Contribution to the discussion on

"Should Religion Keep Its Privileged Status in American Law?"

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My main thesis will be that the freedom of religious thought, belief and expression should be understood as nothing more, and nothing less, than one special case of a more general freedom of thought, belief and expression, both religious and nonreligious. More precisely, the freedom of thought and belief are absolute; and the freedom of expression, including collective expression, is nearly absolute, being subject only to reasonable and modest restrictions of time, place and manner, which moreover must be neutral with respect to the content of that expression. This neutrality implies in particular that whatever restrictions are imposed must not favor or disfavor one religious sect compared to another, or religion compared to nonreligion or anti-religion.

Now, Professor Hamilton, in her book *God vs. the Gavel*[1], makes the very important distinction between belief and conduct: she argues — and I completely agree — that while the freedom of belief is absolute, conduct — particularly conduct that can potentially harm other people — must be subject to the rule of law. Therefore, religious individuals and organizations must obey the same laws as everyone else; they do not obtain any blanket exemption from neutral and generally applicable laws — for instance, laws governing children's rights, nondiscrimination, illegal drugs, land use, or taxes — simply because the conduct in question is religiously motivated or is incident to religious expression. At most, Professor Hamilton argues, religious individuals and organizations can petition the legislature for specific exemptions from generally applicable laws; the legislature can then assess the relevant facts and debate openly whether the public good would be served by the proposed exemption, i.e. whether the benefit to believers would outweigh the potential harm to other people. I agree with Professor Hamilton's approach, but would add the further condition that the proposed exemption must not favor or disfavor one religious sect compared to another, nor may it favor religious beliefs compared to nonreligious or anti-religious beliefs that play a comparably important role in the lives of those who hold them.

So those are my main theses; and I intend them, in the first instance, as theses of political philosophy: namely, as constituting the proper approach to religion in any democratic society. A quite different question, which I leave to legal scholars, is whether this is also the proper way to interpret the First and Fourteenth Amendments to the American Constitution; but I would like at least to raise the conjecture that it is. This approach provides a coherent and unified interpretation to all the clauses of the First Amendment, both those concerning the freedom of speech, press and assembly and those concerning religion. In particular, the Free Exercise and Establishment clauses work together in saying that no religious sect may be either favored or disfavored compared to another sect, nor may religion in general be favored or disfavored compared to nonreligion or anti-religion. This is, I believe, a settled principle of First Amend-

[1]Marci A. Hamilton, *God vs. the Gavel: Religion and the Rule of Law* (Cambridge University Press, New York, 2005).

ment jurisprudence[2,3] — although, as I shall argue later, it has not always been applied consistently.

At this point one might well object: If the freedom of religion is merely one particular case of a more general freedom of thought, why did the drafters of the First Amendment choose to make specific and extended reference to religion? A good answer is given by Professor Hamilton near the end of her book — although I believe she draws the wrong conclusion from it, as I will discuss later. She says:

> [A]s a matter of cultural description, religion is simply different from other deeply held convictions, because it is an illogical belief that defines an individual's entire worldview. ... History and fact show that it is capable of engendering the most passionate and the most violent positions. For this reason, it is accorded special attention in the First Amendment, and needs to be addressed specifically.[4]

Let us not forget that religious wars and the persecution of religious dissenters were painful facts within the recent memory of the framers of the Constitution. By contrast, in that same century preceding the Constitution, there were also heated debates between Cartesians and Newtonians concerning the correct approach to celestial mechanics; but to my knowledge these disputes never led to violence, nor did the members of one camp attempt to imprison or exile members of the other. Rather, the disputes were resolved by the collection of evidence, together with open debate about the meaning of that evidence; and after a few decades, the Newtonians won, because they had the better arguments. Now, it goes without saying that questions concerning the ultimate nature of the universe or the existence of the afterlife are vastly more difficult to resolve

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[2] "[N]either a state nor the Federal Government ... can pass laws which aid one religion, aid all religions, or prefer one religion over another." Everson v. Board of Education, 330 U.S. 1, 15 (1947).

"[N]either a State nor the Federal Government ... can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

"The First Amendment's guarantees, as applied to the States through the Fourteenth Amendment, foreclose not only laws 'respecting an establishment of religion' but also those 'prohibiting the free exercise thereof.' These two proscriptions are to be read together, and in light of the single end which they are designed to serve. The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end. The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." School District of Abington Township v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J. and Harlan, J., concurring)

"[T]he Government must neither legislate to accord benefits that favor religion over nonreligion, nor sponsor a particular sect, nor try to encourage participation in or abnegation of religion." Walz v. Tax Commission of the City of New York, 397 U.S. 664, 694 (1970) (Harlan, J., concurring)

[3] But see the Postscript at the end of this talk.

[4] Hamilton, p. 294.

than mere questions of physical science, for the simple reason that we possess far less evidence. But, somehow, when it comes to religion, the possession of little or no evidence can coexist in the minds of many believers with an absolute certainty as to the belief, and sometimes also a passion to eradicate any challenges to that belief; and religion seems to be unique, among human doctrines, in engendering this bizarre combination of weak evidence, high subjective certainty, and (sometimes) totalitarian passion. The framers of the American Constitution were painfully aware of these dangers, and they resolved to avoid them by imposing a strict regime of religious freedom and governmental neutrality.

Let me now illustrate the approach I am advocating by means of a few specific examples.

Children's rights. Professor Hamilton, in her book, is passionate and angry about the immense harms that are done to children under the guise of religion, aided and abetted by legal exemptions — and I share her passion and anger. It is a scandal when children die from easily treatable conditions because of the misguided beliefs of their parents — for instance, relying on "faith healing" rather than modern medicine — but it is even more of a scandal when those parents' negligence is officially condoned by the state. And yet, thirty-eight states and the District of Columbia have religious exemptions in their civil codes on child abuse or neglect; seventeen states have religious defenses to felony crimes against children; and fifteen states have religious defenses to misdemeanors against children.[5] Here Professor Hamilton and I are in total agreement that children's rights must be paramount over parents' desires; as the Supreme Court stated nearly 70 years ago,

> Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[6]

I therefore have no hesitation in insisting that, when children are seriously ill, the state must impose the scientifically indicated best treatment; and when parents are recalcitrant, the state must undertake criminal prosecution for child abuse — and in cases of avoidable death, criminally negligent manslaughter — against those parents and their accomplices.[7]

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[5] `http://childrenshealthcare.org/?page_id=24#Exemptions`

[6] Prince v. Massachusetts, 321 U.S. 158, 170 (1944). It is telling that this rhetorical reference to "martyrdom" arose in a case involving nothing more harmful than a child selling religious pamphlets on a public sidewalk in the company of her legal custodian; the Supreme Court upheld the conviction of the custodian for violation of the state's child-labor laws.

[7] Let me mention in passing that while I share Professor Hamilton's outrage that the totally preventable death of an 11-year-old boy from juvenile-onset diabetes, following three days of Christian Science care, was exempt from criminal prosecution because of the religious exemption in Minnesota's

Now, so far this is simply a question of public policy; but Professor Hamilton goes on to raise an interesting legal question, which I wish she had developed further: Since the most important right of all — the prerequisite for all others — is the right to live, she asks whether religious exemptions from child-medical-neglect laws might be not just abominable public policy, but also unconstitutional abridgments of the children's right to life.[8] It seems to me that she is on to something very important here. I would suggest, in fact, that such exemption statutes violate the Fourteenth Amendment's guarantee of the equal protection of the laws, and do so in *two* ways: first and foremost, they deny the state's protection to children who are unlucky enough to be under the care of

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child-neglect statute, I nevertheless disagree with her comments (Hamilton, pp. 37–38) attacking the reversal of punitive damages in the subsequent civil case by the Minnesota Court of Appeals [Lundman v. McKown, 530 N.W2d 807 (Minn. Ct. App. 1995), cert. denied, 516 U.S. 1099 (1996)]. Hamilton cites the court's declaration that

> We do not grant churches and religious bodies a categorical exemption from liability for punitive damages. But under these facts, the risk of intruding — through the mechanism of punitive damages — upon the forbidden field of religious freedom is simply too great.

[Id., at 816] and labels it "indefensible reasoning" (p. 38). But, having read the court's decision in full, I must respectfully disagree. First of all, it is important to note (as Hamilton does not) that the punitive-damages award — imposed by the jury and reversed by the appellate court — was against the Christian Science Church *only*. The court upheld the award of compensatory damages against the mother, stepfather and two of the Christian Science practitioners; but it reversed the award of compensatory damages against several other co-defendants, including the Christian Science Church, on the ground that the practitioners were not agents under their control and hence that they did not have the legal duty of care that is a prerequisite for negligence liability. Having reversed the compensatory-damages award against the Church because of the lack of agency relationship, the court was logically obliged to reverse also the punitive-damages award. The court went on to make an important point:

> [A] church is not a lawn-mower manufacturer that can be found negligent in a products liability case for failing to affix a warning sticker near the blades. As previously noted, the constitutional right to religious freedom includes the authority of churches — not courts — to independently decide matters of faith and doctrine, and for a church as an institution to believe and speak what it will. When it comes to restraining religious *conduct*, it is the obligation of the state, not a church and its agents, to impose and communicate the necessary limitations — to attach the warning sticker. A church always remains free to espouse whatever *religious belief* it chooses; it is the *practices of its adherents* that may be subject to state sanctions.

Id., at 826. The issue here, in my opinion, is not the freedom of religion, but rather the freedom of *speech*; and the constitutional issue it raises is by no means confined to religion. Should the North American Man/Boy Love Association — an organization that advocates the decriminalization of consensual sex between adults and minors — be held civilly liable if pedophiles are found to possess NAMBLA literature? Should the National Organization for the Reform of Marijuana Laws — which campaigns for "the removal of all criminal penalties for the private possession and responsible use of marijuana by adults, including the cultivation for personal use, and the casual nonprofit transfers of small amounts" — be held liable if a member of NORML, driving while high, causes injury to a pedestrian? In both cases I think not; and the Minnesota Court of Appeals explained eloquently why.

[8]Hamilton, p. 32.

parents professing certain religions, compared to all other children; and secondly, they discriminate against adults who negligently cause injury or death to children based on misguided beliefs of a nonreligious nature, compared to those adults whose negligence is religiously based.

Legislative exemptions. Professor Hamilton and I are in agreement that religious individuals and organizations should be free to petition the legislature for exemptions to generally applicable laws, and that such exemptions are sometimes justified. But there are some differences in our approaches to exemptions, and I'd like to illustrate that by addressing one of the examples she treats in her book, namely the use of the illegal drug peyote in Native American religious ceremonies, which was made legal by Congress in 1994 (overriding, or at least purporting to override, any state laws to the contrary).[9] Professor Hamilton observes that

> peyote is a drug that is not widely abused ... Nor do small amounts trigger addiction. The difficulty involved in peyote cultivation makes it highly unlikely that its use could become widespread. Unlike heroin, cocaine, or crack, an exemption for peyote is unlikely to increase the number of addicts ... Moreover, it is used for religious purposes in overnight ceremonies, and therefore it is unlikely that religious users will drive while impaired.[10]

Now, all of these reasons, except the last, are in fact reasons for legalizing the use of peyote *generally*; and the last is an argument for legalizing the use of peyote in overnight ceremonies *generally*, be they of a religious or a non-religious nature (and conversely, for *not* legalizing its use in daytime religious ceremonies). It seems to me that an exemption limited to religious use violates the nondiscrimination principle that is (or should be) at the heart of the Establishment Clause. Rather, any constitutionally valid exemption should refer in a neutral way to those aspects of the conduct that, in the legislature's judgment, render it less likely to cause harm (for instance, use in overnight ceremonies).

Similar principles apply to other proposed exemptions from generally applicable laws,

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[9] American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. §1996a (hereafter AIRFAA). The ceremonial use of peyote by Native Americans was protected by Federal regulation starting in 1965 (21 C.F.R. §1307.31), but some states' drug laws provided no such exception. The sole purpose of AIRFAA was therefore to override such state laws by declaring that

> Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State.

42 U.S.C. §1996a(b)(1). In view of the unconstitutionality of the Religious Freedom Restoration Act (Pub. L. No. 103-141, 1993, codified at 42 U.S.C. §2000bb – 42 U.S.C. §2000bb-4) as applied to state and local law, on federalism grounds [City of Boerne v. Flores, 521 U.S. 507 (1997)], one wonders whether AIRFAA is similarly unconstitutional.

[10] Hamilton, pp. 280–281.

whether granted by the legislature (as Professor Hamilton prefers[11], for reasons that I concur with) or by the judiciary. For instance, in an unemployment-compensation case, the Supreme Court upheld the claim of a Jehovah's Witness who refused to work in a factory that manufactured turrets for tanks.[12] But why should a religious objector to working in a munitions plant have rights any different from those of a secular pacifist?[13] Why should the Amish have rights to keep their children out of school that secular objectors to public education don't?[14]

Tax exemptions. Another important issue, which somewhat surprisingly Professor Hamilton doesn't discuss at all in her book, concerns the tax exemptions for religious organizations. For instance, Section 501(c)(3) of the Internal Revenue Code exempts from federal taxation (subject to certain restrictions on lobbying and electoral activity) entities that are "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals".[15] In addition, individuals and corporations are granted an income-tax deduction for contributions to such organizations.[16] Now, one can easily understand the secular governmental purposes that are served by a tax exemption for charitable, scientific or educational organizations; but what on earth is "religious" doing in this list?

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[11]Hamilton, pp. 295–298.

[12]Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981).

[13]This same point is made by Christopher L. Eisgruber and Lawrence G. Sager, The vulnerability of conscience: The constitutional basis for protecting religious conduct, 61 U. Chicago L. Rev. 1245–1315 (1994), at 1292.

[14]Wisconsin v. Yoder, 406 U.S. 205 (1972). Eisgruber and Sager, *op. cit.*, pp. 1258–1259 make an astute observation:

> If religious motivation signifies legal immunity only at the margins of state authority, there is good reason to suppose that in these cases we are actually responding to well-founded — if inarticulate — doubts about state authority in general rather than to the needs of religion in particular. On this account, if we valued liberty in general to the appropriate degree, there would be no need for the additional feature of religious motivation to enter the story. This may well be the best way to understand *Yoder*. Parents who have a systematic, reflective, and durable scheme for educating their children may be entitled to substitute their curricular judgment for the state's — at least at the margin. If so, then *Yoder* may have been correctly decided; if not, then the religious basis of the Amish approach to education ought not matter.

However, I agree with Professor Hamilton (pp. 295–298) that such judgments ought to be made by the legislature, not the judiciary, and hence that *Yoder* was wrongly decided (pp. 131–132, 209–210, 218, 222–223). Furthermore, as Eisgruber and Sager also point out (p. 1290), "In *Yoder*, Amish parents were structuring a regime of education not for themselves, but for children who had little or no say in the matter" — a fact that ought to make legislators wary of granting exemptions lightly.

[15]26 U.S.C. §501(c)(3).

[16]26 U.S.C. §170.

Wasn't it a settled principle of First Amendment jurisprudence that

> [N]either a state nor the Federal Government ... can pass laws which aid one religion, aid all religions, or prefer one religion over another.[17]

? This is all very embarrassing, because as Chief Justice Burger observed in a 1970 case,

> All of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees. For so long as federal income taxes have had any potential impact on churches ... religious organizations have been expressly exempt from the tax.[18]

Justice Burger felt obligated to concede that

> no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence, and indeed predates it.[19]

But he then proceeded to "refute" this objection by observing that

> Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion ...[20]

— which of course is a complete red herring, because it was and is a settled principle of First Amendment jurisprudence that the Establishment Clause does not simply forbid "an established church or religion" in the narrow sense of a state church like the Church of England, but forbids *any* law that "aid[s] one religion, aid[s] all religions, or prefer[s] one religion over another".[21] And a tax exemption for religious organizations *qua* religious

[17]Everson v. Board of Education, 330 U.S. 1, 15 (1947).

[18]Walz v. Tax Commission of the City of New York, 397 U.S. 664, 676 (1970).

[19]Id., at 678.

[20]Id., at 678.

[21]A few pages earlier, Justice Burger employed the same red herring: "The grant of a tax exemption is not sponsorship, since the government does not transfer part of its revenue to churches, but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.' There is no genuine nexus between tax exemption and establishment of religion." (Id., at 675) This paragraph contains, in fact, *two* specious arguments: the unjustifiably narrow sense attributed to "establishment of religion"; and the reasoning in the first sentence. Obviously, an exemption from an otherwise applicable tax is functionally indistinguishable from a direct appropriation. Justice Burger must have been aware of the flimsy logic of his arguments, because he immediately quoted Justice Holmes to the effect that "a page of history is worth a volume of logic." (Id., at 675–6)

organizations manifestly aids all religions.[22]

In attempting to reconcile these irreconcilable doctrines, the courts have been forced into some amusing contortions. On the one hand, courts in the District of Columbia[23], California[24] and Texas[25] have opted to classify secular humanism as a "religion" — and thus eligible for tax exemption — since denying a tax exemption to the Ethical Culture Society while granting it to theistic organizations would raise even more flagrant Establishment Clause questions. This characterization of secular humanism as a religion then made its way into a footnote in a 1961 Supreme Court decision[26] — which was manna from heaven for fundamentalists, who love to fulminate against what they call "the religion of secular humanism".[27] So when a high-school biology teacher in California sued his school district for forcing him to teach "evolutionism" against his religious beliefs, the Ninth Circuit Court of Appeals felt compelled to observe that

> neither the Supreme Court, nor this circuit, has ever held that evolutionism or secular humanism are "religions" for Establishment Clause purposes.[28]

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[22]Despite my sharp disagreement with Justice Burger's reasoning in Walz v. Tax Commission of the City of New York, it seems to me that the right decision was nevertheless reached in *this particular* case, because of the enormously broad scope of the New York State tax-exemption law that was at issue: "Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes ... and used exclusively for carrying out thereupon one or more of such purposes ... shall be exempt from taxation as provided in this section." (New York Real Property Tax Law, §420, subd. 1) Even if the words "religious", "bible", "tract" and "missionary" were removed from this list, virtually all religious organizations (as well as non-religious organizations like the Ethical Culture Society) would qualify as associations "organized ... for the moral or mental improvement of men and women" — and this irrespective of any "charitable, benevolent, ..., hospital, infirmary, educational ... or cemetery" work that they may or may not do.

[23]Washington Ethical Society v. District of Columbia, 249 F.2d 127 (App. D.C. 1957).

[24]Fellowship of Humanity v. County of Alameda, 153 Cal.App.2d 673, 315 P.2d 394 (1957).

[25]Strayhorn v. Ethical Society of Austin, 110 S.W.3d 458 (Tex. App. – Austin 2003), review denied (Tex. 2004).

[26]"Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

[27]David A. Noebel, J.F. Baldwin and Kevin Bywater, *Clergy in the Classroom: The Religion of Secular Humanism* (Summit Press, Manitou Springs CO, 1995, 3rd. ed. 2007). For a more scholarly version of this argument, see John W. Whitehead and John Conlan, Establishment of the religion of secular humanism and its First Amendment implications, 10 Tex. Tech L. Rev. 1 (1978).

[28]Peloza v. Capistrano Unified School District, 37 F.3d 517, 521 (9th Cir. 1994), cert. denied 115 S. Ct. 2640 (1995). At 521n.5 the court cited Smith v. Board of School Commissioners of Mobile County, 827 F.2d 684, 690–95 (11th Cir. 1987) as "refusing to adopt district court's holding that 'secular humanism' is a religion for Establishment Clause purposes"; but that case did nothing of the kind. The only comment relevant to this issue is the following:

That is strictly speaking true, because the Supreme Court has never clarified what constitutes a religion; but the logical force of these cases, taken together, is that secular humanism is a "religion" for some Establishment Clause purposes but not for others.

All these contortions could be avoided if we restored the word "religion" to its ordinary meaning — requiring some supernatural belief, albeit not necessarily belief in a Supreme Being — and handed out tax exemptions based on the accomplishment of valid secular purposes. Better yet, if we view the freedom of religion as simply one particular case of a more general freedom of thought, then the question of what constitutes a "religion" becomes moot, since religious and nonreligious thought and activities will anyway receive exactly the same protection.

I should mention that an interpretation of the Religion clauses very close to the one I am advocating here — but vastly more detailed and nuanced than my own — was presented two decades ago in a pair of articles by Christopher Eisgruber and Lawrence Sager, and I endorse their views in almost all respects.[29] Eisgruber and Sager reject the view that religion should be in any way legally *privileged*; but they argue that religion, and especially minority religions, must be *protected* both from intentional discrimination and from inadvertent but nevertheless unfair adverse treatment. They propose a principle that they call "equal regard", namely that

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> The district court found that secular humanism constitutes a religion within the meaning of the first amendment and that the forty-four textbooks at issue in this case both advanced that religion and inhibited theistic faiths in violation of the establishment clause. The Supreme Court has never established a comprehensive test for determining the "delicate question" of what constitutes a religious belief for purposes of the first amendment, and we need not attempt to do so in this case, for we find that, even assuming that secular humanism is a religion for purposes of the establishment clause, Appellees have failed to prove a violation of the establishment clause through the use in the Alabama public schools of the textbooks at issue in this case.

Id., at 689.

Subsequently, the Court of Appeals for the District of Columbia Circuit offered the following more precise interpretation:

> The Court's statement in *Torcaso* does not stand for the proposition that humanism, no matter in what form and no matter how practiced, amounts to a religion under the First Amendment. The Court offered no test for determining what system of beliefs qualified as a "religion" under the First Amendment. The most one may read into the *Torcaso* footnote is the idea that a particular non-theistic group calling itself the "Fellowship of Humanity" qualified as a religious organization under California law.

Kalka v. Hawk, 215 F.3d 90, 99 (U.S. App. D.C. 2000).

[29]Christopher L. Eisgruber and Lawrence G. Sager, The vulnerability of conscience: The constitutional basis for protecting religious conduct, 61 U. Chicago L. Rev. 1245–1315 (1994); Christopher L. Eisgruber and Lawrence G. Sager, Why the Religious Freedom Restoration Act is unconstitutional, 69 N.Y.U. L. Rev. 437–476 (1994). See also L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Harvard University Press, Cambridge MA, 2007).

> government [must] treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally. ... Government betrays the ideal of equal regard when it treats religious interests less favorably than secular ones, when it treats some religious interests better than others, and when it treats religious interests more favorably than secular ones.[30]

Professor Hamilton agrees with the first two of these principles but disagrees with the third, and she gives two arguments against it. The first is the eloquent paragraph I quoted earlier, concerning the unique passions that are engendered by religion. Those passions are, she says, the reason that religion "is accorded special attention in the First Amendment, and needs to be addressed specifically"[31] — which is absolutely right. But why should the unique *dangers* posed by religion justify granting special *privileges* to religion? That seems, if anything, to get things backwards: if activity X poses a greater danger of harm to others than activity Y, then a more rigorous governmental regulation of X than Y might well be justified, but certainly not the reverse. In any case, I think the framers of the Constitution made an even more astute choice, by opting for the absolute liberty of thought and belief together with strict governmental neutrality between religions and also between religion and nonreligion.

Professor Hamilton's second argument is that

> equality is a principle that is capable of taking the law to the lowest common denominator. For example, each of the Eisgruber/Sager principles stated above is satisfied by a law that throws all believers in jail ...[32]

(well, to satisfy the first principle one had better throw nonbelievers in jail too). But this objection misunderstands the role of the equality (or neutrality or nondiscrimination) principle in Eisgruber and Sager's argument, and in mine. We are saying that equal treatment for all religions, and for religion and nonreligion, is *necessary*; but it is by no means *sufficient*. After all, the fundamental conception underlying this entire discussion is the *freedom* of thought and belief; and the principle of equal treatment is merely a modifier to that.

I'd like to conclude by emphasizing my full agreement with Professor Hamilton's main thesis: that religious individuals and organizations must obey the same laws as everyone else, and that the freedom of religion does not grant them a license to harm other people. Near the end of her book she makes an incisive observation concerning the politics of religious exemptions:

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[30]Eisgruber and Sager, 61 U. Chicago L. Rev. 1245, 1283; Eisgruber and Sager, 69 N.Y.U. L. Rev. 437, 457.

[31]Hamilton, p. 294.

[32]Hamilton, p. 294.

> It is difficult to fully explain [the] eagerness [of politicians] to grant requests for exemptions from general laws that they would never entertain had the request come from a secular source. What legislator would even grant a meeting with a group asking for the right to avoid prosecution if they let children die or the right to avoid liability for putting children within reach of known pedophiles?[33]

The fact that they do grant such exemptions for religious groups is a scandal, and we need to do something about it.

Postscript

My arguments in this talk have been based on the principle of *religious neutrality*, understood as the proposition that the government must not favor or disfavor one religious sect compared to another, nor favor religious beliefs compared to nonreligious or anti-religious beliefs that play a comparably important role in the lives of those who hold them. In particular, the government "must ... refrain from endorsing or disapproving any religious view, or from taking sides among the various competing religious views."[34]

The trouble is that this principle — if applied literally — is untenable in practice, and indeed in some instances self-contradictory. This disconcerting fact was eloquently pointed out in a recent essay[35] by Professor Steven D. Smith of the University of San Diego Law School, who gives the following examples:

1) Government-sponsored prayer or Bible reading in the public schools manifestly promotes certain religious views and implicitly disparages others. On the other hand, Professor Smith observes, "many citizens believe (sometimes as a matter of their own religious faith) that prayer is a public obligation, and that it should be said in the schools. In rejecting the religious beliefs of these citizens, ... a ruling prohibiting school prayer offend[s] neutrality." It follows logically that *both* school prayer and the absence of school prayer reject and disparage the religious beliefs of some citizens, and hence (if one follows the neutrality principle literally) that *both* options are constitutionally forbidden. This is obviously self-contradictory (unless one abolishes the public schools entirely).

2) In *Epperson v. Arkansas*[36], the Supreme Court

[33]Hamilton, p. 299.

[34]This formulation of the "neutrality proposition" is due to Steven D. Smith, The paralyzing paradox of religious neutrality, San Diego Legal Studies Paper No. 11-060 (August 2011), available at `http://ssrn.com/abstract=1911399`, quote at p. 1 — who goes on to criticize (cogently in my opinion) the principle.

[35]Smith, *op. cit.*

[36]393 U.S. 97 (1968).

> struck down an Arkansas law ... [that] prohibited the teaching of evolution in the public schools. ... "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice," the Court solemnly intoned. Consequently, "the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion. This prohibition is absolute." The Court also said that evolution is inconsistent with the teachings of some religions, and that Arkansas had adopted the law in order to insulate such religions against contrary views; that motivation made the law less than neutral toward religion, and hence constitutionally invalid. And perhaps the Court was right. But on the Court's own premises — namely, that evolution directly contradicts the teachings of some religions and that the Constitution imposes an "absolute" prohibition against a school curriculum that "'aid[s] or oppose[s]' any religion," it follows with at least equal logical force that the teaching of evolution in the public schools is constitutionally prohibited. Thus, without going beyond the Court's own assertions, one can logically conclude (a) that the Constitution forbids states to prohibit the teaching of evolution and (b) that the Constitution forbids states to teach evolution.[37]

Smith concludes by observing that

> the problem is not limited to measures or laws addressing issues like prayer or evolution that everyone thinks of as touching on some people's religion. A wide range of laws at least implicitly reject some people's religious beliefs. When government wages war, it at least tacitly rejects the views of religious pacifists, such as Quakers. Laws requiring parents to obtain medical treatment for their children reject the beliefs of parents — Christian Scientists and others — who are religiously opposed to such treatment. A law prohibiting racial discrimination rejects the beliefs of people who have a religious basis for favoring racial segregation — the Aryan Nations Church, for example. In a nation of over three hundred million diversely-minded citizens, it is a fair bet that almost anything government does will be at odds with, and will effectively reject, the religious beliefs of at least a few citizens.[38]

It seems to me that, concerning this point at least, Smith is absolutely right.

Smith does not make clear what he proposes to substitute for the untenable principle of religious neutrality, but he does suggest that

> Perhaps the classical [Christian] theological rationales for religious freedom should once again be deemed admissible and reenlisted into active duty: if this means acknowledging that religious freedom is inevitably a species of "toleration," so be it.[39]

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[37]Smith, *op. cit.*, pp. 14–15, footnotes omitted.

[38]Smith, *op. cit.*, p. 15.

[39]Smith, *op. cit.*, p. 23, footnotes omitted.

It will come as no surprise that I disagree strenuously with this suggestion. In order to see what I would propose to put in its place, it is necessary first to examine *why* government should not — indeed, cannot — always maintain neutrality between different religious doctrines.

Consider, for instance, the child-medical-neglect laws (*without* religious exemptions) that Professor Hamilton and I so passionately defend. What is the goal of such laws? Obviously to protect the lives and health of children. Therefore, in enforcing such laws, the courts must assess the *evidence* as to what measures are most efficacious in protecting the lives and health of children, and they must make their decisions based on that evidence. In particular, there is ample evidence that, in at least some cases, modern medicine is efficacious — for instance, that "juvenile-onset diabetes is usually responsive to insulin, even up to within two hours of death"[40] — while there is no credible evidence that prayer is efficacious beyond the placebo effect.[41] (And the placebo effect is, alas, not powerful enough to save children suffering from diabetes.)

Likewise, when deciding which scientific theories merit being taught in public-school science classes, educators assess (or at least ought to assess) the *evidence* concerning those theories. Thus, we teach that the Moon is made of rock (with an iron-rich inner core), and we don't teach that the Moon is made of green cheese. Along similar lines — and with roughly the same strength of evidence, however much it may offend approximately half of Americans[42] for me to say this — we teach (or at least ought to teach) that biological species on Earth have evolved over 3–4 billion years (and in particular

[40]Lundman v. McKown, 530 N.W.2d 807, 813 (Minn. Ct. App. 1995), cert. denied, 516 U.S. 1099 (1996).

[41]For reasons that are too lengthy to explain here, this latter conclusion is in my opinion much more robust than one might expect from the mere *absence* of reliable (e.g. randomized double-blind) studies confirming the efficacy of prayer, or from the handful of reliable studies that tested the efficacy of prayer and obtained negative results (i.e., an effect consistent with zero). For some relevant references concerning such studies, see Alan D. Sokal, *Beyond the Hoax: Science, Philosophy and Culture* (Oxford University Press, Oxford–New York, 2008), p. 403n.62.

[42]A Gallup poll taken in the United States in 2012 asked the following question: "Which of the following statements comes closest to your views on the origin and development of human beings? — Human beings have developed over millions of years from less advanced forms of life, but God guided this process. Human beings have developed over millions of years from less advanced forms of life, but God had no part in this process. God created human beings pretty much in their present form at one time within the last 10,000 years or so." The results were 32% developed with God, 15% developed without God, 46% God created in present form (the remainder have "no opinion"). These results have been remarkably stable since this question was first asked in 1982, though there has been a slight upward trend in development without God, entirely at the expense of development with God (in 1982 the results were 38% developed with God, 9% developed without God, 44% God created in present form).

In a 2005 poll, the last option was reworded as "God created human beings in their present form exactly the way the Bible describes it." Curiously, this *stronger* formulation received *greater* assent: the results were 31% developed with God, 12% developed without God, 53% God created exactly as the Bible describes it.

Details of these polls can be found at `http://www.gallup.com/poll/21814/`

that *Homo sapiens* arose approximately 200,000 years ago), and we don't teach that human beings were created pretty much in their present form at one time within the last 10,000 or so years. We do this simply because there is overwhelming evidence in favor of the foregoing proposition, and overwhelming evidence against the latter.[43]

In short, there are compelling governmental interests in protecting the lives and health of children and in educating a scientifically literate citizenry; and the aforementioned governmental practices are legitimate — indeed, in my opinion, absolutely essential — means towards those ends. These governmental practices *do* implicitly reject and disparage the religious beliefs of Christian Scientists and creationists, respectively; there is no denying that. But they do not do so *gratuitously*; rather, they do so only as an unavoidable side-effect to their principal goal of protecting or educating children. In fact, they are "the least restrictive means of furthering that compelling governmental interest" (to use the language of a law that both Professor Hamilton and I oppose[44]).

But perhaps it would be more honest — and also more productive — to put matters rather more bluntly. In response to Christian Scientists' and creationists' complaint that their religious beliefs have been disparaged, I would answer, "Yes they have, but rightly so. In a free society each person has the right to believe whatever nonsense he wishes — Christian Science and creationism included — but public policy must be based on the best available evidence. And if that evidence goes against your religious beliefs, tough luck. No one forced you to adopt beliefs that are contradicted by overwhelming evidence."

But this answer means that we are forced into addressing the epistemological questions that are actually my main interest but that I had hoped, for the purposes of the present legal/political discussion, to sidestep. What *does* the best available evidence indicate concerning medical or biological matters? And even more fundamentally, what *counts* as credible evidence? These are difficult questions, but I think they *can* be answered.[45]

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[43]In discussing evolution, it is essential to distinguish clearly between three very different issues: namely, the *fact* of the evolution of biological species; the *general mechanisms* of that evolution; and the *precise details* of those mechanisms. (One of the favorite tactics of deniers of evolution is to confuse these three aspects.) The Gallup poll cited in the preceding footnote of course concerns only the *fact* of evolution as applied to *Homo sapiens*, not its mechanisms. For further discussion, along with a fascinating international comparison, see Alan D. Sokal, What is science and why should we care?, *Logos*, vol. 12, no. 2 (spring 2013), available at `http://www.physics.nyu.edu/faculty/sokal/logos_May_13.pdf`, see pp. 7–9.

[44]Religious Freedom Restoration Act, 42 U.S.C. §2000bb1(b)(2).

[45]My views concerning the epistemological status of religion can be found in Sokal, *Beyond the Hoax*, *op. cit.*, Chapter 9. Concerning the question of what counts as credible evidence — and in particular, how to answer the epistemic challenge from fundamentalist Christians — see my contribution to Michael P. Lynch and Alan Sokal, Defending science: An exchange, New York Times (online), March 11, 2012, `http://opinionator.blogs.nytimes.com/2012/03/11/defending-science-an-exchange/`

Alas, is not only *we* (i.e., scholars of law) who are forced into addressing these epistemological questions; the *government* as an institution is also ineluctably forced into addressing them, at least implicitly. Evaluating evidence is, after all, the bread-and-butter of judicial activity; many administrative decisions are also required by law to be based on an assessment of the relevant evidence; and legislative decisions are (or at least ought to be) informed by evidence as well. So government cannot sidestep the problem of assessing what the best available evidence indicates, or of determining what counts as credible evidence.

But this problem is not, of course, limited to religion, nor is it in any way special to religion; it concerns the status of ideas generally. Every time any branch of the government makes *any* decision — even something so mundane as choosing an economic or tax policy — it is implicitly affirming some ideas and rejecting or even disparaging others.[46] Complete neutrality towards all ideas is impossible.

And yet, some governmental actions seem to cross an intuitive red line. Professor Smith gives the following amusing but enlightening examples:

1. *Science*
    a) A government education agency declares that science is a valuable human enterprise and that scientific education and research should be encouraged.
    b) A government agency declares that the Big Bang theory is true but that "string theory" is bogus science.
2. *Music*
    a) A government agency responsible for promoting cultural affairs says that music is a valuable human achievement and activity, and that musical performances and music education should be promoted.
    b) A government agency declares that jazz music is the highest and best form of music originating in this country and that Country Western music is aesthetically inferior.
3. *Sports*
    a) Congress passes a resolution declaring that baseball is an important part of the national heritage and that a particular week will be designated as "National Baseball Week."
    b) Congress passes a resolution declaring that the New York Yankees have been the most worthy and admirable franchise in the history of baseball,

[46] Of course, the chosen economic or tax policy may not always be based on legislators' or administrators' sincere belief in the economic theory that provides its ostensible justification. Rather, the theory may in some (or even many) cases be simply a fig leaf designed to obscure the fact that the policy was chosen in order to benefit powerful special interests; and there may even be wide public recognition, or at least a vague public intuition, of that fact. A similar situation can also occur in cases where religious doctrine plays a role, though perhaps more rarely.

> to be revered above any other team (especially including the Boston Red Sox and the Los Angeles Dodgers).[47]

He comments:

> In each of these instances, I suspect, many citizens would likely regard the generic statements as unobjectionable but would find the more specific statements to be inappropriate. But why? The specific statements are controversial, to be sure, and some people would disagree with them. But that does not seem to be the precise problem here. After all, some people disagree with anything government says (including the more generic statements I have given above); it surely does not follow that government cannot speak. In these instances, moreover, I suspect that even people who happen to agree with the specific affirmations — the statements condemning string theory, disparaging Country Western music, and extolling the Yankees — would acknowledge that government acts improperly in saying such things.[48]

Otherwise put, the statements labeled (b) are

> objectionable if, because, and to the extent that they go beyond the proper functions of government. ... [T]hey suggest and reflect an objectionable capture of governmental institutions by partisan factions, and they produce the evils associated with such capture.[49]

I think this analysis is correct; but of course in order to apply it in any concrete instance one must first ascertain what are "the proper functions of government" in that instance. I contend, for example, that protecting the lives and health of children is one of the proper functions of government; and if, in carrying out that function, government is forced to assess the relative efficacy of alternative medical treatments, and finds that the evidence favors one set of ideas (modern medicine) and disfavors another (Christian Science), I have no problem with that. But what about string theory? It is intuitively distasteful when the government takes official sides in an ongoing scientific (or historical or artistic) controversy; and it is even more distasteful when that decision emanates from officials who have no relevant expertise. But complete neutrality is not always possible even in such matters. For instance, the National Science Foundation, in allocating scarce research funds, must inevitably make some judgments concerning the validity and importance of string theory compared to other approaches to quantum gravity and elementary-particle physics. One hopes that these decisions will be made by expert panels, not by politicians or ideologues; and one also hopes that the NSF will act prudently by not putting all its eggs in one basket. And even were NSF to

[47]Steven D. Smith, Why is government speech problematic? The unnecessary problem, the unnoticed problem, and the big problem, 87 Denver Univ. L. Rev. 945, 966 (2010).

[48]Id.

[49]Id., at 967.

decide to allocate zero funding to string theory, one would still be a bit taken aback by an official NSF pronouncement that string theory is "bogus". Roughly speaking, it seems that government should avoid *gratuitously* taking positions on controversial issues, and should do so only where it is an inevitable concomitant of some other legitimate governmental interest. But this is, of course, a delicate balancing question; and it is very difficult to say where the line is crossed from a policy that is unwise to one that is improper, or from one that is improper to one that is unconstitutional.

This stress on the centrality of *evidence* answers many questions concerning governmental non-neutrality in matters of religion, but not all; for instance, it does not tell us whether government-sponsored school prayer is constitutional or not. As Professor Smith points out, both school prayer and the absence of school prayer reject and disparage the religious beliefs of some citizens. But there is an asymmetry. Government-sponsored school prayer disparages the core religious beliefs of all those whose religion is different from the one embodied in the chosen prayer[50] and all those who are nonreligious or agnostic or atheist; it also disparages the religious beliefs of all those, whatever their sect, who believe that religion is a private matter in which government should not interfere. By contrast, the absence of government-sponsored school prayer disparages the religious beliefs only of those who believe that prayer is a public obligation that should be carried out by the government; and it only disparages this limited part of their beliefs. This asymmetry justifies, I think, the Supreme Court's holding in *Abington School District v. Schempp*[51] that government-sponsored school prayer is unconstitutional. But this issue is admittedly more complicated than those that are governed solely by questions of evidence.

[50]Thus, even a "non-sectarian" reading from the King James version of the New Testament is offensive to Catholics, Jews, Muslims and Hindus; a "non-sectarian" Christian prayer is offensive to Jews, Muslims and Hindus; and a "non-sectarian" monotheistic prayer is offensive to Hindus.

[51]374 U.S. 203 (1963).