, Six Troopers Resign as Chaplains*, WASH. POST, Sept. 25, 2008, at B6.

<sup>3</sup> *Turner v. City Council of Fredericksburg, Va.*, 534 F.3d 352, 353 (4th Cir. 2008).

<sup>4</sup> *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1250 (10th Cir. 2008).

could restrict opening invocations to monotheistic religions,<sup>5</sup> another was constitutionally barred from allowing only clergy from certain denominations to offer prayers.<sup>6</sup> Although the proper outcomes of these disputes may be unclear, it is beyond doubt that the problem of excluding religion continues to trouble constitutional decision makers.

Excluding religion is the practice of singling out religious actors or entities for special denial of government aid or support. Until not too long ago, many exclusions of religion were required by the Establishment Clause.<sup>7</sup> Over the past decade or so, however, the Supreme Court's antiestablishment jurisprudence has shifted so that today more forms of government support for religious practice are constitutionally permitted.<sup>8</sup> That shift has increasingly presented federal and state governments with the question of whether their support programs ought to include religious practices and institutions, not because of any legal requirement, but simply as a matter of policy. Some have chosen not to extend such support to religious actors on equal terms.<sup>9</sup> Consequently, a distinct legal question has become newly prominent: now that governments are permitted to include sectarian groups in certain support programs, are they constitutionally required to do so?

In *Excluding Religion*, I argued that governments ought to be given wider constitutional latitude to exclude religion from their support programs than has conventionally been supposed, although I also recommended certain limits on the practice.<sup>10</sup> I defended that more permissive approach toward selective support solely as a matter of constitutional law, leaving to one side the question of whether particular exclusions were desirable as a matter of good governance. My proposition was simply that the Constitution has less to say about governmental decision making around the funding of religion than many

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<sup>5</sup> *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 278 (4th Cir. 2005).

<sup>6</sup> *Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263, 1278-79 (11th Cir. 2008).

<sup>7</sup> *See, e.g., Tilton v. Richardson*, 403 U.S. 672, 679 (1971) (upholding an act because it was "carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions").

<sup>8</sup> *See* NOAH FELDMAN, *DIVIDED BY GOD* 210-11 (2005) (describing a series of major decisions in the 1990s and 2000s that relaxed restrictions on government funding of religion).

<sup>9</sup> *See, e.g., Eulitt ex rel. Eulitt v. Me., Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004) (upholding the Maine voucher program, which funded only students that wished to attend nonsectarian public or private school).

<sup>10</sup> Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263 (2008).

have thought. Chiefly, that is so because religious freedom is best viewed primarily, though not exclusively, as a guarantee of liberty or autonomy, rather than neutrality or equality. According to that understanding, government often can decide not to subsidize the exercise of a protected activity without offending the Constitution. A key distinction exists, then, between government regulation of religious practice and government subsidy of it. Finally, I outlined five limits that the Constitution imposes on the ability of governments to exclude religion.

Now three prominent scholars have offered thoughtful responses to *Excluding Religion*.<sup>11</sup> Unsurprisingly, they have endorsed certain of its arguments while questioning others. In the first Part of this Response, I accept the invitation to explore the implications of my position for legal and political theory, albeit in a limited way. Then I defend some of my original points. Part II supports the affirmative argument for wider governmental latitude to selectively deny support to religion, and Part III discusses my proposed limits on that practice, particularly the prohibition on singling out particular denominations or sects.

## I.

What would a permissive approach to excluding religion mean for liberal or constitutional democracy? Without adopting a “muscular” form of liberalism, as Richard Garnett invites me to do,<sup>12</sup> I will test one thought about the argument’s possible implications for political theory.

Of course, a permissive approach to selective support need not have any significance at all for ideal theory. A rule allowing some selective funding of religion could be compatible with a range of approaches to basic conceptual questions. That is because arguments for the constitutionality of excluding religion occupy a middle level of abstraction, at the highest—they draw on ordinary precedent and legal doctrine, as well as on a conception of the right to religious freedom, but not necessarily on arguments of basic design. Rather, they take fundamental legal and political institutions largely as they find

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<sup>11</sup> Thomas C. Berg, Response, *Religious Choice and Exclusions of Religion*, 157 U. PA. L. REV. PENNUMBRA 100 (2008), <http://www.pennumbra.com/responses/12-2008/Berg.pdf>; Richard W. Garnett, Response, “*Excluding Religion*”: *A Response*, 157 U. PA. L. REV. PENNUMBRA 113 (2008), <http://www.pennumbra.com/responses/12-2008/Garnett.pdf>; Steven D. Smith, Response, *Playing Around with Religion’s Constitutional Joints*, 157 U. PA. L. REV. PENNUMBRA 123 (2008), <http://www.pennumbra.com/responses/12-2008/Smith.pdf>.

<sup>12</sup> See Garnett, *supra* note 11, at 121.

them, shaped as they are by the range of contingent circumstances that characterize our actually existing, second-best world. Lower-level arguments like those do not entail any necessary commitment to any particular view of liberalism (though of course they are incompatible with some such theories).

Nevertheless, people who oppose a neutralist conception of liberal democracy may also wish to allow government to be selective in its support. Here, in other words, I hypothesize only that people who think that democracies ought to be able to take positions on comprehensive conceptions of the good, rather than remaining neutral as to such questions, may also wish to allow officials greater leeway to decide whether to subsidize religious observance. That combination of views may strike some as counterintuitive, because people who defend government's power to promote values that it considers worthwhile or wholesome—often those who value religious commitments as a personal matter—tend to be the same ones who oppose exclusions of religion. Yet I think such people could well come out in favor of the prescription that *Excluding Religion* defends. Although any particular exclusion might not appeal to nonneutralists on policy grounds, allowing democratic branches constitutional authority to decide such questions might be compatible with their view of government's role, namely that the state ought to be able to encourage behavior that it considers to be morally worthwhile.

Let us step back and unpack that hypothesis. One commonplace understanding of liberalism holds, in part, that a democratic government ought to remain neutral as between private conceptions of the good.<sup>13</sup> According to this view, a democracy best responds to modern conditions of conflict among private values by striving to remain evenhanded, neither promoting nor disfavoring one or another of the comprehensive commitments that vie for citizens' allegiance.<sup>14</sup> Re-

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<sup>13</sup> See, e.g., RONALD DWORKIN, A MATTER OF PRINCIPLE 191-92 (1985) (arguing that liberal "government must be neutral on what might be called the question of the good life"); STANLEY FISH, THE TROUBLE WITH PRINCIPLE 177-78 (1999) (depicting liberalism as "a form of government where political decisions are, in so far as possible, 'independent of any particular conception of the good life or what gives value to life'" (quoting DWORKIN, *supra* note 13, at 191)); Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*, in ARTICLES OF FAITH, ARTICLES OF PEACE 74, 75 (James Davison Hunter & Os Guinness eds., 1990) ("[Liberalism's] central idea is that government should be neutral on the question of the good life."); *id.* at 78-82 (arguing that this philosophical version of liberalism informs actual Supreme Court case law on religious freedom).

<sup>14</sup> See DWORKIN, *supra* note 13, at 191 ("Since the citizens of a society differ in their conceptions [of the good life], the government does not treat them as equals if it pre-

garding religion specifically, adherents of this conception have advocated strict separation of church and state as well as government neutrality among religions and between religion and irreligion.<sup>15</sup> The idea is that because government can never resolve ultimate disputes over religion on terms that all citizens will find acceptable, a democracy ought to stay out of metaphysical debates, privileging none.

Opponents of this conception of liberal democracy have argued that governmental neutrality regarding comprehensive commitments is unnecessary, impossible, and/or undesirable.<sup>16</sup> According to at least some of them, government invariably does take positions on ultimate questions, promoting positions on controversial moral issues with implications for commitments of conscience. Moreover, that practice is entirely proper and compatible with modern democracy. On this view, what liberalism requires is only that the state not restrict individual freedom, not that it strive to cultivate a needless and unattainable neutrality.

Think, for instance, of Justice Scalia, who has argued that it ought to be perfectly permissible for government to endorse the idea of a single divine creator in its pronouncements and displays.<sup>17</sup> According to him, American legal and political traditions have long countenanced government promotion not only of belief generally over non-belief,<sup>18</sup> but also its endorsement of one particular sort of religious commitment—namely, monotheism or the belief in a single creator.<sup>19</sup> More generally, Justice Scalia has said that American constitutional law ought to allow lawmakers to enact legislation that prohibits certain activities solely on moral grounds. In support of government nonneutrality on questions of morality, he invokes longstanding bans on polygamy, incest, and prostitution.<sup>20</sup>

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fers one conception to another . . .”).

<sup>15</sup> Sandel, for instance, argues that “religion offers the paradigmatic case for bracketing controversial conceptions of the good.” Sandel, *supra* note 13, at 78.

<sup>16</sup> For theorists whose views approximate this position, see generally JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986) and JOHN STUART MILL, *ON LIBERTY* (Edward Alexander ed., Broadview Press 1999) (1859).

<sup>17</sup> See *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting) (“Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion.”).

<sup>18</sup> See *id.* at 885-89.

<sup>19</sup> See *id.* at 894.

<sup>20</sup> See *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (invoking with approval “[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity,” and describing these as “laws based on moral choices”).

Now, of course, Justice Scalia may simply be opposed to liberalism. But it is not necessary to go that far to think that government ought to be able to take positions on matters of morality and conscience, and that the core attributes of liberal democracy lie not in government neutrality, but instead in popular sovereignty combined with robust equal protection of individual liberty or autonomy. Other serious thinkers have advocated similar conceptions.<sup>21</sup>

My point is just that people who take the view that a liberal government ought to be able to promote conduct that it thinks is valuable, so long as it does not restrict the freedom to dissent, may also take the view that government has discretion to engage in a certain amount of selective subsidization. With regard to religion, someone like Justice Scalia who believes government can endorse religion as a category, or even monotheism in particular, may also want to allow government discretion to single out religion for nonsupport. While such a person may not approve of any particular exclusion of religion on policy grounds, he would support the broader sense that government ought to be allowed, as matter of legal and political theory, to take moral positions regarding citizen conduct. Under this combination of views, both promoting and declining to promote religious practice would be permissible, at least within certain limits discussed below.

So while a more permissive approach to excluding religion might seem at first to appeal chiefly to separationists, who see such a rule as a poor substitute for a constitutional prohibition on subsidies of religion, *Excluding Religion* may also hold some appeal for people who favor greater governmental influence over matters of conscience and morality. Put differently, the article's argument is at least compatible with a conception of democracy that envisions government taking somewhat greater care to guide its citizens in matters of conscience than neutralist conceptions have been willing to contemplate. To be clear, I am not endorsing that political theory or any other here. Instead, I am suggesting only that *Excluding Religion* may prove attractive to a group of theorists who might at first seem particularly inclined against it.

## II.

The principal argument of *Excluding Religion* is that government ought to have greater constitutional leeway than is commonly sup-

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<sup>21</sup> See sources cited *supra* note 16.

posed to decline to support religious actors or entities.<sup>22</sup> That is chiefly because religious freedom is best conceptualized as a right to liberty or autonomy that is not normally burdened when government decides simply to forego subsidizing its exercise. The article therefore draws an important distinction between government regulation, on the one hand, and government support, on the other. With regard to the former, the First Amendment places real limits on the ability of law and policy to regulate observance, because there the threat of hindrance is very real.<sup>23</sup> With respect to the latter, however, religious practitioners will often not be thwarted by an official decision to withhold state support. The article illustrates that point by gesturing toward other liberty-based rights, such as free speech and due process, as to which the Court has held that government may selectively deny aid, even when it targets constitutionally protected activity. The Court itself has even compared religious freedom to free speech and due process in just this way, saying that lawmakers may decide to subsidize one protected activity rather than another.<sup>24</sup> And again, the article differentiates between its constitutional argument and any suggestion—which it avoids—that excluding religion is attractive or necessary as a matter of ordinary policy.

In his perceptive response, Steven Smith calls this a “play in the joints” approach.<sup>25</sup> It is easy to see why he thinks that phrase fits, because the article does share something with approaches that argue for greater room for government maneuvering between the Free Exercise and Establishment Clauses. I avoid that formulation for a reason, though: it risks eliding the critical distinction between regulation and funding. While I do think that government should have somewhat greater latitude over funding decisions in certain carefully-defined areas, I have also argued that it should face *greater* constitutional limits on its ability to regulate conduct than exists under current law.<sup>26</sup> So overall, my position, when fully worked out, differs from what the phrase “play in the joints” might call to mind. And that position makes sense

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<sup>22</sup> Tebbe, *supra* note 10, at 1267.

<sup>23</sup> See *id.* at 1280 (discussing the distinction made by the Court in *Locke v. Davey*, 540 U.S. 712 (2004), between regulation and funding).

<sup>24</sup> See *id.* at 1283-84 (explaining the *Davey* Court’s implicit but unmistakable references to free speech and due process cases).

<sup>25</sup> Smith, *supra* note 11, at 123.

<sup>26</sup> See Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 703-05 (2005) (arguing for a more robust Free Exercise doctrine guided by “liberty and formal neutrality”).

if you believe—as Smith himself seems to<sup>27</sup>—that the primary value of free exercise is liberty or autonomy, because government regulation risks coercion in ways that defunding often does not.

Conceptualizing religious freedom as a liberty right ought to be enough to support my prescription, but it leaves open the question of why officials would want to withhold aid to religion as a matter of policy. Are there any good reasons to do so, apart from simple bias or animus? I suggest that colorable policy rationales do exist, and I offer three possibilities: to avoid dissensus and promote unity among the citizenry, to lift the requirement that taxpayers support religious practices with which they disagree as a matter of conscience, and to protect equal citizenship. Each of these justifications has the added virtue of resonating with antiestablishment norms that are grounded, to one degree or another, in the American constitutional tradition. Now, these reasons may not be particularly strong as a constitutional matter.<sup>28</sup> Yet the point is not that they justify a constitutional rule requiring the exclusion of religion, or even that they are persuasive on the level of policy, but simply that they provide decent, nonarbitrary grounds for policymakers to opt not to subsidize religious observance on the same terms as other social practices. These three rationales need to do little work for the argument to succeed—they need only provide grounds other than mere bias to exclude religion. Garnett acknowledges that they offer “good reasons for legislating.”<sup>29</sup> Nothing more is required. And to the degree that the responses argue that any one of these rationales does not resonate, even faintly, with the American antiestablishment tradition, I respectfully disagree.

Thomas Berg argues that if the First Amendment means that government must minimize its influence over private religious choices, then excluding religion should not be permitted.<sup>30</sup> Obviously this is so. After all, declining to subsidize religious practice, even while choosing to aid other practices, will discourage observance. So Berg spends the bulk of his response demonstrating that the no-influence approach best fits constitutional history, structure, and precedent. That theory has been developed and defended at greater length by

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<sup>27</sup> See Smith, *supra* note 11, at 127-28 (agreeing that “freedom of religion is best conceptualized as a right to liberty or autonomy”).

<sup>28</sup> See Garnett, *supra* note 11, at 117-18 (recognizing that there may be sound legislative reasons for refusing to fund religious activity, but questioning whether they qualify as constitutional reasons).

<sup>29</sup> *Id.* at 117 (internal quotation marks omitted).

<sup>30</sup> See Berg, *supra* note 11, at 101.

Berg and other leading scholars.<sup>31</sup> While I am sympathetic to their work and believe that it captures much of the American constitutional approach to religious freedom, I have argued that it sits somewhat uncomfortably with these authors' own commitment to the value of religious exemptions (a commitment that I share).<sup>32</sup>

Moreover, the no-influence approach pulls against important aspects of the Court's case law. Most obviously, the Court squarely rejected that reading in its most significant free exercise decision to date, *Employment Division v. Smith*.<sup>33</sup> Although *Smith* has drawn criticism, the case stands in the way of the argument from precedent. And while *Smith* concerned a regulation, the Court's decisions with respect to funding also sometimes clash with the no-influence approach.<sup>34</sup> There are also significant conflicts between the theory and cases concerning government displays of religious symbols, such as the decision upholding legislative prayer—a patently nonneutral practice.<sup>35</sup> Certainly, the case law also contains many passages deploring discrimination among religion or against religion as a whole, but there is a serious question whether such statements apply to selective funding. After all, they did not seem to trouble the Court too much when it upheld an exclusion of religion in *Locke v. Davey*.<sup>36</sup>

So while the no-influence theory has offered arguments from precedent that are respectable (and widely respected), they do not seem to me to be dispositive. Nor do its arguments from history, but I

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<sup>31</sup> See Thomas C. Berg & Douglas Laycock, *The Mistakes in Locke v. Davey and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L. REV. 227, 232-33 (2004) (describing and defending substantive neutrality); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1018 (1990) (arguing that neutrality is the closest the author can come "to a single principle that summarizes the religion clauses"); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 1 (1989) (proposing "an economic definition of 'neutrality' to determine when government action impinges impermissibly on religious choice").

<sup>32</sup> Tebbe, *supra* note 26, at 714-23.

<sup>33</sup> 494 U.S. 872, 878 (1990) ("[I]f prohibiting the exercise of religion . . . is not the object of [a law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.").

<sup>34</sup> See, e.g., *Locke v. Davey*, 540 U.S. 712 (2004) (holding that Washington could constitutionally exclude students of devotional theology from its scholarship program). Also, the direct aid case, *Mitchell v. Helms*, arguably sets out an approach that would allow the government to fund only secular schools. 530 U.S. 793, 869 (2000).

<sup>35</sup> See *Marsh v. Chambers*, 463 U.S. 783, 792-95 (1983). The Court will almost certainly also uphold the Pledge of Allegiance, despite its inclusion of the phrase "under God." See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (resolving the case on standing grounds).

<sup>36</sup> 540 U.S. 712 (2004).

will leave those to one side. Ultimately, Kent Greenawalt probably put it best when he recently wrote that although the no-influence approach captures much of the meaning of the religion clauses, it alone does not always or fully describe everything that they permit or require.<sup>37</sup> Neutrality articulates some of what the Constitution signifies regarding religion, but a freestanding liberty or autonomy component is a necessary—and prominent—element of any satisfying understanding.

I take comfort from knowing that Smith seems to accept both my argument that religious freedom should be interpreted primarily (or, for him, perhaps completely) as a right to liberty or autonomy, and my contention that thinking of it that way suggests the general permissibility of exclusions of religion.<sup>38</sup> Garnett also seems to think that the practice of excluding religion ought to be free of constitutional constraints, for the most part.<sup>39</sup> And while Berg has not been convinced, that is because of the genuine conceptual difference that I have just described regarding the proper reading of the religion clauses.<sup>40</sup> Once the smoke has cleared, therefore, the principal argument of *Excluding Religion* appears to have stood up well.

### III.

Although liberty or autonomy is the principal value driving the argument of *Excluding Religion*, it is not the only one. Consequently, I offer several limits on officials' ability to exclude religion, most of which sound in neutrality or evenhandedness. These restrictions seem to me undeniable, not only because each of them occupies an important place in our legal tradition, but also for independent reasons of constitutional theory.

On account of these limits, Smith concludes that I do not actually believe in an autonomy approach.<sup>41</sup> Yet he himself does not offer a

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<sup>37</sup> See 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 456 & n.14 (2008) (quoting Douglas Laycock as saying, "I have never claimed or intended that substantive neutrality should be the single explanation or only value of the Religion Clauses").

<sup>38</sup> See Smith, *supra* note 11, at 127-28 ("I am more attracted to Tebbe's view than Tebbe himself is . . ."); see also *id.* at 131 (suggesting simply a rule against coercion).

<sup>39</sup> See Garnett, *supra* note 11, at 117 (accepting that "governments may and should, sometimes and for some purposes, treat religion in a special or distinctive way").

<sup>40</sup> See Berg, *supra* note 11, at 101 ("[T]he Free Exercise and Establishment Clauses together require government to minimize the effect it has on the choices of private individuals and groups in matters of religion.").

<sup>41</sup> See Smith, *supra* note 11, at 131 (saying that despite the similarity between a noncoercion approach and my liberty approach, I seem "not at all attracted" to either,

unitary principle or value that he thinks can accurately capture everything that religious freedom should permit or require. And for good reason: matters are more complicated than that. Sometimes his writing gives the impression that the entire endeavor of trying to identify constitutional principles in this area is hopeless.<sup>42</sup> But to me, saying that the interpretive undertaking is complex is not the same as saying that it is meaningless or impossible.<sup>43</sup> With regard to exclusions of religion, it does not follow from my contention that certain freestanding neutrality protections are necessary that noncoercion is not the primary value in the right to free exercise, nor does it follow that the right has no comprehensible structure at all.<sup>44</sup>

Take, for instance, my first proposed limit, which prohibits exclusions that discriminate on the basis of sect or denomination. None of the responses ultimately contends that there should not be a strict constitutional rule against government preferentialism of this sort. (Nor does any of them deny, in the final analysis, the attractiveness of any of the other limits I propose, as far as I can tell.) Yet today scholars are becoming interested in whether and why government should be prohibited from singling out particular faiths for favor or disfavor, and the responses reflect that curiosity. So Smith objects that it is not enough to say that the rule against government preferentialism is longstanding in our constitutional tradition, as it undeniably is, because neutrality toward religion is similarly ancient, and yet I seem happy to devalue that principle.<sup>45</sup> And Garnett wonders why a liberal democracy cannot disfavor certain faiths. After all, he reasonably points out, some of them are more compatible with American democ-

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because I retain certain limits grounded in neutrality).

<sup>42</sup> See *id.* at 125 (“[T]here just is not much to say—no sufficiently definite standards or authorities to appeal to—that could or should convince anybody who is not independently inclined toward a particular advocate’s point of view.”); see also 2 GREENAWALT, *supra* note 37, at 438-39 (noting Smith’s “skepticism”).

<sup>43</sup> See Nelson Tebbe, *Eclecticism*, 25 CONST. COMMENT. (forthcoming 2009) (book review) (manuscript at 1), available at <http://ssrn.com/abstract=1333767> (noting the meaningful distinction between concluding that interpreting the religion clauses is impossible and “irreducibly intricate”).

<sup>44</sup> There is an interesting disagreement among the responses regarding whether the limits I propose are narrow or broad. Smith thinks they are broad, and will ensure a place in this area for robust judicial intervention. Smith, *supra* note 11, at 132. Berg, however, thinks they are narrow, not powerful enough to guarantee the sort of neutrality that he thinks the religion clauses require. Berg, *supra* note 11, at 104-05.

<sup>45</sup> See Smith, *supra* note 11, at 132 (asserting that, in fact, “nonpreferentialism seems to be a corollary of th[e] more general requirement of neutrality, which itself has been long considered a basic feature of American jurisprudence” (internal quotation marks omitted)).

racy than others, and one might expect government to be able to craft its subsidy programs accordingly.<sup>46</sup>

First, I do not think it is true that neutrality as between religion and nonreligion is as firmly rooted in precedent as the ban on preferentialism. While there are plenty of passages in Supreme Court dicta endorsing neutrality among religions and between religion and irreligion,<sup>47</sup> the actual holdings are less consistent, as I show in the article. In fact, it is difficult to think of a single free exercise or antiestablishment decision striking down an exclusion of religion as a whole from an aid program.<sup>48</sup> With regard to differentiation among sects, however, the Court has been almost entirely consistent.

Second, rule of law considerations bolster the commonsensical conclusion that a constitutional democracy ought not draw lines between or among religious groups. In the democratic tradition, there is a fundamental prohibition on government action that is arbitrary or irrational.<sup>49</sup> One way of formulating this ban is that government cannot take action based on reasons that are accessible only to people who share a certain comprehensive commitment and not to outsiders, who will view those reasons as senseless or meaningless.<sup>50</sup> Imagine, for instance, that a state establishes a voucher program under which parents can choose to direct government funds to all public and private schools except to, say, Lutheran ones. There could be no nonarbitrary, accessible reason for officials to craft that sort of exclusion—no legitimate ground to think that Lutheran schools should be treated differently from any others on account of their Lutheran character. What could possibly lead a government to engage in that sort of targeting? The action could be based on unthinking bias, which is, of course, anathema in our constitutional system, or it could be an ex-

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<sup>46</sup> See Garnett, *supra* note 11, at 120-21 (“It would seem noncontroversial that some faiths are more simpatico with political liberalism than others, so why should the state not be able to subsidize accordingly?”); Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 860-61 (2009) (discussing my proposed limit on preferential exclusions of religion).

<sup>47</sup> See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (“[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers . . .”).

<sup>48</sup> Of course, there are free speech decisions that do something like that, but the neutrality language that Smith quotes comes from religious freedom cases, not speech cases.

<sup>49</sup> See Nelson Tebbe, *Witchcraft and Statecraft: Liberal Democracy in Africa*, 96 GEO. L.J. 183, 226-27 (2007) (illustrating how bans on capricious governmental action promote freedom, equality, and other liberal ideals).

<sup>50</sup> See *id.*

pression of an official theological commitment that is unavailable to those who do not share it—such as the excluded Lutherans, perhaps, or people who do not speak the language of Christian theology at all. Whatever its exact formulation, the rule of law presents an obstacle to official policy when it is based on what will seem to many citizens to be nothing more than capriciousness.<sup>51</sup>

None of that is to say that officials cannot disfavor undemocratic practices free of this concern, as Garnett rightly suggests that they can.<sup>52</sup> That is true regardless of whether the disfavored conduct tends to be engaged in by certain sects more than others, or even exclusively by some. So for instance, it would not constitute preferentialism for a government to prohibit aid to organizations that conduct terrorist activities against the United States, even if calls to violence tended to be limited to certain faiths.<sup>53</sup> There is a crucial difference between, on the one hand, singling out a denomination for defunding out of simple bias or for theological reasons and, on the other hand, declining to support all organizations that engage in condemned practices. What matters is that the ground for condemnation is accessible to all citizens, even if they object.

Excluding on the basis of religion as a category is not capricious in that way. There are understandable reasons for a government to decide not to subsidize observance as a whole. Where that is not the case, and the exclusion really is based on bias or animus, another of my limits kicks in. But when differentiation among sects is at issue, a general ban is appropriate. So both as a matter of political tradition and constitutional theory, nonpreferentialism has a place in our democracy that is difficult to question. Doubtless, others will differ with me on the best way to justify it, but the rule itself appears to be uncontroversial. To my mind, the other limits on government discretion in this area are similarly unavoidable, although surely there is also a great deal of worthwhile thinking to be done regarding their rationales.

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<sup>51</sup> For a harder hypothetical, imagine a government program that provided financial support to small, impecunious denominations, citing an interest in fostering religious pluralism and counteracting the overwhelming influence of majority faiths. Would such a policy constitute impermissible preferentialism or permissible pursuit of a neutral policy? I am grateful to Susan Herman for raising this question.

<sup>52</sup> See Garnett, *supra* note 11, at 120-21. Of course such programs can raise difficult constitutional questions when they pit religious freedom against, say, gender equality or other values of constitutional stature. Yet those difficulties must be worked out independent of the problem of preferentialism.

<sup>53</sup> John Finnis, *Discrimination Between Religions: Some Thoughts on Reading Greenawalt's Religion and the Constitution: Establishment and Fairness*, 25 CONST. COMMENT. (forthcoming 2009).

## CONCLUSION

Why do people engage in scholarship of this sort, asks Smith?<sup>54</sup> He kindly calls *Excluding Religion* “impressive,” but he also wonders what motivates its inquiry.<sup>55</sup> It is interesting to consider what drives a question like that. My sense, which could be wrong, is that the question presents itself to him precisely because he thinks that it is virtually impossible to generate determinate answers in this area of law on account of his assessment that the considerations—text, structure, and history—stand in equipoise, or at least allow plenty of room for reasonable minds to differ. Because of that situation, scholars cannot generate arguments that will convince people who are not already inclined to agree with them. And if that is your view, you may well wonder why scholars bother.

But that is not my view. Rather, I see a collective effort to detect, describe, and defend the values that underlie the American constitutional order. That effort is difficult because political life is exceedingly intricate, and because circumstances are ceaselessly changing. So someone puts forward a view of the Constitution regarding exclusions of religion, and others disagree, and over time we work out a *modus vivendi*—or perhaps even an agreement in principle. While it may not be possible to convince people who are already committed to another view, it may well happen that people at the margins will not have made up their minds and can be swayed. Moreover, the alternative is unclear. Judges, policymakers, and other constitutional actors will make decisions concerning exclusions of religion regardless of what we do in the academy. Is the better course to remain silent or is it to do what we can to make the best arguments available to them?

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<sup>54</sup> Smith, *supra* note 11, at 133.

<sup>55</sup> *Id.* at 123, 133.