Comment: Political Liberalism and Establishment Clause Jurisprudence

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POLITICAL LIBERALISM AND
ESTABLISHMENT CLAUSE
JURISPRUDENCE

Edward B. Foley*

In a new book that builds upon a series of articles published during the last decade, John Rawls provides a systematic account of "political liberalism." For purposes of this essay, "political liberalism" is defined as the idea that the state, insofar as is possible, should remain uncommitted to any of the various religious faiths or other "comprehensive" philosophies that exist in modern society. The Establishment Clause, properly construed, is the Constitution's textual embodiment of this idea of political liberalism: the basic purpose of including the Establishment Clause within the Bill of Rights was to prohibit the new federal government from developing an allegiance to any of the various religious belief-systems that then existed, or that might come to exist, within American cul-

* Assistant Professor of Law, The Ohio State University. I would like to thank the editors of this Law Review for inviting me to participate in this symposium. A somewhat different version of this paper was presented at the Ohio Legal Theory Workshop, and I am grateful for the opportunity to have the benefit of that forum as well. Finally, a number of friends and colleagues have given me valuable comments on earlier drafts, especially Jim Fleming and Larry Solum, who have helped me to clarify the relationship between Rawls' views and my own. Whatever confusion and errors that remain are, of course, attributable solely to my own misunderstanding of Rawls' work.

1. JOHN RAWLS, POLITICAL LIBERALISM (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]. Prior to its publication, Professor Rawls kindly provided me with a draft manuscript of his new book prior to its publication. The articles are as follows: The Domain of the Political and Overlapping Consensus, 64 N.Y.U. L. REV. 233 (1989); The Priority of Right and Ideas of the Good, 17 PHIL. & PUB. AFF. 251 (1988); The Idea of the Overlapping Consensus, 7 OXFORD J. LEG. STUD. 1 (1987); Justice as Fairness: Political Not Metaphysical, 14 PHIL. & PUB. AFF. 223 (1985).

2. By "comprehensive" philosophy, Rawls means an ideology or belief-system that addresses not merely political issues (such as the distribution of wealth in society) but also metaphysical or meta-ethical issues (such as whether God exists, or whether moral duties are discovered or invented). See RAWLS, POLITICAL LIBERALISM, supra note 1, at 11-15.
ture. Accordingly, the ongoing task of developing a coherent corpus of Establishment Clause jurisprudence can be aided considerably by understanding and appreciating the insights that Rawls provides in his account of political liberalism.

Rawls, it must be acknowledged, is not the only philosopher who has been at work in recent years on the idea of political liberalism. Charles Larmore, in particular, has made important contributions to the topic. But I focus on Rawls for purposes of this symposium so that my necessarily brief discussion of political liberalism may be as clear as possible.

3. See, e.g., Douglas Laycock, Noncoercive Support for Religion: Another False Claim about the Establishment Clause, 26 VAL. U. L. REV. 37 (1991). Of course, as originally adopted, the Establishment Clause, like the rest of the Bill of Rights, applied only to the federal government and not to the states. Along with most other provisions of the Bill of Rights, the Establishment Clause is now understood as having been incorporated into section one of the Fourteenth Amendment and therefore now controls the practices of state governments in precisely the same way as it does the practices of the federal government.

4. By focusing my remarks on political liberalism, I intend no disparagement of Dean Smith's efforts to substitute the term “conscience” for “religion” in Establishment Clause analysis. See Rodney K. Smith, Conscience, Coercion, and the Establishment of Religion: The Beginning of an End to the Wandering of a Wayward Judiciary?, 43 CASE W. RES. L. REV. 917, 926-33 (1993). On the contrary, I wholeheartedly support this substitution and, in support, observe that Rawls also uses the term “liberty of conscience” to describe the central principle of justice applicable to the issue of church-state relations. See RAWLS, POLITICAL LIBERALISM, supra note 1, at 227 (emphasis added).

I hope, however, that my remarks demonstrate that substituting “conscience” for “religion” will not solve all the problems that confront contemporary Establishment Clause jurisprudence. Even if we use “conscience” in place of “religion,” we still need to explain how the principle of equality applies to the liberty of conscience — since most of us assume that the liberty of conscience is a right to which we are all equally entitled. For example, James Madison, while using “religion” and “conscience” interchangeably, underscored the “equal title to the free exercise of Religion according to the dictates of Conscience.” JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶ 4 (1785) (quoting Virginia Declaration of Rights, art. 16, reprinted in Appendix to Everson v. Board of Educ., 330 U.S. 1, 66 (1947)). Madison made unmistakably clear that he considered the principle of equality to be crucial to protection of religious liberty: “Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.” Id. (emphasis added). Thus, my contribution to this symposium is an effort to explore the principle of equality as it applies to “liberty of conscience” (or, alternatively, “freedom of religion”).


6. Do not assume, however, that in explaining political liberalism I follow Rawls’ account in every respect. Moreover, insofar as I use the term “Rawlsian” to describe my own ideas, I do so not to suggest that Rawls would agree with all (or even much) of what I say, but rather only to acknowledge my reliance upon his work in developing these ideas. I trust that Rawls himself would appreciate this use of the term “Rawlsian,”...
I. AN OVERVIEW OF POLITICAL LIBERALISM AND ITS RELATIONSHIP TO THE ESTABLISHMENT CLAUSE

A Rawlsian approach to church-state relations leads one to reject the so-called "coercion" test, which some have suggested as a replacement for the "endorsement" test that has prevailed in recent years. The endorsement test is a refinement of the basic principle of "neutrality" that has guided Establishment Clause jurisprudence ever since Everson v. Board of Education, and political liberalism teaches that the government should endeavor to maintain a position of strict impartiality among different religious belief-systems and, most certainly, must not endorse any particular religion as the one true faith.

Rawls is quick to acknowledge, however, that the state cannot be completely neutral toward all religions. As he explains, some religions are antithetical to the requirements of liberalism (for example, a religion that insists upon a theocracy), and the liberal state necessarily must reject as erroneous any religion that contradicts the basic tenets of liberalism itself. In this way Rawls replaces the idea of complete neutrality with a new standard of limit-
ed, or circumscribed, neutrality, which he calls “the idea of an overlapping consensus.”\(^{12}\)

According to this idea, liberalism embraces on equal terms all those religions and other comprehensive philosophies that affirm from within their own particular belief-systems the political doctrines that liberalism entails.\(^{13}\) But liberalism simultaneously discriminates against all those religions (and other belief-systems) that are inconsistent with liberalism. These illiberal religions, in other words, are outside the scope of the overlapping consensus and hence are not treated according to the same impartial terms as the various liberal religions within the overlapping consensus.

Rawls articulates a concept called “public reason” to distinguish the liberal religions and philosophies inside the overlapping consensus from the illiberal religions and philosophies outside the

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12. *Id.* at 144.

13. As the metaphor of “overlapping consensus” suggests, Rawls envisions that different religions and philosophies converge insofar as they accept the political doctrines of liberalism, but diverge insofar as they disagree about metaphysical or meta-ethical issues (including the meta-ethical issue of why the political doctrines of liberalism should be accepted as correct). Rawls’ idea of an overlapping consensus can also be illustrated in the following way:

![Diagram](image-url)

Each of the above circles represents the set of beliefs affirmed by a particular religion or philosophy: for example, Episcopalianism, Unitarianism, Reform Judaism, and atheistic humanism. These four belief-systems do not agree on all issues of metaphysics or theology, but they all do accept the basic political precepts of liberalism (namely, liberty and equality for all citizens). *Cf. id.* at 145-46 (explaining his own “model case” of an overlapping consensus).
overlapping consensus. Liberal religions are “reasonable” from the perspective of public reason, while illiberal religions are “unreasonable” from this perspective. Public reason, as Rawls uses the term, has two basic components: one is epistemological, and the other ethical. The epistemological component is, essentially, the methods and conclusions of logic and science. The ethical component, as I understand it, is the fundamental idea that the interests of all persons count equally for purposes of determining their rights and duties as citizens.

As we shall see, Rawls’ ideas of an overlapping consensus and of public reason prove to be useful tools for Establishment

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14. Id. at 61-62. Rawls uses the concept of public reason for other purposes as well, most particularly to identify sets of principles to be used by government bodies (including the U.S. Supreme Court) to justify their actions as being in accord with the requirements of justice. See id. at 231-33; see also Lawrence B. Solum, Constructing an Ideal of Public Reason, SAN DIEGO L. REV. (forthcoming 1993) (using the ideal of public reason to identify the kinds of moral arguments that are appropriate for public debate in a pluralistic society). In this essay, however, I focus specifically on the most elementary components of public reason, or what might be called the “substratum” of public reason: the irreducible core precepts from which other principles or doctrines are derived.

15. Rawls puts it this way:

The values of public reason not only include the appropriate use of the fundamental concepts of judgment, inference and evidence, but also the virtues of reasonableness and fair-mindedness as shown in abiding by the criteria and procedures of commonsense knowledge and accepting the methods and conclusions of science when not controversial.

RAWLS, POLITICAL LIBERALISM, supra note 1, at 139. I am not sure exactly what Rawls means by the qualifying phrase “when not controversial,” which he applies to the methods and conclusions of science. This qualification is one of the issues concerning the concept of public reason that needs further exploration as the theory of political liberalism begins to be used to help think through particular controversies that arise in the course of adjudicating church-state disputes. For example, some parents do not wish their children to learn about the existence of dinosaurs because this knowledge would conflict with their belief that the age of the earth is less than 10,000 years old. Cf. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1062 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988) (parents objected to schools teaching evolution theory as scientific fact). Is it consistent or inconsistent with “public reason” to teach children what most, but not all, citizens consider to be the entirely uncontroversial results of geological science (including evidence of the earth’s age)? The justification for this education is, in part, that children need to learn some geology in order to become citizens who can think intelligently about such public policy issues as whether scientists can predict earthquakes with sufficient accuracy to permit the construction of nuclear energy facilities in certain locations. Issues like this one will require church-state scholars to explore Rawls’ concept of public reason more extensively than he has done thus far.

16. See RAWLS, POLITICAL LIBERALISM, supra note 1, at 225-226 (“the fundamental idea of equality,” which is the basis for the principles of justice as determined “in the original position,” also underlies the idea of public reason — because the “the guidelines of public reason and the principles of justice have essentially the same grounds”).
Clause jurisprudence. The overlapping consensus idea explains why the Supreme Court's initial quest for complete neutrality was destined to fail, and it also shows how the Court can modify the concept of neutrality without having entirely to abandon the ideal of impartiality. Moreover, the Court needs to develop the concept of public reason, or some similar concept, in order to distinguish those religions that are inevitably disfavored under its Establishment Clause jurisprudence from those religions that are not. Finally, this reconstruction of Establishment Clause jurisprudence along Rawlsian lines is as faithful to the original understanding of the Establishment Clause as a contemporary interpretation of the clause possibly can be — although it must be acknowledged that no contemporary interpretation can conform completely to original understanding, since the Framers of the First Amendment intended that the new government be completely neutral toward all different religions, and, as we know now, complete neutrality is an impossibility.

II. COERCION V. ENDORSEMENT: CHOOSING BETWEEN THE TWO TESTS

Michael Paulsen, who advocates adoption of the coercion test, candidly acknowledges that doing so would permit Congress to enact a law declaring Christianity to be the official religion of the United States — so long as the law did nothing to compel anyone to support this official religion by attendance, or financial support, or some other means.' With all due respect to Professor Paulsen, this acknowledgement should suffice to rebut all his arguments in favor of the coercion test's adoption. Any test that would permit Congress to choose an official religion should be summarily rejected for this reason alone. To see why, let us consider the issue as

17. Lawrence Solum has already put Rawls' ideas to good use to address a related jurisprudential issue, namely whether a judge may rely upon religious reasons when deciding cases. See Lawrence B. Solum, Faith and Justice, 39 DEPAUL L. REV. 1083 (1990). See also Solum, supra note 14 (applying the idea of public reason not only to judges, but also to other government officials, as well as to citizens generally). And in a recent article, Kathleen Sullivan also relies upon Rawls' work to address issues of church-state jurisprudence. See Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. Chi. L. Rev. 195, 198-200 (1992). My approach here shares affinities with Professor Sullivan's although it relies upon Rawls' work much more directly and extensively than hers.

18. See infra part IV.B.

19. Professor Paulsen made his position on this point unmistakably clear during his oral remarks at this symposium. See supra note 7.
one of normative analysis — what should the Constitution say about Paulsen’s hypothetical? — before treating the issue as one that requires interpretation of the piece of text we call the Establishment Clause.20

It should be obvious why, as a matter of normative analysis, Congress should not be permitted to endorse Christianity as the one true faith. Congress has no legitimate reason to prefer Christianity over Unitarianism, Judaism, or Islam, for example. This is so because from a purely philosophical perspective — the perspective of "public reason," to use Rawls’ term — Christianity is no more worthy of adherence than Unitarianism, Judaism, or Islam.21 What distinguishes Christianity from these other faiths is the belief that Jesus of Nazareth is God incarnate in human flesh, and this distinctively Christian creed cannot be proven true in any philo-

20. By “normative analysis,” I mean moral reasoning or political theorizing without regard to what the law actually provides. In other words, I am asking what principle concerning church-and-state ought the Constitution contain (even if it takes a constitutional amendment to adopt this principle), rather than what principle is actually contained in the Constitution. In this sense, the normative question I am considering is analogous to the normative question of whether the federal Constitution ought to be amended to guarantee the right to a decent education, assuming arguendo that the existing Constitution does not guarantee this right. See San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

21. Rawls would not put this point in precisely the same way as I do, and I must be candid that here I am using the term "public reason" more to advance my own explanation of political liberalism than to describe it. Rawls speaks of the "burdens of judgment," which he describes as the inability of human inquiry to determine conclusively the answers to certain questions (with the result that reasonable people disagree upon the answers to these questions). RAWLS, POLITICAL LIBERALISM, supra note 1, at 55-56. I accept Rawls’s description of these burdens of judgment and think this description is well-suited to questions of theology: e.g., does God exist?

But what is the method of inquiry for determining whether these burdens of judgment apply to a particular issue of human concern? I’m not sure that Rawls’ discussion is entirely satisfactory on this point. In my own view, this method of inquiry must be philosophy itself: pure rational inquiry; the Socratic method, if you will. Thus, as I would put it, philosophy (i.e., pure rational thought) tells us whether an issue is one about which reasonable people may disagree, or whether it is an issue on which all reasonable people must agree. The philosophical method of inquiry that makes this distinction is part of public reason — or at least is a necessary antecedent to public reason — since public reason is a form of reasoning to which all reasonable people must subscribe.

Now this philosophical method that underlies public reason is not a "comprehensive view" — it does not provide answers to all issues of human concern. Indeed, as we have just seen, one function of this philosophical method is to identify those issues of human concern for which it cannot provide conclusive answers. Nevertheless, it is still philosophy that supplies the methods and content of public reason (and marks the boundary between those domains of human thought to which public reason applies and those to which it does not). Accordingly, I have chosen to speak of "philosophy" as the perspective (or method of inquiry) that determines whether one religion is just as reasonable as another (and therefore deserving of equal treatment in an overlapping consensus).
sophistical sense. It is just as reasonable, from the perspective of philosophy, to deny that Jesus was God-as-man in a unique way, as it is to maintain the distinctively Christian claim that Jesus is unique in his relationship to God.22

Even devout Christians, if they are intellectually honest and open-minded, must acknowledge this fact.23 Of course, philosophy does not require Christians to abandon their faith. Philosophy cannot refute the divinity of Jesus any more than philosophy can prove the divinity of Jesus. In other words, from the perspective of philosophy, the divinity of Jesus is an open issue. People are intellectually free to make a leap of faith, accepting Jesus as God-as-man. At the same time, however, people are equally free, intellectually speaking, to reject the special status of Jesus. Thus, Christianity is compatible with philosophy, but once a Christian examines the issue of religious faith from a philosophical point of view, he or she must recognize that the rejection of Christianity is equally as compatible with philosophy as its acceptance.24

Because non-Christian religions (e.g., Unitarianism, Judaism, and Islam) are equally as reasonable as Christianity from the perspective of philosophy, they deserve equal treatment from the government. This proposition is the essential tenet of political liberalism.25 The argument in its support is as follows. First, citizens

22. For philosophers who have challenged the truth of Christianity, see MICHAEL L. MARTIN, THE CASE AGAINST CHRISTIANITY (1991); BERTRAND RUSSELL, Why I am not a Christian, in WHY I AM NOT A CHRISTIAN AND OTHER ESSAYS (1957).
24. Rawls expresses this idea in a more general form:
   [R]easonable persons do not all affirm the same comprehensive doctrine. Moreover, they also recognize that . . . many reasonable comprehensive doctrines are affirmed, not all of which may be true (indeed none of them may be true). The doctrine that any reasonable person affirms is but one reasonable doctrine among others . . . .
   Thus, it is not in general unreasonable to affirm any one of a number of reasonable comprehensive doctrines. We recognize that our own doctrine has, and can have, for people generally, no special claims on them beyond their own view of the merits. Others who affirm doctrines different from our own are, we grant, reasonable also . . . .
   RAWLS, POLITICAL LIBERALISM, supra note 1, at 60.
25. At least it is in my own conception of political liberalism. Cf. id. at 61:
   To conclude: reasonable persons see that the burdens of judgment set limits on what can be reasonably justified to others, and so they endorse some form of
should be treated equally insofar as they are equally situated.\(^{26}\) Second, citizens are equally situated with respect to their religious beliefs if their religious beliefs are equally reasonable from the perspective of philosophy.\(^{27}\) Therefore, the government should give equal treatment to the equally reasonable religious beliefs of different citizens. And so, since Unitarian, Jewish, and Muslim citizens all hold religious beliefs equally reasonable to those of Christian citizens, political liberalism entails that Congress be forbidden to prefer Christianity over these other faiths.\(^{28}\)

In this way, political liberalism leads directly to the “endorsement” test that Justice O’Connor articulated in her *Lynch v. Donnelly*\(^{29}\) concurrence, and which a majority of the Court adopted in *County of Allegheny v. ACLU*.\(^{30}\) Indeed, the justification that Justice O’Connor gave for adopting the endorsement test, which was the justification reiterated by the Court in *Allegheny*, strongly echoes the central principles of political liberalism. In the most memorable sentence of her concurrence, Justice O’Connor explained: “Endorsement sends a message to nonadherents that they

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26. This elemental egalitarianism is axiomatic to Rawls’ entire theory of justice.
27. This proposition necessarily follows from the commitment to public reason. If rational inquiry leads to the conclusion that there are two or more equally reasonable ways to think about an issue, then these different ways of thinking are all equally situated from the perspective of rational inquiry and, hence, bound to be respected by all persons as such. Accordingly, all persons holding equally reasonable views on a given issue are equally situated in this respect. Another way of expressing the same idea, a way closer to Rawls’ own formulation, is to say that social relations among persons with different ideas must be conducted on the basis of the equal legitimacy of all ideas that are equally reasonable under rational, or philosophical, scrutiny. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 1, at 60-61.

28. The question arises: must two or more religious belief-systems or comprehensive philosophies be equally reasonable in order to deserve equal treatment from the government? Or, alternatively, might different religious belief-systems be entitled to equal treatment from the government even though some are more reasonable than others, so long as all satisfy a minimum threshold of reasonableness? Although interesting and important, this issue need not be resolved for purposes of this paper. Even if all sufficiently reasonable religions deserve equal treatment from the government, it certainly remains correct to say (as a special case of a more general principle) that all equally reasonable religions deserve this equal treatment. Thus, as long as I am correct in contending that certain religions are equally reasonable (e.g., Episcopalianism, Unitarianism, Buddhism, and the Baha’i faith), then I am correct in maintaining that at least these religions are entitled to equal treatment from the government.

are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”

In other words, to permit Congress to endorse Christianity as the one true faith — as adoption of the coercion test would do — would be to deny to Unitarians, Jews, and other non-Christians the equality of treatment to which they are entitled. And this insistence on equal treatment of non-Christian and Christian citizens, which is a normative argument derived from political liberalism, remains the most persuasive reason why the Supreme Court should not replace the endorsement test with the coercion test.32

III. THE IMPOSSIBILITY OF COMPLETE NEUTRALITY

Even if the Supreme Court adheres to the endorsement test, the Court cannot guarantee completely equal treatment for all religious belief-systems that exist, or conceivably might exist, in our society. When Justice O'Connor articulated the endorsement test in *Lynch*, she expressed her belief that the Establishment Clause prohibits “disapproval” of any religion by the government, just as it prohibits “endorsement” of any religion by the government.33 In this respect, Justice O'Connor was merely rephrasing a refrain from the early days of the Court’s Establishment Clause jurisprudence when the Court proclaimed that the clause required strict neutrality towards all religions, the government being forbidden to favor any or disfavor any.34 Although this aspiration to complete neutrality was lofty and laudable, it nonetheless is unattainable, as Rawls

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32. Although I shall not set forth the full argument here, I note briefly that the same Rawlsian argument that requires equal treatment for the Christian and the non-Christian also requires equal treatment for the theist and atheist. This conclusion follows from the fact that both theism and atheism are equally reasonable beliefs from the perspective of philosophy. Compare RICHARD SWINBURNE, THE EXISTENCE OF GOD (rev. ed. 1991) with JOHN L. MACKIE, THE MIRACLE OF THEISM (1982).

One other point. John Garvey, in his discussion of possible harms caused by the graduation prayer in *Lee v. Weisman*, 112 S. Ct. 2649 (1992), fails to recognize the most significant harm: i.e., the denial of equal treatment that the atheist suffers when the government endorses theism to be true. See John H. Garvey, *Cover Your Ears*, 43 CASE W. RES. L. REV. 761, 763 (1993).


makes perfectly plain in his account of political liberalism.\footnote{35}

A. Liberalism’s Disapproval of Illiberal Sects

Consider the most obvious illustration of this point: the possibility that some fundamentalist sect of Christianity insists, based on its reading of the Bible, that Congress must endorse Christianity as the one true faith; otherwise, this sect believes that God will condemn all American citizens to eternal purgatory. This sectarian claim is obviously incompatible with the proposition that Congress is not permitted to endorse Christianity as the one true faith. No one, not even the Supreme Court, can hold that Congress \textit{must not} endorse Christianity and, at the same time, accept as legitimate the claim that Congress \textit{must} endorse Christianity. It is a logical impossibility, and even the Supreme Court cannot escape the strictures of logic.

Thus, the Supreme Court cannot maintain a position of strict neutrality between an extremist sect that insists that Congress must endorse Christianity and other religious groups, including other Christian denominations, that accept the proposition that Congress must not endorse Christianity over any other equally reasonable religion.\footnote{36} In short, the political philosophy of liberalism necessarily divides religions into two categories: (1) liberal religions, which are those philosophically reasonable religions that accept the liberal position that the government must be impartial among all philosophically reasonable religions; and (2) illiberal religions, which are

\footnote{35. Rawls is by no means the only political philosopher who recognizes the impossibility of a completely neutral liberalism. Indeed, in recent years it has become commonplace among both opponents and proponents of liberalism to point out that liberalism cannot maintain a position of strict neutrality. \textit{See}, \textit{e.g.}, WILLIAM A. GALSTON, \textsc{Liberal Purposes}\ 93 (1991): “Liberalism is the theory not of the neutral state but of the minimally committed state.” \textit{See also} Stephen Macedo, \textsc{The Politics of Justification}, 18 POLITICAL THEORY 280, 289 (1990):

All religions compatible with liberalism will be respected; those not compatible will be opposed. The liberal must in this way imply that religious convictions incompatible with liberalism are unsupportable.

36. The Court itself recognized this truth in \textit{Allegheny}:

[In a pluralistic society there may be some would-be theocrats, who wish that their religion were an established creed, and some of them perhaps may be even audacious enough to claim that the lack of established religion discriminates against their preferences. But this claim gets no relief, for it contradicts the fundamental premise of the Establishment Clause itself. The antidiscrimination principle inherent in the Establishment Clause necessarily means that would-be discriminators on the basis of religion cannot prevail.]

\textit{County of Allegheny v. ACLU}, 492 U.S. 573, 611 (1989).}
those that deny this liberal position and insist, instead, that the
government endorse or favor their particular creed as the one true
faith. While the government can maintain a position of neutrality
among liberal religions, liberalism itself necessitates that the gov-
ernment must disfavor and discriminate against illiberal religions. In
other words, contrary to Justice O'Connor's hope for strictly
equal treatment of all religions, we now see that adoption of the
endorsement test itself necessarily requires the Court to disapprove
of any religious sect insofar as it insists upon the government's
endorsement of its particular creeds.

Moreover, we must recognize also that liberalism's disapproval
of illiberal religions is necessarily a rejection of these illiberal
religions as theologically unsound. After all, if the extremist Chris-
tian sect is correct in claiming that all Americans will burn in hell
forever unless Congress endorses Christianity, then surely the Con-
stitution should permit Congress to endorse Christianity. The in-
finitude suffering of all citizens is obviously too high a price to pay
for political correctness.

But those of us who are liberals continue to insist that Con-
gress be forbidden to endorse Christianity. This is so because we

37. Illiberal religions are disfavored in the specific sense that a part of their belief-
system is deemed illegitimate by the liberal state, whereas the belief-systems of liberal
religions are accepted by the government as wholly legitimate. Rawls captures this point
when he explains that political liberalism rejects "neutrality" if "neutrality" means "that
the state is to ensure for all citizens equal opportunity to advance any conception of the
good they freely affirm." RAWLS, POLITICAL LIBERALISM, supra note 1, at 180-83. The
reason is that political liberalism "allows that only permissible conceptions (those that
respect the principles of justice) can be pursued." Id. (emphasis added). But, Rawls goes
on to say, the meaning of neutrality "can be amended to allow for this; and as so
amended, the state is to secure equal opportunity to advance any permissible conception."
Id. (emphasis added).

38. "Disapproval" in this context is not too strong a term. If the endorsement test is
correct, as liberalism insists it is, then the extremist sect is necessarily incorrect — i.e.,
wrong — in claiming that Congress must endorse its creeds. Liberalism therefore disap-
proves as being wrong the insistence by any sect that its creeds be established as the
nation's official religion. This is true even if this insistence stems from the sect's sincere
religious belief that God commands the official endorsement of its creeds. Surely this
usage accords with common understanding: liberal senators and representatives, if they are
indeed committed to liberalism, would be required to express their profound disapproval
of any bill that would establish Christianity as the nation's official religion.

39. In other words, even if God would be unjust (according to political liberalism) to
punish Americans with eternal damnation if Congress refused to endorse Christianity, if
we nonetheless knew that God would impose this punishment, we would acquiesce in the
congressional endorsement of Christianity, despite its injustice, because we would not wish
to subject Americans to the fate of eternal damnation.
liberals reject as theologically unreasonable the idea that God would punish all Americans with eternal damnation if Congress failed to endorse Christianity as the one true faith. Even if Christianity is the one true faith, liberalism entails the recognition that, from the perspective of philosophical reason, Christianity is not the only reasonable faith. Given the equal reasonableness of other religions to intellectually honest human minds, liberals cannot accept the idea that God would be so cruel as to subject all Americans to eternal purgatory if Congress remains impartial among all equally reasonable faiths. The liberal view, which is shared by liberal Christians (who believe for themselves that Christianity is the one true faith), is that God would not have caused other religions to be equally reasonable from the perspective of philosophy if God had intended to punish people for believing that their government should remain impartial among all philosophically reasonable religions.

In this way, then, liberalism necessarily rejects as theologically untenable any religion that claims that citizens will suffer eternal damnation if the government does not endorse that particular religion as the one true faith.40

40. I understand Rawls' account of political liberalism to be in accord with my own explanation of liberalism on this point. Rawls himself considers the example of a religion that insists that "the salvation of a whole people" depends upon the state's endorsement of that particular religion. If this occurs, Rawls says, "we may have no alternative but to deny this, or to imply its denial and hence to maintain the kind of thing we had hoped to avoid," namely that someone's religious belief is theologically unreasonable. RAWLS, POLITICAL LIBERALISM, supra note 1, at 152.

Rawls, however, goes on to say:

[W]e need not say that their religious beliefs are not true, since to deny that religious beliefs can be publicly and fully established by reason is not to say they are then false. Of course, we do not believe the doctrine the believers here assert, and this is shown in what we do . . . . [O]ur actions . . . imply that we believe the concern for salvation does not require anything incompatible with [equal treatment for all reasonable religions]. Still, we do not put forward more of our comprehensive view than we think needed or useful for the political aim of consensus.

Id. at 153 (citation omitted). I confess I am not altogether sure about the meaning of this passage. It seems to me that liberalism does reject as false, as well as unreasonable, the idea that the state must endorse a particular creed if the people are to avoid eternal damnation. As I have said, were this idea not false, but instead true, it would follow that the government should endorse the creed so as to avoid the horrible consequence of infinite suffering for all citizens. I think Rawls recognizes this point when he writes that "we believe that the concern for salvation does not require" a rejection of the principle of equal treatment for all philosophically reasonable religions. Id. In any event, if I am misunderstanding this passage, it is possible that Rawls' account of political liberalism differs from my own in this detail.
B. Other Disfavored Religious Beliefs

There are many additional examples of religious beliefs that are denied equal treatment by political liberalism because they are outside the scope of the overlapping consensus. A detailed examination of such other examples must await another occasion. But I would fail to convey an accurate impression of political liberalism if I did not identify briefly some of the other religious beliefs that are unavoidably disfavored by a regime that has adopted a liberal Constitution.

First of all, as Rawls himself points out, some religions reject one-person-one-vote and other democratic principles and advocate instead antidemocratic ideas, including slavery or the exclusion of women from the suffrage. Since these antidemocratic ideas are contrary to the principles of justice affirmed by political liberalism, these religions are illiberal and must be denied equal treatment by the liberal state, just as liberalism denies equal treatment to those illiberal religions that insist upon establishing a theocracy.41

Second, some sects reject the efficacy of modern medicine, preferring to rely solely upon prayer to cure disease. Suppose, for example, members of such a sect, on theological grounds, refuse vaccination even though science shows that the vaccine reduces the spread of a highly contagious, deadly disease.42 The liberal state will insist upon vaccinating these sectarians, despite their conscientious objection, in order to reduce the risk of contagion to other citizens.43 In this way, liberalism embraces the medical advances

41. See id. at 196-97. The liberal state, of course, may choose to tolerate these undemocratic or illiberal religions in the sense of permitting them to exist and even to proselytize their creeds. But the liberal state, if it is to remain liberal, cannot permit them to achieve their objectives — even though their objectives are motivated by sincere religious beliefs (e.g., a belief that God requires women to be denied the suffrage). Thus, the liberal state necessarily must frustrate the aims of these illiberal religions, and in this specific way the liberal state denies equal treatment to these illiberal religions, since the liberal state does not frustrate the aims of liberal religions.

42. Assume that the vaccine poses little or no danger to anyone who receives the vaccination. In other words, the only objection stated to the vaccination is the theological argument that God wants people to trust God to heal them, if it is God’s will; therefore, God enjoins people from using medical procedures and commands them to pray instead.

43. Based on the reasoning of Employment Div. v. Smith, 494 U.S. 872 (1990), one might argue that compulsory vaccination is “neutral” because it applies to all citizens, not just those with certain religious beliefs. But as Douglas Laycock has explained, such “formal” neutrality is not the same as “substantive” neutrality. See Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993 (1990). In any event, it is perfectly plain that a compulsory vaccination law expresses the state’s implicit “disapproval” (to use Justice O’Connor’s term) of any religion that ob-
caused by scientific investigation and rejects the religious objection to immunization as theologically unreasonable.\(^4\)

Third, and similarly, the liberal state will require parents to give their children medical treatment, even if the parents sincerely believe that their children will burn in hell forever if they receive this medical treatment. Liberalism rejects as unreasonable any religious belief that requires a child to die prematurely when an efficacious cure is readily available. Again, were it really true that giving the child the medicine would cause her to suffer eternal damnation, then obviously the state should not require that the child receive the medicine. But liberalism denies that God would permit humans to invent life-saving medicines and then punish an innocent child for being the beneficiary of this technology.\(^4\)

Fourth, as Rawls explains, the liberal state forces parents to educate their children in certain ways, even if this liberal education conflicts with the parents' religious beliefs. For example, the liberal state may require children to learn the principles of justice affirmed by the liberal state itself, including the principle of racial equality, even if the parents' religion dictates that their children should not be exposed to such liberal ideas.\(^6\) Likewise, the liberal state may

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\(^4\) Science is a part of public reason, whereas the sectarian objection to immunization is not.

\(^5\) It should be noted also that the coercion test does not adequately explain this case. Here, the liberal state does more than deny equal treatment to these religious parents. The state, in fact, coerces the parents to violate their religion. Thus, even adoption of the coercion test (which purports to prohibit such coercion) would require an explanation of what religious beliefs are unreasonable, so that the state legitimately may coerce their adherents to violate them.

\(^6\) Cf. Bob Jones Univ. v. United States, 461 U.S. 574 (1983). In this case, federal law denied racist schools the same tax exemption available to schools that did not discriminate on the basis of race. Several schools whose racist policies were based on religious doctrine sued the government, claiming that denying them the tax exemption was a violation of the Establishment and Free Exercise Clauses of the First Amendment. The Supreme Court rejected this claim, arguing that the government's commitment to eradicating racism justified denying equal tax treatment to racist schools. Thus, the Bob Jones case illustrates the Rawlsian principle that the government may deny equal treatment to religions that reject the fundamental principles of justice affirmed by liberalism.

Also, it should be noted that requiring school children to learn about the principles of justice affirmed by the liberal state is not the same as requiring these children to affirm these principles as their own. In other words, teaching children what the Constitution provides, so that the children are informed about the system of government their society has adopted, is very different from requiring the children in school to swear their allegiance to the Constitution. Cf. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that requiring school children to salute the flag is a violation of the First and Fourteenth Amendments). Some parents, however, might object on religious grounds
require children to learn the methodologies of math and science, so that these children are in a position to become productive members of the national economy, even if the parents object to this education for religious reasons.  

In all these ways and more, political liberalism disfavors religious faiths that are unreasonable from the perspective of public reason.  

IV. FROM POLITICAL PHILOSOPHY TO CONSTITUTIONAL LAW  

Thus far, as I indicated, we have been considering the problem of church-state relations purely as a problem of political philosophy — solely as an issue of normative analysis, rather than as interpretation of the Establishment Clause. It is now time to ask what relevance this normative analysis has to the task of interpreting the United States Constitution. There are two alternative answers to this question, either of which suffices to make the constitutional law of church-state relations congruent with the political

47. Rawls writes:

[V]arious religious sects oppose the culture of the modern world and wish to lead their common life apart from its unwanted influences. A problem now arises about their children's education and the requirements the state can impose . . . . [Political liberalism requires] that children's education include such things as knowledge of their constitutional and civic rights, so that, for example, they know that liberty of conscience exists in their society and that apostasy is not a legal crime, all this to insure that their continued membership when they come of age is not based simply on ignorance of their basic rights or fear of punishment for offenses that do not exist. Moreover, their education should also prepare them to be fully cooperating members of society and enable them to be self-supporting . . . .

RAWLS, POLITICAL LIBERALISM, supra note 1, at 199. This passage indicates that Rawls might consider Wisconsin v. Yoder, 406 U.S. 205 (1972) (sustaining Amish parents' refusal to send children to school beyond eighth grade), to have been decided incorrectly. In any event, political liberalism certainly would not permit a religious sect to deny its children knowledge of sixth grade math or science.

48. Those of us who work in the field of church-state jurisprudence need to better understand this concept of public reason, which permits such extensive official disapproval of illiberal and unreasonable religions, while simultaneously requiring the state to maintain impartiality among all reasonable and liberal religions. There is not space here to explore this idea in detail. Suffice it to say for now that some such idea is essential to defend liberalism's distinction between reasonable and unreasonable religions.
philosophy of political liberalism.

A. The Trans-Textualist Answer

The first answer is that the Constitution itself, properly understood, calls upon the judiciary to engage in the methodology of political philosophy in order to perform the function of constitutional interpretation: the judge must ask what an ideal constitution would provide with regard to the particular issue before the court, in order to answer what result the actual Constitution provides regarding the issue. This approach to constitutional interpretation has been advocated by numerous constitutional scholars.

This approach draws largely upon such textual provisions as the Ninth Amendment to argue that the text looks beyond itself to ascertain the scope of the rights that citizens possess regarding such fundamental matters as the relationship of church and state. In other words, according to this approach to constitutional interpretation, it really does not matter what the specific text and intent of the Establishment Clause would provide with regard to a particular case. By adding the Ninth Amendment to the Bill of Rights, the Framers indicated their intent that, should the First Amendment, as originally drafted and understood, be insufficient in its protection of intellectual liberty from government interference, then the courts should supplement the rights specifically guaranteed by the First Amendment with additional rights, derived by exercising the methodology of political philosophy as best they can.

I shall not defend this approach to constitutional interpretation. It has been ably defended by its leading exponents. For the sake of candor, I simply note that I largely subscribe to this approach to constitutional interpretation, although in a form that is tempered by a decent respect for the virtue of judicial restraint.

This approach to constitutional interpretation causes one to turn to political liberalism to guide the development of church-state jurisprudence. Since political liberalism is the best that political

49. By "trans-textualist" I mean to include any theory of constitutional adjudication that embraces the proposition that answers to constitutional questions are not determined solely by resolving the meaning of the text of the Constitution itself.

50. For an especially eloquent statement of this view by one of its most prominent proponents, see Charles L. Black, Jr., On Reading and Using the Ninth Amendment, reprinted in The Rights Retained by the People 337 (Randy Barnett ed., 1989).

51. This moderately restrained form of the trans-textualist approach to constitutional interpretation is best exemplified by the writings of Archibald Cox. See, e.g., ARCHIBALD COX, THE COURT AND THE CONSTITUTION (1987).
philosophy has to offer so far on the subject of church-state relations, the judiciary should rely upon political liberalism in its adjudication of church-state disputes.  

B. The Clause-Specific Answer

Even if one rejects the foregoing approach to constitutional interpretation in favor of a clause-specific approach, one still should turn to political liberalism to aid in resolution of Establishment Clause disputes. The reason is that political liberalism conforms, insofar as is logically possible, with the original understanding of the Establishment Clause — at least as the Establishment Clause was originally understood by its principal author, James Madison.

Madison, as is evidenced by his famous Memorial and Remonstrance Against Religious Assessments, and other writings, believed strongly in the principle that the government must treat all religions impartially — the principle we associate today with the Court’s endorsement test. Indeed, as Justice Souter explained in his concurrence in Lee v. Weisman, Madison’s Memorial itself articulated the functional equivalent of today’s endorsement test when it condemned any law that “degrades from equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.” Madison thus expressed precisely the same view as did Justice O’Connor when, in articulating the endorsement test, she wrote: “The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.”

53. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), in THE FOUNDERS’ CONSTITUTION 82 (Philip B. Kurland & Ralph Lerner eds., 1987).
54. See, e.g., JAMES MADISON, DETACHED MEMORANDA, reprinted in JAMES MADISON ON RELIGIOUS LIBERTY 92 (Robert S. Alley ed., 1985) (“The establishment of the chaplainship to Congress is a palpable violation of equal rights, as well as of Constitutional principles.”).
55. See supra note 8.
57. Id. at 2674 (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), in 5 THE FOUNDERS’ CONSTITUTION 82, 83 (Philip B. Kurland & Ralph Lerner eds., 1987)).
The problem, however, is that Madison, like Justice O'Connor, thought that the government could be strictly impartial to all religious faiths. In the *Memorial*, Madison said that religion was "wholly exempt from [the] cognizance" of the state, which was incompetent to judge the truth or falsity of any religious belief. But, as we have seen, this standard of complete impartiality is not logically possible: in order to accept this standard as correct, the state necessarily must reject as incorrect any religion that insists upon establishing a theocracy.

Thus, even if one wishes to adhere to Madison's original conception of church-state relations in interpreting the Establishment Clause, one still must modify the Madisonian conception to cure it of its logical inconsistency. Political liberalism accomplishes this task: it remains as faithful as possible to the original Madisonian goal of equal treatment for all religions, while modifying this standard only as necessary to conform to the strictures of philosophical reason. Consequently, anyone who wishes that Establishment Clause jurisprudence conform as closely as possible to original intent should adopt political liberalism as the best available guide to that original intent.

V CONCLUSION

I have attempted to explain why the judiciary should turn to Rawls' philosophy of political liberalism to aid in the development of Establishment Clause jurisprudence. Political liberalism is the political philosophy that animates the best possible conception of the Establishment Clause and its aspiration of governmental impartiality towards conflicting religions (and other comprehensive belief-systems). Accordingly, I close by urging everyone interested in Establishment Clause jurisprudence to consider carefully Rawls' work on political liberalism.

59. See *Madison*, supra note 53, ¶ 1, 5.