Book Note

Turning Religion's Shield into a Sword

Religion in Politics: Constitutional and Moral Perspectives. By Michael J. Perry.* *New York and Oxford: Oxford University Press*, 1997. Pp. 168. $29.95.

Over the past decade, constitutional scholar Michael J. Perry has struggled with the question of what role religion can and should play in the public policy of a liberal democracy such as the United States.[1] While some on the left want "God talk" hermetically sealed off from all political debates,[2] many on the right would build the city of God on the foundation of the U.S. Capitol.[3] Perry consistently has provided a reasoned and illuminating voice in the middle, respecting both the importance of religion

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* Wake Forest University Distinguished Chair in Law.

1. Perry previously has suggested a balance between liberalism and religious conservatism by urging the religious right to bring only its "accessible," moderate views into public political debate. *See* MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991). *Religion in Politics* represents the culmination of Perry's rethinking of the role that religious views should play in politics. *See also* Michael J. Perry, *Religious Morality and Political Choice: Further Thoughts—and Second Thoughts—on Love and Power*, 30 SAN DIEGO L. REV. 703 (1993) (arguing that public debate should be more open to different types of religious arguments than he had suggested in his earlier works).

2. *See, e.g.*, KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995) (arguing that religious arguments in public debate divide people by making those who do not share the same beliefs as the majority feel excluded); JOHN RAWLS, POLITICAL LIBERALISM (1993); Bruce A. Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 16 (1989) ("We should . . . put the moral ideas that divide us off the conversational agenda of the liberal state."). Perry offers extended and persuasive point-by-point responses to Greenawalt (pp. 49-54) and Rawls (pp. 54-61).

3. *See, e.g.*, T.R. Reid, *Republicans Rue Mecham's Return; Arizonan's Maneuvers Embarrassing National Party Leaders*, WASH. POST, Mar. 14, 1989, at 12 (reporting that Arizona's Republican Party declared the United States to be "a Christian nation" and that the U.S. Constitution created "a republic based upon the absolute laws of the Bible, not a democracy"); Gayle White, *A "World View" Based on the Bible*, ATLANTA CONST., Sept. 25, 1992, at E6 (describing a Christian Reconstructionist belief that the Bible dictates establishing theocracy).

to the believer and the need for a government of and for all the people, religious and nonreligious alike.

In *Religion in Politics*, Perry advocates a greater role for religious ideas in policymaking, arguing that the Free Exercise and Establishment Clauses require the judiciary to accept a very deferential stance toward laws justified by religious arguments. To be sure, Perry continues to have a healthy regard for nonestablishment as a principle; yet his permissive attitude toward the role of religion in legislation and judicial review fundamentally underprotects the democratic value of nonestablishment, transforming the shield of free exercise into a sword for privileging the majority's religious views.

I

Perry's argument starts with the uncontroversial suggestion that the Free Exercise Clause prevents government from penalizing the expression of religious belief in public debate (p. 32). The truly difficult questions begin when religious beliefs form part—or all—of the basis for the political choice. Perry views free exercise as an antidiscrimination command, prohibiting government action that disfavors one religion or religion generally *because of its religious nature* (p. 13).[4] Perry goes further, interpreting free exercise as also requiring the "accommodation" of religious practice. Under this position, generally applicable laws that do not serve a compelling public purpose would require an exemption for religious practice (p. 30). The nonestablishment principle is also a governmental antidiscrimination command, but instead of prohibiting the *disfavoring* of religion as free exercise does, nonestablishment prohibits *favoring* religion because of its religious nature (pp. 15-16).

Perry ultimately synthesizes his characterizations of the religion clauses into a general rule that government may not make judgments about the "value or disvalue—the moral value, the truth value, the social value" of religion or religious practices as such (p. 14). Actions disfavoring religious practices (violating the free exercise norm) and favoring religious practices (establishment violations) send the message, endorsed and effectuated by the government, that one religious idea, faith, or practice is better or worse than another.[5] But what happens if a public policy choice is motivated by

4. *But cf.* Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.").

5. This position closely tracks the "endorsement" test developed by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (arguing that the government violates the Establishment Clause by excessive entanglement with religion or by "endorsement or disapproval" of religion).

both a secular and religious justification?[6] Perry argues that a government policy choice violates the nonestablishment norm only when no *plausible* secular purpose supports the choice (p. 34). If a secular purpose is plausible, the decision does not violate the Establishment Clause, regardless of whether the *actual* purpose—the cause in fact—was religious in nature (p. 34).[7] Only where a religious purpose alone could have motivated a decision does that decision send an impermissible message favoring religion.

Perry views this balance—allowing religious justifications if there is also a plausible secular justification—as preferable for two reasons. First, courts would not need to substitute their own definitions of what constitutes a sufficient secular reason for those of the legislature. Second, this balance would rescue decisions motivated in fact by secular justifications that coincide with religious purposes where those religious motivations were unnecessary to the decision (p. 35). Perry readily admits that his position represents an "underenforcement" of the nonestablishment norm, but he considers this position preferable "as a practical matter" (p. 35).[8]

II

The structure and nature of Perry's theory of judicial review underprotects the nonestablishment norm even while laudably protecting free exercise. A too-deferential court fails to fulfill the minority-protecting function of the judiciary described in *United States v. Carolene Products*.[9]

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6. Controversial examples abound. The posting of the Ten Commandments on a classroom wall, intended as a lesson about Western law rather than as a religious display, is one example. *See* Stone v. Graham, 449 U.S. 39 (1980). Requiring public schools to teach creationism whenever evolution is taught, ostensibly to protect academic freedom rather than to favor the creationist account, is another. *See* Edwards v. Aguillard, 482 U.S. 578 (1987).

7. Perry urges the faithful to show restraint by exercising their legislative power only when, in their view, a persuasive secular rationale supports a decision they would make on religious grounds.

8. Perry does not detail how his construction of the religion clauses would result in different outcomes in constitutional cases, but it seems certain that he would at least come out differently from the *Aguillard* Court, which overturned an Arkansas state law requiring the teaching of "creation science" whenever scientific evolution was taught. *See* 482 U.S. at 595-97. In fact, the case presented a plausible secular purpose: the balancing of religion and science. Perry sympathizes with Justice Scalia's dissenting argument that students should be permitted to "decide for themselves, based upon a fair presentation." *Id.* at 631 (Scalia, J., dissenting). Among more current issues, Perry argues that abortion could be banned on secular grounds without violating the nonestablishment norm, but that prohibitions of legally recognized same-sex marriages cannot be. Although antiabortion advocates often rely on religious arguments, Perry points out that some prominent Catholics have advanced a secular reason to outlaw abortion (pp. 70-72), while the ban on same-sex marriages relies entirely on religious belief (pp. 82-85).

9. *See* United States v. Carolene Prods., 304 U.S. 144, 153 n.4 (1938).

A. *Freedom from the Majority's Religion*

In *Carolene Products*, the Court announced its view that legislative decisions demonstrating "prejudice against discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry."[10] Further, the opinion recommends aggressive judicial review when "legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments."[11] The Court's judicial review power therefore is strongest in correcting defects in the democratic process and in enforcing enumerated constitutional guarantees, including religious liberty, *against the majority*.[12]

Perry does not ignore the role of the religion clauses in promoting a well-functioning democracy. His standard, however, constrains the Court from considering impermissible religious motivation where the majority privileges its religious view and a plausible—though not persuasive—secular reason also supports the decision. Perry's two central propositions regarding free exercise prevent the courts from aggressively rooting out religious or even sectarian favoritism in legislation. First, free exercise means the courts cannot punish religious faithful for their "God talk" during legislative debates by considering their statements as evidence of an impermissible motivation. From a litigation view, this reduces the chance that a plaintiff could prove that an impermissible religious motive drove the passage of a bill.[13] Second, any plausible secular purpose can validate a law even though the actual purpose was religious. This signals something like rational basis review where governmental actors imagine some reason, however weak, to base a decision on a secular foundation.[14]

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10. *Id.*

11. *Id.*

12. The paradigmatic religious liberty cases center on protecting minorities from coercive majority action of two types. First, free exercise protects religious minorities from interference by the majority representing either no religion or other religions. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (holding that free exercise protects minority religion that holds Saturday as Sabbath from penalty in qualifying for government benefits). Second, nonestablishment protects religious and nonreligious minorities from the coercive use of their government and tax money to aid a majority religion. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1, 15-16 (1946). In addition to these tangible harms, one can argue that a deeper injury is inflicted in both types of cases when the majority communicates through the government the message that the minority is not part of mainstream society. *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

13. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 56-57 (1985) (relying on a legislator's extensive pro-religion remarks as evidence of an impermissible religious purpose).

14. *Edwards v. Aguillard*, 482 U.S. 578 (1987), and *Stone v. Graham*, 449 U.S. 39 (1981), provide examples of how Perry's deferential standard jeopardizes nonestablishment on a practical level. The state law in *Edwards* had the effect of promoting a religious view (but for the law, the view would not have been heard in hundreds of classrooms) and seriously entangling government

Because a theory of judicial review entails majority-approved legislation, the deferential position Perry advocates can benefit only those religious people able to muster majorities, not those permanently relegated to minority status or even disinterested in political action. A conception of free exercise that privileges the majority in this way turns the *Carolene Products* justification of judicial review on its head: Those able to command majorities get the protection of the Court, while those too weak to have a voice in the democratic process do not. In this way, the higher constitutional law principles that should protect political minorities would be hamstrung by a compliant judiciary.

B. Carolene Products *and Diffuse or Anonymous Minorities*

Countering the *Carolene Products* defense of judicial review, Bruce Ackerman has argued convincingly that diffuse and anonymous minorities—far more than "discrete and insular" ones—stand a greater risk of harm by majority indifference.[15] Discrete and insular minorities, such as racial and ethnic groups, typically are able to marshal significant political power within a pluralistic process because of their ability to coalesce and organize.[16] In contrast, anonymous or dispersed minorities, such as the victims of sexual discrimination or poverty, face a greater risk of constitutional disregard because they are less able to find a voice within the process, organize politically, and push for inclusion.[17] In this group, one might include atheists, agnostics, and the religiously indifferent,[18] who, despite their lack of interest in free exercise, may have a true concern with nonestablishment on both political and cultural levels.

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with religion (through government-employed teachers' use of the doctrine and authorities' monitoring and enforcing the law). Such a law fails the Court's purpose test, *see Edwards*, 482 U.S. at 594 (holding that the law's "primary purpose" of endorsing religion—despite the presence of a secondary secular purpose—violates the Establishment Clause), as well as the entanglement aspect of O'Connor's concurrence in *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). Yet just as in *Stone*, where the display of the Ten Commandments ostensibly demonstrated the foundation of Western law, a court bound by the plausible secular justification standard of review could hardly find the statute deficient on establishment grounds, despite the obvious benefit to a particular religion. The argument that such statutes do not establish religion if the religious messages are presented antiseptically without an endorsement of the "value or disvalue" (p. 14) of the messages ignores the obvious effect of promoting the dissemination of a particular (majority-held) religious message.

15. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 737 (1985) ("It is the members of anonymous or diffuse groups who, in the future, will have the greatest cause to complain that pluralist bargaining exposes them to systematic—and undemocratic—disadvantage."); *see also id.* at 742 ("After a generation of renewed struggle for civil rights, it no longer follows that the discreteness or insularity of a group will continue to serve as a decisive disadvantage in . . . pluralist bargaining.").

16. *See id.* at 723-24.

17. *See id.* at 729.

18. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2172 (1997) (Stevens, J., concurring) (arguing that the Religious Freedom Restoration Act violates nonestablishment by favoring religious people).

While Perry justifiably expresses concern over the free exercise rights of religious groups, tipping the balance in favor of religious practice over freedom from religion raises the minority-protection problem Ackerman foresaw. The enactment in 1993 of the Religious Freedom Restoration Act (RFRA),[19] which granted exemptions from general laws for religious activities, provides an example of the conflict between free exercise and nonestablishment. RFRA's passage reflected the lobbying of a coalition of different faiths and some civil libertarians concerned with what they viewed as an encroachment on free exercise.[20] The coalition demonstrated the type of lawmaking implicated by Perry's deferential judicial review model: Motivated by a desire to protect acts of religious conscience—a *religious* purpose—religious groups banded together to enact legislation. Yet, as Justice Stevens succinctly stated, RFRA violated the nonestablishment norm by granting favors only to the religious: "[T]he statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment."[21] While *Carolene Products* may not require aggressive review in the absence of prejudice against a discrete and insular minority, the vulnerability of diffused or anonymous minorities justifies stronger protection.

Perry's model argues for the opposite result, a deferential review validating a law with a thin secular justification. He argues that lawmakers may act to protect *all acts of conscience* from the burden of neutral, generally applicable laws without violating nonestablishment (p. 29). This would be a secular reason that in no way prefers religion. By enacting RFRA, Congress protected acts of religious conscience, but only because the Free Exercise Clause protects religious acts and not all acts of conscience. It would be extreme, in Perry's view, to suggest that nonestablishment prohibits the protection of religious practice merely because free exercise favors religion (p. 29). Would Congress's concern with protecting all acts of conscience constitute a plausible secular justification through a law giving special exemptions to religious practice? Whether RFRA itself could be defended under Perry's "plausibility" standard is debatable, but at a minimum it shows the need for aggressive judicial review in defining and defending constitutional norms in ways not contemplated by *Carolene Products.*

—*Kevin Metz*

19. 42 U.S.C. § 2000(bb)-(bb)(4) (1994).

20. *See* Gustav Niebuhr, *Disparate Groups Unite Behind Civil Rights Bill on Religious Freedom*, WASH. POST, Oct. 16, 1993, at A7.

21. City of Boerne v. Flores, 117 S. Ct. at 2172 (Stevens, J., concurring).