Talking about Religion in the Language of the Law: Impossible but Necessary

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In speaking to this conference about religion and law I am in a decidedly peculiar position, for it may be that every one of you has thought longer and harder about the relation between these two forms of life than I have. When Scott Idleman first asked me to talk to you, I explained that I was no expert, to put it mildly, and that the most that I could offer would be the reflections of a neophyte. He said that this was fine—perhaps he was just desperate for a speaker; perhaps he thought that it might be helpful to have a fresh look from the outside at some of the difficulties and possibilities of thought in this field.

Whether I can achieve such a thing is of course a real question; but I do want to say that I am grateful to him and to you for the opportunity, since in thinking about this topic for this occasion I have learned a great deal. Perhaps you can take what I say as the observations of a visitor to a terrain that is familiar to you.

As my title suggests, what has struck me most in these reflections is the simplest and most obvious fact, namely the enormous difficulty of talking about religion in the language of the law. In what follows I shall try to explain what seem to me to be some of the reasons for this, beginning with some that will be highly familiar to you, relating to the history and structure of our Constitution, then going on to some that are more speculative in nature. I will conclude by asking how, in light of these circumstances, courts ought to think about questions of religion, particularly in the context defined by the First Amendment. My aim is

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not to propose rules of law, but to make some suggestions about the attitudes with which judges might approach these questions.

I.

The most obvious problem to me as a newcomer to the field is the traditional one of understanding and defining its central term, "religion." It is not possible for the law simply to avoid the use of the word, for it appears in the First Amendment, which is the ruling text in the field, and also, in one form or another, in important statutes, such as the Military Selective Service Act, The Religious Freedom Restoration Act, state and federal tax codes, and the like.¹ We must use it and must define it. Yet deciding what meaning it should be given is most problematic, particularly with respect to the First Amendment, where it must have a very different meaning for us now from any that was current in the population to which that text was originally addressed. At that time it would have referred, I suppose, mainly to different branches of Christianity, indeed to different branches of Protestantism, of which most of the population had personal experience. Today, by contrast, it would include an astonishing variety of beliefs and practices (while presumably excluding others). By what criteria, then, can "religion" possibly be defined, and the line between it and "nonreligion" be drawn?

To make matters worse, some of the purposes of the First Amendment, upon which we would naturally hope to call in giving meaning to its central term, are, as Steven Smith in particular has shown, unavailable to us. The idea, for example, that the prohibition of "establishment" is meant to protect the church itself against the infection of the state is hard for us to entertain as a polity, however appealing it may still be to some people personally; and much the same could be said of the idea that "free exercise" is important not just as an aspect of individual autonomy but for a theological reason, that such

¹. See, e.g., I.R.C. § 170 (c)(2)(B) (1994) (providing charitable deduction for gifts to entities "organized and operated exclusively for religious . . . purposes"); Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1983) (defining "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution"); Military Selective Service Act of 1948, Pub. L. No. 759, 62 Stat. 604, 612 (exempting those who "by religious training and belief" are "conscientiously opposed to participation in war in any form"). The statute goes on to say: "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." Id. at 613. The reference to a "Supreme Being" was dropped in 1967. Pub. L. No. 90-40, 81 Stat. 104.
freedom is necessary to the full realization of the Christian life.²

What one might call the federalism aspects of the First Amendment make it still harder for us to retrieve and use any original meanings. The Establishment Clause of course originally worked only at the federal level, preserving the rights of the states to continue such religious establishments as they had, of which many people presumably approved. Likewise the Free Exercise Clause left existing state restrictions in place, and these must again have been thought by many to be good and valuable.³ Among other things, all this makes the "incorporation" of the First Amendment into the Fourteenth theoretically more difficult than is, say, the Fourth, for which there were widespread state analogues. And it means that the widespread opposition of our day to all signs of religious establishment at every governmental level, among academics at least, and the related idea that free exercise is to be regarded as an aspect of autonomy in a secular state, are harder to root in the constitutional past than some other features of our discourse. Their authority must rest on other grounds.

By contrast with the eighteenth century, today the Free Exercise Clause can trigger claims of the widest variety, including not only virtually every formal religion known in the world but also private beliefs and sentiments. What is more, this sense of religious pluralism is I think generally, though certainly not universally, approved. Our official position seems to be that it is a fine thing for us, as it was for Gibbon's Rome, that every imaginable religion be present and tolerated:

The deities of a thousand groves and a thousand streams possessed in peace their local and respective influence; nor could the Roman who deprecated the wrath in the Tiber deride the Egyptian, who presented his offering to the beneficent genius of the Nile . . . . Rome gradually became the common temple of her

2. See MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995). You can look at it still in another way. For example, one clergyman of my acquaintance thought that the separation of church and state required him to suppress or deny any political views, on the grounds that to do otherwise would impair his capacity to minister to his congregation, which was not surprisingly divided on such issues.

3. For the view is that by the end of the eighteenth century "Americans had achieved a broad consensus with regard to Church and State," namely that "government should impose no religious belief, and that within the boundaries of law every person was entitled to the free exercise of religion." See Thomas Curry, Church and State in Seventeenth and Eighteenth Century America, 7 J. L. & RELIGION 261, 269 (1989).
subjects; and the freedom of the city was bestowed on all the
gods of mankind.4

But it raises the question why we approve of this variety, if we do; is
it for the reasons Gibbon with fatal irony attributes to the Romans?
“The various modes of worship which prevailed in the ancient world
were all considered by the people as equally true; by the philosophers as
equally false; and by the magistrates as equally useful. And thus
toleration produced not only mutual indulgence, but even religious
concord.”5

II.

I have elsewhere argued that one can think of every act of judicial
interpretation as a kind of translation, necessarily imperfect, from one
world to another, one mind to another.6 The familiar but deep changes
in our world and in our law that I have just sketched out make the act of
translation involved in interpreting the constitutional word “religion”
exceedingly difficult.

But there are additional circumstances that make it difficult to talk
sensibly about religion in the law, the most formidable of which are not
contingent upon constitutional history and structure but reside more
deeply in the nature of religious experience. Even without the problems
of history and original intention which so plague our readings of the
First Amendment, that is, we would still face serious difficulties in
speaking in legal terms about religion, and it is to these that I wish to
draw attention.

Here I am concerned not only with defining religion—which might in
a rough way be done from the outside, by the use of more or less
objective criteria, such as a stated belief in a Supreme Being, the use of
ritual and sacred space, the existence of a class of persons set aside for
the religious life, and so on—but with understanding it. I do this on the
premise that understanding is in fact necessary to the inescapable duty
of definition, especially in close cases.

A.

My own sense is that in the culture of academics and intellectuals, in

4. See Edward Gibbon, The Decline and Fall of the Roman Empire 11, 14
5. Id. at 11.
6. See James Boyd White, Justice as Translation: An Essay in Cultural and
the university and on the pages of journals, including in the law—in the culture defined by the expectations you and I bring to this very conference—it has proven impossible to speak in any very satisfactory way about religion and religious belief.\(^7\) Religion has not been, for example, a common topic of conversation on any of the faculties of which I have been a member. I assume the reason is that people think that little or nothing can be said about religious experience that makes sense in the common language of our present intellectual life. The journals that seek to bridge the religious and the secular seem to me not to do a very good job of it, and, based on my casual exposure to them, I think much the same can be said of many of the works of theology that seek a wide audience.\(^8\) To turn to mass culture, there we do hear public evocations of religious sentiment or belief, often by politicians, but this does not define a conversation in which I would much want to participate.

As I hear them, in fact, the tones in which religion is commonly spoken of in our world, including in the law, are mainly sentimental; or patronizing; or insulting; or fearful; or threatening; usually not notably comprehending or really respectful. I do not mean that this is anyone's fault, but I do think that there is now a deep disjunction between religious experience and public language of a kind that makes it most difficult to talk sensibly about religion in our common discourse.

This disjunction can exist at the level of the individual person as well as that of the society as a whole. To take my own experience as an example, if I may, when I try to write or speak about my own religious experience I find that I seem to inhabit two worlds, two languages, in one of which I can speak about these matters intelligibly, in the other not at all. It is as though I speak Polish as well as English, and an English speaker—or the English-speaking side of myself—asks me to reproduce in English what I say or think in Polish, and it cannot be done. What makes sense in one place makes no sense in the other. This is true whichever way I attempt the translation: My religious experience makes no sense in one of my languages, and in the other the claims of

\(^7\) I do not mean this as a criticism of scholarship about the law of religion—constitutional or otherwise, which seems to be of a generally high quality, but simply to say that when it comes to representing religion in our common speech, none of us knows how to do this very well.

\(^8\) And of course there are other theological works available of the highest quality. See, \textit{e.g.}, \textsc{David Tracy}, \textit{The Analogical Imagination: Christian Theology and the Culture of Pluralism} (1981).
the state and law simply disappear.  

That there should be such a gap between religious and other ways of talking should not be surprising, since there is much about religion, at least in the forms I know it, that is inherently ineffable or transcendent or mysterious. Think of what moves a people to build a cathedral, for example, or to make religious paintings or music: a need to do something, say something, that cannot be said or done in words. If you could do it in words, you would, and save all that trouble.

9. Imagine a conversation in which someone skeptically asks me whether I “believe in God.” I cannot begin to answer such a question unless it already makes sense to the person asking it, which usually it does not. Often the question really is, “Are you some kind of fool?” or “Do you insist upon asserting something I do not understand?” In such a case, I could perhaps best respond in this way: “Not in your sense of ‘God,’ nor in your sense of ‘believe,’ nor indeed (as I shall suggest below), in your sense of ‘I.’”

10. There are two apparent authorities with my position that I would like to address here. First, there is a question as to whether any experience at all, not just religious experience, is “expressible” in language, or, more precisely, what we mean when we say that our experience is expressible.

Think of one’s experience of love, for example, or fear, or the beauty of a landscape, or moral revulsion. Is this experience expressible in words? In a sense of course not, or not wholly. We talk and talk about these things but do not express them, or not adequately, and much of our talk about them circles around that fact, sometimes consciously, sometimes not.

On the other hand, there have been and still are cultures in which at least some people feel that their religious experience is expressible in language, perhaps more expressible than anything else. “Do you accept Jesus as your personal savior?” is a question that would not make sense to some people, but it does to others, as does the answer. In fact, as a friend pointed out to me, what in the history of the world has been talked about more than religion?

I still want to say, however, that religious experience is ineffable in a way that other experiences are not. Part of what I refer to is the boundedness of religious discourse. You may say that your experience is expressible in your language, and others in your community may agree, but your expression does not come across to those outside the community defined by your language. When I speak of love and pain and anger, I do so on the assumption that any speaker of the English language may be able to connect to what I say, for I assume that each of us has had versions of these experiences. In religion, the particular discourse defines a much more sharply bounded world. When I speak the language of Islam or Christianity, I have no expectation that anyone outside of my group will understand me. In this sense, religious experience may indeed be expressible, but only within a rather clearly defined community defined by the language in which I speak. For purposes of modern American law, this means that religious experience really is ineffable, for there is no common language of religion to which the law can try to relate.

All this is to accept the claim that one’s religious experience is expressible in the language of one’s religion. Obviously, I cannot disprove such a thing, but I do have doubts about it. For one thing, it seems to me of the essence of religion that it carries us to the edge of human understanding and beyond it. At its deepest, religion is in fact about the limits on human life and the human mind, and this makes it inherently inexpressible. For another, in my experience when a believer is pushed he tends either to repeat what seems to me the formulas of belief or to recede into a (perfectly appropriate) silence. Perhaps, then, these formulas do not so much express belief in any real way as give the shared illusion of
Religion is not only a system of ideas or propositions, that is, but a mode of life; one of its functions seems to be to carry us to the edge of the circle of ordinary understanding and beyond it. It is not surprising that we have a hard time talking about religion in the language of our common intellectual culture, then, for religious experience is difficult to talk about in any language at all. Augustine defined the conflict as one between faith and reason: faith cannot be reduced to reason, or it would not be faith; but faith cannot destroy reason either, which is one of the distinctive gifts of humanity. How can these two capacities inhabit the same mind?

Or the same public world? For as I say, this incompatibility presents a deep problem for our law, which commits itself to protecting religion in some situations and restricting it in others. What place can there be in our world, then, for these two incompatible ways of thinking, of talking, and of being in the world? It would be tempting to say that

expression. For what do you really know about what the language of belief means to a fellow-believer until you have spoken in some other way about it? Another way to think of this is not in terms of "expression" at all, but in terms of gestures. Here, intelligibility is less a matter of understanding what a person's experience is than knowing how to respond to him.

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12. The split I speak of here is a feature of our contemporary culture, not of all cultures, nor of all periods of our own. There have been times in which religion and law were closely connected, even identified: The Hebrew Bible, for example, is in large part a body of law, and in medieval Christian thought, running up through such writers as Richard Hooker, one can find a vision of the world that incorporates both human and divine law, and establishes a relation between them. Islam, of course, would provide another example.

But in America, our dominant conception of law: the law is whatever a properly constituted political body declares it to be is severely positivist. Insofar as appeals to higher or deeper authorities are recognized, they take the form of appeals within the law itself, to constitutional law, or to what we call moral or political philosophy. Our state and our dominant intellectual culture—the culture of our leading universities and colleges, and our leading journals—alike seem to be deeply secular in commitment. The First Amendment is naturally and properly read as institutionalizing this understanding. As I say in the text, it cannot avoid the task of defining "religion," and this leads to an effort to understand it, an effort that our cultural circumstances make extremely difficult. Compare John H. Garvey, Free Exercise and the Values of Religious Liberty, 18 CONN. L. REV. 779, 798 (1996) (arguing that "religion is a lot like insanity"); with Sanford Levinson, The Multicultures of Belief and Disbelief, 92 MICH. L. REV. 1873, 1879 (1994) (pointing out that once a conversation between a believer and a non-believer shifts to include the invocation of specifically religious grounds for judgment or action, "it is actually hard to figure out where the conversation might go next"). Professor Levinson, understandably resists the claim that he should somehow cherish views that "from [his] own perspective, just do not make sense." Id. at 1881.
“religion” is for the individual and the private, “rationality” for the public and the law; but this is impossible, for in our system at least “religion” must be defined by the law, and how is that to be done without some understanding of it, or of its many forms?

B.

I shall argue that the wisest position for the law to take is a recognition that it cannot understand or represent religious experience with anything like fullness or accuracy, and then suggest some forms that this recognition might take. But first I want to say something more about the difficulty of representing religious experience in the secular languages of our world, including the law. This difficulty arises not only from the peculiar history of the First Amendment and from the ineffable nature of religious experience, as I have just suggested, but also from the nature of our own ways of talking about that experience, our own habits of mind. I think that religion is often imagined among us, that is, in misconceived ways that tempt us to believe that we can in fact understand and represent it; this leads us to make the effort, and then to be puzzled and frustrated and perhaps angry when we fail.

In describing this phenomenon, I do not mean to speak with any authority other than my own experience. I shall be reporting on conversations engaged in and overheard, from college days to the present; on books and articles read; on attitudes I myself have picked up in the process, and the like, all offered to you as something with which you can compare your own experience.

Here is the image of religion (I think deeply Protestant in nature) to which I have been repeatedly exposed. Religion at heart consists in something called “belief”; this belief is arrived at by an individual, in whatever ways seem best to him; the object of this belief is a set of propositions, usually about a Supreme Being, sometimes about a set of beings superior to the human; this being (or beings) issues commands to human beings, who are threatened with punishment, often eternal punishment, if they fail to comply; and the life of religion consists in large part of obedience to these commands.13

13. This model shows up in a lot of casual speech—both in the law and out of it—and with particular force in the conscientious objector cases. See Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965). It is sometimes used to explain the free exercise protections, on the grounds that one who faces eternal damnation for doing what is required of him by law will simply not do it; he is not himself subject to deterrence and is thus, on the grounds that make deterrence fair, not a proper object for punishment to deter others. See, e.g., JESSE CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR
Let me consider the elements of this view one at a time, in a slightly different order.

First, the view of religious belief as essentially propositional. This is one source of the difficulty of translation I refer to above, because the reduction of religion to a set of "propositions believed in" invites us to think that one language can incorporate the other, or that effective translation between them is possible, and this in turn generates misunderstanding and frustration. You say that you believe that the Great Otter created the universe by hatching an egg; an expectable response is that your beliefs are entitled to toleration, but not in any real way to respect, for who among the rest of us could believe such a thing? Or that if eagle feathers are not collected from certain canyons, the rains will never come? Or that each grove and stream has a deity of its own? Or that in the beginning God created heaven and earth? "Such propositions simply have no place in the language I speak," someone might understandably respond.

To frame the center of a religion as a set of beliefs cast in propositional form is implicitly to treat them like facts, or like theories subject to verification, and thus to encourage the view that they should be able to take their place among the propositions affirmed by our general culture, including the law. This of course proves impossible. It makes the act of translation seem more feasible than in fact it is. The view of religion as propositional in this way trivializes it into the object of patronization, or demonizes it into the object of fear—you believe that the Koran is the literal word of God dictated to the Prophet by an angel?

It is important to say that the view of religious belief as propositional is not eccentric. It is supported by at least two tendencies in our culture. One is the Christian tradition, which has focused so much attention on the Creed, the articles of faith that believers affirm and over which the Christian community has frequently divided, often to the point of war. The other is the contemporary secular assumption, deep in our shared theory of knowledge and language, that real thought takes the form of propositions, the utterance of assertions about the way the world is. These propositions are not language-bound, it is often thought, but are translatable into any language whatever; this is in fact necessary if we are to claim, as many want to do, that our knowledge is universal, that what makes sense here will make sense anywhere. (Compare our insistence that foreign regimes become "democratic" so far as possible.)

This is the image of thought and language that animates most science and most modern philosophy; it is the understanding out of which the great majority of academic books and articles are written.

These two traditions, the Christian credal one and that of modern analytic discourse, combine to teach us that "religious belief" means the affirmation of certain propositions. What else could it be? In the context defined by the first of these traditions, the Christian one, the conversation often (but not always) understandably stops with the affirmation—we now know that you are one of us, and that is what matters. In the second context, the secular one, the affirmation of religious belief framed as a set of propositions is taken as an automatic invitation to argument, and argument in a language in which these propositions already make no sense.14

But—still taking Christianity as my example—if you read the Gospels, especially Mark and John, you will find that Jesus does not ask his disciples or others to sign on to a set of propositions about the world which they are to assert as true. Belief for him is not propositional, nor is it a watered down version of scientific knowledge. Rather, he asks them to "believe in me": belief in a person, not a set of sentences. When he does utter sentences, as in his parables, they are often knotty, hard, paradoxical, puzzling—problems of thought and spirit, not propositions. And the word that is translated "believe," pisteuein, has a primary meaning of "trust." What is asked is not acquiescence in certain statements about the world, but something very different, a kind of pledging or commitment of the self to another. Much the same is true, I think, of the God of the Hebrew Bible.

If religious belief is not really propositional, what is it and how is it to be thought about? Suppose that instead of looking for the root of religious belief in propositions affirmed or denied we looked to the

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14. As to which of these traditions is the stronger I have no opinion; but it is worth remembering that the credal tradition began before our contemporary view of language and reason had come into existence, and that we may therefore be systematically misreading them if we assume that creeds were written on modern assumptions. The Creed might be understood, for example, not as a set of propositions, but as something else entirely, as a kind of ritual. Or the Creed might be understood from another perspective as a record of the issues that have divided this community in the past and of the way they were resolved. At one point, for example, it mattered whether the Holy Ghost was of the "same substance" with the Father and Son, or only "of like substance." This is the famous "homoousian" versus "homoiousian" dispute of which Gibbon made so much. The Creed tells those in the western church how they resolved that dispute and they continue to affirm that resolution, even though the issue is, so far as I know, not real to anyone. What is real is the tradition of which it is part, the sense of connectedness to another world through this language. This is an example of talk which makes no sense outside this context, but in it a great deal.
religion. Jaroslav Pelikan, in *The Vindication of Tradition*, takes such a line—I think it is more Catholic than Protestant in character—in speaking of Christianity when he says that what really defines the Christian community is the Eucharist, the gathering together to share the mystic meal. This is what Christians have done, somewhere in the world every day, for two thousand years. The language of the Creed, like the language of theology more generally, is secondary not primary. To speak for the moment from inside this community, as Pelikan does, one might say that our creeds are our highly imperfect attempts to explain to ourselves what it is that we are doing; we make and repeat them knowing that they will be imperfect, incomplete, distorted. The life of the church is the life of community and ritual, not the Creed in which we try to explain and order that life. Not propositions, but practices, should be the focus of attention of someone seeking to understand the meaning of this religion.

C.

This brings me to a second element of the common image of religion


16. I speak in the text at times as though law were itself a system of propositions on the model of modern analytic philosophy. Yet, as I and others have elsewhere argued at length, that is in fact a most incomplete view of law—which is full of metaphor, verbal and social action, narrative, authority, the management of social relations, and so forth. It is also true that, despite certain appearances, the law is not in the usual sense a logical system—that is, a system in which particular conclusions are reached by deduction from more general propositions.

Here is an example of an apparently logical statement in the law: “A contract exists where there is an offer, acceptance, and consideration; here there is offer, acceptance, and consideration; therefore, this is a contract.” This apparently logical structure has the function of providing, by agreement among the parties or decision of the judge, a statement of the issues in the case—Is there an offer, acceptance, or consideration?—or a statement of their resolution. But for the lawyers each term is open to argument; none has a fixed meaning; the real question in the case is how each is to be defined. That is a question to which the logical structure itself does not speak and to which all kinds of other material, not in principle determinable ahead of time, may be relevant.

The main force of logic in law, in addition to providing an armature for argument and thought of the kind I have just described, is essentially negative. You can always attack another if he asserts contradictory things. A lot of energy is normally spent protecting oneself against such a charge and trying to make it against one’s adversary.

Yet, all this being said, it remains true that much of law does take the form of the assertion of propositions, as commands, as descriptions of prior authority, or as argumentative conclusions. Of particular relevance to us, in the trial of a case a witness’s testimony will normally be reduced to propositions, which must in turn be related by standards of relevance to the propositions one is trying to prove.
with which I began, namely the idea of "belief" itself, for when we focus on practice rather than proposition the question of belief becomes much more problematic. Let me give a minor example: I have some friends who used to organize a Christmas carol sing each year, usually inviting much the same group of people to come. The husband who organized the sing and many of the guests were not in any way Christian, including by upbringing. I do not know, but I believe, that if you had asked all fifty people at this sing whether they believed in the divinity of Jesus, that perhaps two or three at most might have said yes, and not many more would have identified themselves as Christian in any way. This was a Christmas carol sing for non-believers.

But was it really? Could it have been? I listened to the carols that to me were sacred music and asked why they were being sung by people who "did not believe." Would an anthropologist say that they did not believe? Or would she speak instead of the extraordinary diffusion of belief, albeit in a diluted form? Suppose the singers were asked not whether they "believed" but whether it was important to them that Jesus had lived: what would they say? (What would the world be like if he had not?) Were they not in a real way celebrating the birth of this child who transformed the world?

I do not mean that my friends were closet Christians, or Christians without knowing it. But I don't think that the explanation one of them gave, that "I just like the music," quite works either. None of us would sing Nazi songs, no matter how appealing we thought the tunes were. What I do mean to suggest, and all I mean, is that the nature and boundaries of belief are harder to trace out or define, including for a "believer," than we may think.

Compare the practice of the Christmas tree, which apparently has Druidic or at least pre-Christian roots. Is the family that buys such a tree and brings it into the house, decorating it with lights and baubles, really expressing some dim animistic belief in the sacredness of the tree, even worshipping it? And: are the lights and fires of Christmas calls for the return of the sun? As one who does have a Christmas tree each year, I think it would be difficult and in an important way dangerous to deny these beliefs, enacted as they are in our practices. I think here of a remark attributed to Plutarch, that it was the religious practices that they least understood to which the ancient Greeks adhered most stoutly.17

To expand the circle still farther, one could find the religious impulse, or a part of it, expressed in activities not normally thought of as religious at all, from Freudian psychoanalysis to market economics to fly-fishing, wherever people try to organize all of their experience, and claim meaning for it, by reference to a single language or practice or attitude. Norman MacLean’s *The River Runs Through It*, for example, begins with the famous sentence, “In our family, there was no clear line between religion and fly fishing.” This is partly a joke, of course, and there is a lot of sentimental talk about fly fishing with which one would want to have nothing to do, but I think it is also one aim of the book to show how this sentence could be true.

On the other hand, it is easy to overstate belief as well as understate it. Think of a culture in which large numbers of people engage in certain religious practices. Could you infer from this a subjective state of “belief?” We often talk as though everyone in the Middle Ages in the west was a devout believer. Can that have been? Or think of the study of ancient Greek religion, often represented as a system in which the Athenians, say, “believed.” How can we know such a thing? What can we mean by it? Does the fact that Homer or Euripides used gods as characters mean that he believes in them, or that he did not?

Think in this context of Santa Claus, in whom none of us believes. We all know that he is a mythical figure. Yet many of us who celebrate Christmas do speak to our children of Santa Claus. If we do not, we think we might do them an injury by depriving them of an important source of experience and meaning, of magical love and generosity. We would become Gradgrinds, thinking that the fictions we call “the facts” alone have value. Actually in many homes there comes a time when the children “know” that Santa Claus does not exist, but the parents still want to talk as if he did, and want the kids to talk that way too, and they comply, humoring us. At such a moment it is the parents, not the children, who are insisting upon belief in this figure that none of them in another sense believes in at all. But in talking about him as we do we make him real, emotionally and actually real; we expect him to come, and we see the evidence that he has. So too in the law: in talking in a certain way about the Constitution we make it real; in talking to a judge in a certain way we make him or her a judge, not merely a person with a cushy political job; and these transformations are real, as real as anything we know, in a sense the proper object of belief.18

Maybe the truth is that what we call religious experience is a dimension of human life to which some people are deeply given or adapted, by nature or training, others little or not at all; a dimension like music or sport, in which some people or cultures have great gifts, others much smaller ones, and that these gifts are not well described as "beliefs."

D.

I shall speak much more briefly to the third assumption of the model given above, namely that belief is a matter of individual choice. While this view may be right as a matter of law and politics, it misstates the actual experience of most people. Obviously there is no culture-free place from which one can select the religion of one's choice—we are all made by our prior experience—and in a deep way religion is often familial and communal, not only in its practices but in its origins. Of course people do adopt new religions, or convert, but for many people I think religious practices are part of their sense of belonging to a particular family, a particular world, in which they have meaning of a particular and untranslatable kind.

Likewise, the assumption that religion involves belief in a Supreme Being who issues commands, enforced by sanctions, perhaps eternal ones, corresponds with only some kinds of religious experience. There are religious people who have no belief in a Supreme Being at all—Buddhists and some Quakers, for example, not to mention individual members of churches that have an official belief the person does not share.

More important, for many the heart of religion is not a set of commands but a set of enablements: These people are moved by hope and desire, not fear, by a sense of fulfillment, not restraint. And for many the issue of eternal or extra-temporal sanctions is simply not part of their imagined space: the consequence they fear is the desiccation of life, not externally imposed punishment. Of course there is much in Judaism and Christianity alike to support such an image, but it is drastically incomplete. This image omits for example the desire to do what is right, the wish to be in harmony with another, and the idea that the greatest punishment is not punishment at all, but loss of connection.

One could go on in this vein at great length, drawing upon testimonies of saints and mystics and ordinary people too, all to the

effect that religious experience cannot in the end be adequately reflected in the common languages of our present culture, including the law.

To what kind of understanding might such work ultimately lead us? Perhaps it could be expressed in an analogy. Suppose that in our culture music were for many people the ground of life: to listen to it, to make it, to dance to it, this is what they lived for. But of course there are many different kinds of music, with different instruments, different tones and feelings; different musical worlds, ranging from plainsong to punk. There are naturally tensions among the various musical communities, sometimes leading to violence—for, as I say, music is what people build their lives upon. Now suppose a new nation is created, one in which it is wisely thought that people should be free to practice their own music without interference from the state except upon very good grounds, and that the state itself should not promote one school of music over another or perhaps even music itself. The question would arise as it does now with religion: how is music to be defined and understood? What is to one person or group resonant and meaningful is to another an abomination; and some musicians of course produce work that deeply challenges accepted norms.

How under these circumstances could music be spoken of by the law? Not in terms of propositions or beliefs or commands; only in terms of the kinds of significance claimed by people for their practices. The way of dealing with the intranslatability of music into other terms would be to grant that fact, and to ask other questions, about the meaning of music in the lives of people practicing it.

To turn briefly to what such a view of religion might mean, one could conclude from it that courts addressing free exercise claims should attend rather less to the person's religious "beliefs," stated in propositional terms—for those propositions can in many cases do very little to carry the nature of the life and conviction into the language of the law—and rather more to the nature of those beliefs as they are experienced by the claimant. The central question would ultimately be that of the sincerity and depth of the person's commitment. This is the direction in fact taken by our conscientious objector legislation and jurisprudence, which moved from a requirement of belief in a Supreme Being to a much more open ended definition of religious belief.¹⁹

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¹⁹. The Selective Service Act of 1948 provided an exemption for those whose opposition rested on "religious training and belief," and extended to "participation in war in any form." Pub. L. No. 80-759, 62 Stat. 604, 612 (1948). The statute went on to define its key
Of course one would still have to define the outer boundaries of religion, from the outside as it were. I know no better way of approaching this question than the analogical method elaborated by Kent Greenawalt, under which it is asked how closely one alleged religion approximates the features of a religion whose status as such in our culture is unquestioned. This is a necessarily multi-factorial and context-sensitive approach, not reducible to a single criterion or standard.

My argument is not against making definitions, for we must do that, but for an attitude of considerable generosity in doing so, coupled with a somewhat more intense scrutiny of the depth and sincerity of commitment than is perhaps now usual. The best way for the law to respect religion is to acknowledge that it cannot understand or represent it—and thus not to try to do so. Instead, what it can do is to focus upon the character of individual experience. To return to the analogy of music, there is no guarantee that any of us in the law will have gifts of this kind. But we should recognize that others may, and respect those differences even when we can only dimly perceive them.

This is not a proposal for a new rule of law, or a new method of analysis, but a suggestion about the attitude the courts might best take towards these problems. I am saying that in this context the law should move away from the ideal of clearly articulated standards in the direction of particular judgments, just as it must in child custody cases, for example. But here, as elsewhere, when one moves towards the discretionary, procedural protections become all the more important. For example, to continue with the conscientious objector cases, and to restate an argument I made many years ago, the claimant should be able
term by saying that the required belief consisted in an “individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation,” but did not include “essentially political, sociological, or philosophic views or a merely personal moral code.” Id. In United States v. Seeger, the Court held that the language in fact applied to an objector who denied any belief in a Supreme Being. 380 U.S. 163 (1965). The Court explained in rather tortured language: “A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.” Id. at 176. In Welsh v. United States, the Court extended the language to one who struck out the word “religious” on the form and said that his views were based on “reading in the fields of history and sociology.” 398 U.S. 333, 337 (1970). The Court said, “That section exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become part of an instrument of war.” Id. at 344.

to make his case on the merits not only to the draft board that classifies him but also to the judge and jury who are asked to convict him. A judgment of this kind should not be bureaucratized, but left connected to the world of ordinary language and ordinary experience.

III.

In all of this it is important to remember that there is nothing automatically good about religion, which can after all lead to war, insanity, mutilation, suicide, soul-murder. Nearly every evil that man has inflicted on man has been done in the name of religion, or under its influence. Religion is a dimension of life different from the rest of life; in it some participate more than others, with greater or less intensity, to ends sometimes of extraordinary beauty, kindness, and wisdom, sometimes of extraordinary ugliness, cruelty, and folly. What the First Amendment does, in essence, is to say that we must pay special attention to this dimension of experience, protecting it in one context, that of private belief and practice, and limiting it in another, that of official participation in ecclesiastical or theological life.

What I have said so far about the difficulty of talking about religion in the language of the law relates mainly to the free exercise of religion. With respect to the establishment of religion I want to trace out quite a different line of thought about the difficulty—the impossibility, really—of talking about religion in the law.

It is important to note to begin with that the question here is very different: it is not what religious language means to an individual who is committed to it, but what it means to the rest of us. When the government puts "In God We Trust" on our money, for example, there is no person using religious language to express a side of his experience that is ineffable and which we should struggle to understand, or for which we should express respect even though—perhaps partly because—we do not understand it. The question rather is what this language means to the rest of us, as a public act or symbol.

The particular issue I want to address is how we should think about the vestiges of Christian or nondenominational theistic establishment present in our constitutional practice and either approved or ignored by the Court: "In God We Trust" on our money, legislative chaplains, the use of the Bible for oaths of office (including the highest in the land),

regular protestations of religious belief by politicians in office, theistic language in Thanksgiving Proclamations, prayers as part of Presidential Inaugural addresses, and so forth. There seem to be essentially three views on these: (1) that they are all right because they are vestigial and without real religious significance; (2) that they are bad because they promote or espouse religion; (3) and that they are good because they acknowledge that we are at bottom a religious people. Some of these practices plainly have traditional roots that go back to the founding generation, and, some say, who are we to disapprove what they approved?

The question at present arises in two forms: Whether to approve or disapprove these established practices, and whether to approve or disapprove their extension. On one view they are not to be tolerated; on another, tolerated but not extended; on still another they stand as precedential authority justifying new practices of a similar kind.

One's judgment about the continuing authority of early practices is complicated by the fact to which I referred earlier, namely that at the founding "religion" meant, for the most part, the Christian religion or some set of Christian religions. Of course it no longer has such restrictive significance but includes, like Gibbon's Rome, religions from around the world. What this means is that one can now object to the official manifestations of religion I describe above not only on the grounds that they establish religion, but on the grounds that they prefer one religion over others, which almost everyone agrees is impermissible. The practices I mean, then, are properly controversial not only because they establish but because they prefer. This fact is normally elided by the Court, and by the legislatures, who try to use nondenominational language, call on Rabbis to give commencement prayers, and so forth, but this I think must fool very few people.

My question is this: If these elements of our public life have hung on from an earlier more fully Christianized sense of the meaning of "religion," and of our country, how are we in the law properly to regard this fact? My own instinct has been to regard them as wrong, inconsistent with the modern understanding of the secular state, and to think that the only barriers to their proper judicial removal are political necessity and the doctrine of standing. This instinct is based both on the sense that these vestiges of Christianity injure those of other faiths and

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backgrounds and, more personally, the sense that they vulgarize religion in general, my religion in particular. But as I have thought about it more, I have become much less sure of that position. To explain why, I would like to approach this question by seeing it as an aspect of an even larger one, equally difficult and sensitive, which is how we should regard the past of this country more generally: as having what authority, what claims upon us, and why?

This issue of course arises in many different contexts. One familiar to all of us has to do with the burden of past human slavery. What does that mean for us today? I have heard people try to disown the past, with an argument like this: "If someone's ancestors were here, and owned slaves, or approved slavery, or did not try to stop it, or acquiesced in it as part of the constitutional settlement, then maybe they are implicated in it, and perhaps they should bear a cost, in the form of money or lost opportunity, in a general social effort to remedy the consequences of that grave social wrong. But if my ancestors were not here, if I or my parents came only much later on, and if I have my self neither owned slaves or approved of racial discrimination, then I have no such burden, and should pay no price." What does one say to such an argument?

First, and most obviously, any white person in some sense "benefits" from the racial system even if he had nothing to do with making it and even if he loathes it, including its supposed benefits; for, whether he likes it or not, he has powers by virtue of his race that are denied to others—the power to insult, the power to join with whites in economic or social solidarity, and, perhaps most important of all, the power to forget that he has a race. So he too is implicated in the history of race and slavery, and in my view at least cannot properly disown that past.

For present purposes it is more interesting to ask about the person who is here assumed to have inherited a burden of guilt. Why should he be responsible for what his ancestors did, or what the community in which his ancestors were present did? It is unfair to blame one person for the acts of another, after all. But I think there is a complex psychological reality that may justify such a sense of inherited responsibility: People are proud of what their ancestors did—proud to be descended from John Adams, say, or Charlemagne—and why should they not be properly ashamed at their connection to Benedict Arnold, say, or John Wilkes Booth, or a slave-owning family? And this kind of feeling is not dependent on familial relations. To think of it at the level of the nation as a whole, are not most of us proud to be part of a country that based its existence on the Declaration of Independence, that created constitutional government, that fought World War II, and so
on? And if we are proud of these things, are we not right to be ashamed of others? What is true of a person whose actual ancestors did good or bad things is in a way true of the rest of us too, for the connection in both cases is really imaginative, a way of identifying with the past of a community of which we are members. Whether we grew up in or later joined a community, we cannot properly select the parts of its history in which we are imaginatively implicated, choosing what we like and discarding what we dislike; we should regard ourselves as living both with what we admire and with what we detest about the world we now belong to. When we join a nation that has a burden of guilt we assume that burden, as we assume what we admire. This is obvious I think in the case of war reparations of a formal kind, or any other national debt. One could in fact say that our national obligation to respond to the wrong of human slavery is a kind of war reparation or debt, to which all of us are bound.

What does this argument about race have to do with the First Amendment? The analogy would be this: that one who is born into this country in the late twentieth century, like one who chooses it, becomes part of a nation with a particular past that he should not simply disown. In America that past is made especially authoritative through our practice of building our life upon an ancient Constitution. This Constitution originally had provisions prohibiting the establishment of religion that were thought not inconsistent with various ceremonial involvements of the state with a kind of non-denominational Christianity. If these practices were initiated today, they would be widely and properly regarded offensive to the First Amendment.

Should they nonetheless, for the sake of that past, be tolerated? One possibility is to say that the conditions that made these practices tolerable have simply changed, and that they are no longer acceptable. "Let us discard this element of the past and build on our own values and our own perceptions," we say. But how much of the past will we thus discard? If we are to be thorough-going "presentists," and say that in nothing has the past any authority, or any claim upon us, that in nothing is it the source of pride or shame, that we should simply build our own world our own way, we may at least have the virtue of theoretical consistency. But if we try this, in practice we shall find that we must live with and employ the materials of the past, even in the language with which we imagine the present and the future. There is in my view no way to escape the issue of the authority of the past, its institutions and
If one is less radical in one's views, one will try to select what one admires and approves, and reject the rest. Given a sufficiently complex sense of who the person is that is doing these things, how they should be done, what is meant by approval and admiration, and so on, this is of course a standard view, and I approve it myself, for we do want to disown human slavery, for example, and other basic injustices of the past. But there remains the question: How confidently or easily can we take apart the past in this way, separating elements that belong together?

Let me give a single example of what I mean. There is nothing that I would hold to more dearly in our past than the language of the Declaration of Independence, "all men are created equal." As Abraham Lincoln argued, this is in an important sense the foundation of our Constitution. The circumstance that the social facts of our world, then and now, are hideously inconsistent with this promise or ideal simply make it all the more important. Yet upon what does this value of equality rest? Is it self-evident? Certainly not, and one may find oneself in deep trouble trying to rest it upon independent philosophical foundations. As a factual statement it is obviously not true, and cannot be true; as a matter of value no one thinks that we ought to equalize every aspect of life. So what can it mean? The answer to this question depends upon another: Upon what does this claim of equality rest, and what does it mean?

In the context in which it was written a part of the answer lies in its verb "created." This word at once implies a Creator and connects the sentence with the opening of Genesis, thus giving it some of the status of a sacred text. The significance of the presence of the Creator, here implied and in the next sentence express—"endowed by their Creator"—is that it gives a narrative explanation for the value of equality: We are all created, after all, none of us self-born, and we owe our existence to that which lies beyond us. This Creator, it is implied, has towards us the attitudes natural to a creator, or a parent, those of love and caring; and he values us, as a parent values his children, equally. The fact that you or I may not believe this to be true as a

23. For further discussion see JAMES BOYD WHITE, ACTS OF HOPE: CREATING AUTHORITY IN LAW, LITERATURE, AND POLITICS, especially at 303-07 (1994).
24. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
matter of theology is irrelevant to my point; the old language of theology gives a significance and a coherence to the language of equality that it otherwise would lack. Like any piece of language, it derives its meaning from a cultural context, and one that is at least widely theist and for the most part Christian—a context for example that enabled Tom Paine to make the claim that every man is a new Adam.\footnote{See THOMAS PAINE, THE RIGHTS OF MAN 42 (Dutton, Everyman's Library ed. 1958).}

The force of this has been brought home to me in the course of work I have done in a seminar on translating and learning foreign law. I require the students to have a foreign language within their command, and in an early assignment meant to explore the nature of language and translation I ask them to translate the phrase, "all men are created equal," into their language and to explain what happens when they do so. And what happens is astonishing. In many languages and cultures this clause makes absolutely no sense, either as a matter of fact or of value; in others it has resonances that are deeply surprising. One person, for example, translated it into Arabic and then discovered that what she had written was one of the sayings of the Prophet and had the force and significance of his authority. What makes it work for us in America, simultaneously as an ideal and as a paradox, is its relation to the culture in which it was written, and this is partly a theistic one.

All this means that what many of us—including some who are not at all theologically minded, or in any way Christian—most value and admire and want to preserve in our past may be connected in important ways to theistic or Christian views that we would otherwise want the State to reject or get rid of. Is it perhaps the wisest and best course to tolerate, even to value, the vestiges of ceremonial theism, not as statements of currently existing belief, but as acknowledgments of the past in which much of what we most value took its life? It may still be very useful for us to have the implied narrative of creation to give definition and standing to the great phrase, and similar arguments could

\footnote{Every history of the creation, and every traditionary account, whether from the lettered or unlettered world, however they may vary in their opinion or belief of certain particulars, all agree in establishing one point, the unity of man; by which I mean that men are all of one degree, and consequently that all men are born equal, and with equal natural rights, in the same manner as if posterity had been continued by creation instead of generation, the latter being only the mode by which the former is carried forward; and consequently every child born into the world must be considered as deriving its existence from God. The world is as new to him as it was to the first man that existed, and his natural right in it is of the same kind. \textit{Id.}}
be made about other parts of our tradition. To remit ourselves entirely
to the language of twentieth century political philosophy would I think
involve a great loss of power and significance in a language that we
value.

Such a view as I suggest would lead to the approval only of the
existing vestiges of a formerly acceptable establishment, not to their
extension by analogy. Legislative chaplains, Bibles at inaugurations, "In
God We Trust," Thanksgiving Proclamations, and Presidential prayers
would be seen as parts of a heritage, connected to other parts that have
current value and vitality. I am painfully aware that such a formulation
does not decide hard cases, such as prayers at high school graduation,
state university support for religious clubs and publications, the
provision of various forms of aid to religious schools, and the like. But
my aim at the moment is not so much to work out a rule of decision as
to render problematic the instinct with which I began, that the right
thing is a clean sweep of all vestiges of religion with a puritanical broom.

One other factor perhaps deserves mention. In the past two
hundred years America has become much more religiously diverse, and
in ways that make ceremonial Christianity more problematic than it was.
But I am not sure that it has become less religious, or even less
Christian. Suppose a new constitutional convention were to be held in
1999, in Dallas, and the question were debated whether the religion
clauses should be revised to permit prayer in schools, for example, or to
declare that this is a Christian nation. I am not at all sure that the
antiestablishment forces would prevail. In other words, the common
view that America has become a more religiously tolerant nation as it
has become more diverse may not be accurate. This in turn means that
to maintain what I have called the vestiges of establishment may not be
to carry into the present era more establishment than it would choose
on its own, but less. In thinking about the authority of the past, the
most rigorous anti-establishmentarian should perhaps consider that the
legacy we have, including its ceremonial element, may be working to
protect, not injure, his values.

I should of course acknowledge that in making this suggestion I am
specially situated, since I am in a general way a member of the religious
community whose vestiges I am saying we might tolerate. "Easy for you
to say," someone might understandably respond, perhaps going on to
say that I should be disqualified for interest, and there is much in such a
position. Of course it is true that I may be led by familiarity or desire
into accepting what I ought not accept. But it also happens to be true
that I intensely dislike the kinds of prayers and other symbols I am
speaking of, in large part because they seem to me to depreciate religion, reducing it to the empty and the sentimental. So far as I am aware I do not draw any inner comfort from legislative prayers, any more than I do from Presidential prayer breakfasts, the work of television evangelists, the invocation of religious grounds for legislation, and the like. But I do think we should tolerate these things.

IV.

I have talked a lot about religion, rather little about the judicial process. How does what I have said relate to that? Not in any direct or automatic way: To think of the topics to be addressed at this conference, for example, nothing I have said would lead me to say that a judge ought (or ought not) to feel free to base a judgment on a religious view, ought (or ought not) to recuse herself from a case in which her religious views were implicated, or that a senator ought (or ought not) to feel free to oppose a candidate for the judiciary on religious grounds. What I do think is that the depth and inherent inexpressibility of religious experience makes it very hard for a person to separate the religious from the non-religious in her life. This means that it would be difficult for me as a judge to say that a particular position was or was not based on religious grounds. In my experience religion works so close to the center of the personality that it is hard to be confident of any such judgment. Likewise with respect to recusal on such a ground, though in clear cases a member of a particular religious community ought not to decide a case to which it is a party.27 With respect to opposition to a judicial candidate on religious grounds, the question seems to me largely or exclusively political, and here I would regard it as highly undesirable to begin, or to make explicit, a conversation which has in it sentences like: “I am opposed to (or in favor of) him because he is a Catholic; or a Jew; or an Evangelical Christian.”

V.

My object has been not to propose rules of decision, but to speak to the deeper question of appropriate judicial attitude. In the first part of my remarks, dealing with free exercise, my idea has been to try to find a way of respecting the experience of others, or of other parts of

27. The difficulty here lies in defining the boundaries of the community. As a Catholic from St. Mary's parish, I ought not decide a suit against that parish and maybe not a suit against the Catholic church. But what about a suit against another denomination? It is hard to know who would decide religious cases if recusal were required in such an instance.
ourselves, even though—or especially because—it cannot be translated into our common language. In the second part, I have tried to find a way of respecting the way in which our own patterns of thought and value, as reflected in that common language, are partly shaped by elements in our culture that we would now be inclined to resist. I am trying, that is, to imagine both religious experience and our past in ways that enable us to respect them, despite—or because of—the way they do not fit the premises of our contemporary public discourse.

There is of course a tension between these positions, for the first leads to a very generous definition of belief, which would tend to make the ceremonial vestiges of the second part seem less vestigial and more problematic. I accept this fact, but invoke as authority for tolerating it the first amendment itself, the great achievement of which is the profound tension, indeed paradox, between its religion clauses.\(^{28}\) I think we can read it not as committing us to a single value, or coherent set of values, but to something more important, a struggle between two values, both of them crucial, neither of which can be accommodated perfectly, both of which acquire definition partly from their relation to the other. Despite all the difficulties I referred to at the beginning of this talk, the first amendment has the great merit of insisting simultaneously upon the importance of religion and its danger, and it does so in such a way as to make it impossible to theorize away the tension it identifies. Think how different our world would be, for example, if there were simply no law, or no constitutional law, about religion, from either point of view; or if the Constitution contained only one of its two clauses.

The First Amendment also insists upon another tension, that between the language of religion and the language of the law. I asked earlier whether different modes of discourse can inhabit the same mind, the same polity. I think that they can, but only if it is understood that we cannot successfully insist that either make sense in terms of the other. Indeed I think that it is a great thing for the person as well as the polity, that it have distinct resources of life and meaning that cannot be reduced to each other.

What the amendment calls for in the end is not a set of generalizations that will harmonize the inconsistencies between its two religion clauses, or those between law and religion more generally, but a set of attitudes that will enable us to face and live with the problem it insists upon putting before us, the impossible but necessary task of

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talking about religion in the language of the law. To return to the passage from Gibbon with which I began, our hope at the end might be that we could achieve a condition of “religious concord” based not, like the Roman one upon contempt, credulity, or cynicism, but upon respect.