Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock

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The religion provision of the first amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” This Article will focus primarily on its prohibition against the “establishment of religion.” As I have previously argued, however, it is inappropriate to separate the religious liberty provision of the first amendment into two wholly distinct clauses, one dealing with “an establishment of religion” and the other dealing with the “free exercise of religion,” because the intent of the provision as a whole was to promote religious liberty. The failure to consider the liberty-maximizing purposes of the first amendment can be misleading; it is a source of my disagreement with Professor Douglas Laycock.

Recently, Professor Laycock asserted that “history refutes one important claim about the establishment clause—that the framers specifically intended to permit government aid to religion so long as that aid does not prefer one religion over others.”

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1 U.S. Const. amend. I.
Laycock also impugned the historical analysis of nonpreferentialists—those who espouse the view that government may aid religion or conscience so long as it does so in a nonpreferential manner. He unequivocally declared that nonpreferentialists have "no scruples whatever to conform their claims to the evidence." Finally, Professor Laycock objected that nonpreferentialism "does not go away despite repeated rejection by the United States Supreme Court."

In this Article, I examine Professor Laycock's assertion that nonpreferentialism lacks historical or decisional support. In Part I, I question Professor Laycock's contention that nonpreferentialism is inconsistent with the intent of the framers and ratifiers of the first amendment. In Part II, I consider the Supreme Court's decision in *Texas Monthly, Inc. v. Bullock*, and demonstrate that, contrary to Professor Laycock's understanding, each of the Justices embraced some version of nonpreferentialism. Finally, in Part III, I conclude that while Professor Laycock's work is thoughtful and certainly adds to the scholarly dialogue, his assertions regarding the status of nonpreferentialism, in terms of the case law and as an historical matter, are, at best, overstatements.

Throughout the Article, my perspective is formed by my growing concern over the Court's general misunderstanding of religious liberty; the Justices appear to espouse nonpreferentialism as a means of deferring to the "majoritarian" (i.e., the legislative and executive) branches of government, rather than using nonpreferentialism to further the libertarian aspirations that the framers embodied in the religious liberty provision of the first amendment. Indeed, the Court's recent retreat from the libertarian underpinnings of the religion provision in cases pertaining to the free exercise demonstrates an alarming lack of concern for religious liberty.

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*Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 875 (1986).*

4 *Id.* at 877.

6 *Id.* at 876.


7 In defense of Professor Laycock, I acknowledge that *Texas Monthly* was decided after the publication of his article, although it is clear that decisions rendered prior to the publication demonstrated that nonpreferentialism is a viable theory. See *infra* notes 68-81 and accompanying text (discussing various views of nonpreferentialism embraced by Justices). For Professor Laycock's own analysis of *Texas Monthly*, see Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 De Paul L. Rev. 993, 1008 (1990). In that analysis, Professor Laycock states nothing to cause me to retract my assertion that *Texas Monthly* is based on nonpreferentialism.

I. Nonpreferentialism: An Historical Defense

Professor Laycock has asserted that proponents of nonpreferentialism misapprehend the historical underpinnings of the first amendment:

The prominence and longevity of the nonpreferential aid theory is remarkable in light of the weak evidence supporting it and the quite strong evidence against it. I do not mean to overstate what we know about the establishment clause. Neither its history nor its text offers us a single unambiguous meaning. But they can eliminate some possible meanings, and to do that is real progress. So long as the debate is dominated by a false claim, it is hard to discuss the real issues.\footnote{Laycock, supra note 3, at 877.}

Clearly, Professor Laycock is arguing that nonpreferentialism is so devoid of historical support that it constitutes a purely “false claim” about original intent, not just a plausible but inconclusive reading of the applicable history. Because Professor Laycock refuses to admit that nonpreferentialism is one among a number of plausible readings of the history—and the Court has taken his view seriously\footnote{See County of Allegheny v. ACLU, 109 S. Ct. 3086, 3099 n.39 (1989) (citing Professor Laycock's article with approval); see also Gedicks, Toward a Constitutional Jurisprudence of Group Rights, 1989 Wis. L. Rev. 99, 169 n.322 (noting that legal scholars generally believe church-state separation concept emerged long after founding era); McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1410, 1414 n.16 (1990) (historical background on establishment clause); Smith, Separation and the "Secular": Reconstructuring the Disestablishment Decision, 67 Tex. L. Rev. 955, 957 n.9 (1989) (Laycock’s views are arguably “lacking in historical and textual support, and . . . riddled with analytical and practical deficiencies”).}—, a response is in order.

At the outset, “nonpreferentialism” should be defined and placed in an analytical framework.\footnote{Professor Laycock's definition of “nonpreferentialism” is not altogether clear. At one point, he apparently defined it as a doctrinal theory that would “permit government aid to religion so long as that aid does not prefer one religion over others.” Laycock, supra note 3. Later, however, as he discussed the sense in which those in the framers' generation may have understood “nonpreferentialism,” he noted that “Cord correctly states that aid to all Christians was viewed as nonpreferential in the late eighteenth century.” Id. at 898. Professor Laycock may be saying one of two distinct things: (1) nonpreferentialism can be defined . . .
sions of nonpreferentialism. The view that government may aid or accommodate "religion" so long as it does so in a nonpreferential manner may be referred to as "religious nonpreferentialism." The view that government may aid those seeking to act in accordance with their conscience may be referred to as "nonpreference as to matters of conscience." Finally, the view that government may aid religion when to fail to do so would demonstrate a preference for nonreligion may be denoted as "nonpreferentialism between religion and nonreligion."

The first view seems to be the one Professor Laycock labels nonpreferentialist. The third view, in turn, appears to be curiously close to Professor Laycock's own preferred view—that of "perfect neutrality"—a view that "neither encourages nor discourages religious belief or practice." The second view, providing for non-preference as to matters of conscience, is my preferred view, although I acknowledge that the general term "nonpreferentialism" could refer to all three possibilities.

Similarly, any delineation of views regarding the meaning of the religion provision of the first amendment might well be placed on a continuum. At one end is the view of those who would permit government to establish a national religion (the theocratic view) and at the other end is the view of those who would prohibit government from aiding religion in any form (the strict separationist view).

The theocratic view would permit government the broadest power to establish religion; it would allow government selectively to promote a particular religion at the national level. Thus, on the

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as including aid to all Christian groups, but not necessarily to all religious groups; or (2) the adulterated version of "nonpreferentialism" adopted, if at all, by the framers, does not constitute evidence supporting the contemporary, broader view of nonpreferentialism among all religions. I suspect that Professor Laycock supports the latter view, particularly because he agrees with Professor Levy that some members of the framers' generation "tried to cover establishment with a veneer of nonpreferentialism." Id. at 911. Therefore, I will assume that he defines "nonpreferentialism" as he first used it.

It is difficult to determine whether Professor Laycock was recognizing this view as non-preferential in nature or whether he was arguing that the history did not support a broader reading of nonpreferentialism. However, even taken in its broadest form—nonpreference among all religions—Professor Laycock's definition of nonpreferentialism is crabbed.

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12 See generally Smith, supra note 2, at 499-509 (analyzing advantages and disadvantages of three versions of nonpreferentialism).
13 Laycock, supra note 3, at 922.
14 See Smith, supra note 2, at 502-06, 511 (nonpreference as to matters of conscience view preferable because "best maximizes religious liberty").
continuum, the point furthest to the left would be a point representing the position that government may, in its discretion, promote religion.\(^{16}\) I have elsewhere argued that such a view is incompatible with the history of the framing of the religion provision and, therefore, unsupported by original intent analysis.\(^{16}\)

Next on the continuum is a perspective developed by Justice Story, who became its leading proponent in the early nineteenth century.\(^{17}\) I have summarized Justice Story's view as follows:

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\text{[First] the people (generally, if not universally) believed that, in adopting the First Amendment, Christianity could be encouraged by the state, provided only that such encouragement was not incompatible with rights of worship of non-Christians; and [second] any attempt "to level all religions, and to make it a matter of state policy to hold all in utter indifference" would have met with "universal disapprobation."}^{18}
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Thus, Justice Story first interpreted the religion provision of the first amendment to mean that government could promote a generalized or nondenominational Christianity, so long as it did so in a manner that tolerated non-Christian religions.\(^{19}\) Story's view might be broadened slightly to encompass the view that government may promote a nondenominational religion (that includes elements of Judaism or Christianity) at the national level.\(^{20}\) Thus, Story's view

\(^{15}\) See, e.g., id. at 487-89 (discussing position that government may promote national religion). I do not use the term "left" to denote "liberal" in a political sense; rather, I use it to depict a starting point on the continuum.

\(^{16}\) See, e.g., R. SMITH, PUBLIC PRAYER AND THE CONSTITUTION 81-85, 109-18, 208-10 (1987) [hereinafter R. SMITH, PUBLIC PRAYER] (original intent was to prevent preference of one denomination or sect over another). Even Chief Justice Rehnquist, one of the Justices most inclined to defer to governmental power, agrees that original intent analysis precludes the possibility of permitting government to promote a national religion. See Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("Framers intended the Establishment Clause to prohibit the designation of any church as a 'national' one").

\(^{17}\) See generally R. SMITH, PUBLIC PRAYER, supra note 16, at 107-20 (discussing Justice Story's view on religious liberty).

\(^{18}\) Id. at 103 (emphasis in original).

\(^{19}\) It also should be noted that Justice Story felt strongly that the promotion of nondenominational Christianity would receive its primary support from the state governments. Id. at 108-09.

\(^{20}\) See Engel v. Vitale, 370 U.S. 421 (1962). In Engel, the New York Board of Regents had commissioned the preparation of a short, essentially nondenominational prayer (but primarily reflecting a Judeo-Christian approach) for recitation in the New York public schools. Id. at 422. The Court held that such a prayer violated the establishment clause and rejected a view slightly broader than Justice Story's. Id. at 433-34. It is evident, therefore, that the Court has rejected Story's view, although some cases suggest that it might be revitalized. See R. SMITH, PUBLIC PRAYER, supra note 16, at 237-60 (discussing Marsh v. Cham-
that government may promote nondenominational Christianity can be expanded to include some broader category of religious promotion without becoming nonpreferential; it would continue to exclude or discriminate against some religions and some religious expression.

The next view on the continuum is that of nonpreferentialism. As previously noted, nonpreferentialism may be divided into three separate categories—"religious nonpreferentialism" followed by "nonpreference as to matters of conscience" succeeded by "nonpreferentialism between religion and nonreligion"—each of which progressively restricts the kind and degree of support extended by government to religion. The final view, falling at the right end of the continuum, is strict separationism. Under this view, government and religion must remain entirely separate and government may do nothing to either accommodate or aid religion, even when failure to do so would demonstrate some preference for nonreligion within the public sector. While it could be argued that this view is within the perimeters set by the framers' broad intent of the religion provision,\(^2\) it has received little or no support in the pertinent historical data.\(^2\) Indeed, as demonstrated by Professor Laycock's "perfect neutrality" view, which is itself nonpreferential, there seems to be some theoretical confusion between the view that government may accommodate religion, when failing to do so would demonstrate a preference for nonreligion, and the view that government must remain strictly separate from religion and may not accommodate religion under any circumstances. A modicum of confusion is expected, given that the two views are immediately adjacent to one another on the continuum of possible views regarding governmental interaction with religion. However, the views

\(^{21}\) See Everson v. Board of Educ., 330 U.S. 1, 31-32 (1947) (Rutledge, J., dissenting) ("object [of first amendment] was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation").

\(^{22}\) See, e.g., R. SMITH, PUBLIC PRAYER, supra note 16, at 125-32 (discussing why Justice Rutledge's position in Everson is weakly supported in historical record); Ingber, Religion or Ideology: A Needed Clarification of the Religion Clauses, 41 STAN. L. REV. 233, 246 (1989) ("strict neutrality approach . . . seriously impair[s] the anti-establishment mandate's effectiveness" and "downgrades the positive value of religious liberty").
should be separated for analytical purposes. The "neutrality view" (which I refer to as "nonpreference between religion and nonreligion") would permit government to aid or accommodate religion when failure to do so would disadvantage religion, while strict separationism would never allow such support.

The continuum of views regarding possible interpretations of the religion provision, therefore, is as follows:

<table>
<thead>
<tr>
<th>Governmental Promotion of a Religion</th>
<th>Story's View (Nondenominational Christianity)</th>
<th>Nonpreferentialism</th>
<th>Strict Separation</th>
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| In placing these views on a continuum, we can better understand their interrelatedness and theoretical proximity or similarity. In addition, we can better evaluate the various views both historically (the goal of this section of the Article) and theoretically.23

With this continuum in mind, we now can turn to an examination of Professor Laycock's historical analysis, in which he concluded that nonpreferentialism is not defensible as an historical matter, and therefore constitutes a false claim about original intent.

Professor Laycock began his reasoning by asserting that the best evidence of the framers' intent is the text of the religion provision itself. In particular, he argued that "the First Congress considered and rejected at least four drafts of the establishment clause that explicitly stated the 'no preference' view."24 He concluded that "[t]he establishment clause actually adopted is one of the broadest versions considered by either House. It forbids not only establishment, but also any law respecting or relating to an establishment."25

Professor Laycock's conclusion that the textual language of the establishment clause seems to prohibit government from

23 See generally Smith, supra note 2, at 481-509 (discussing theoretical benefits of each view and concluding that nonpreference as to matters of conscience view does more than any other view to maximize religious liberty).
24 Laycock, supra note 3, at 879.
25 Id. at 881.
adoption, any law “respecting or relating to an establishment” is ambiguous at best. Using the continuum as a contextual base, it is unclear whether he is implying that the framers adopted a view akin to the strict separationist view or some view more to the left on the continuum. Indeed, without some definition of “establishment,” his conclusion is little more than a tautological restatement of the language of the establishment portion of the first amendment, although he added the term “relating” to the clause.

The language of the establishment clause does not resolve matters, except to imply that the framers at least rejected the view that the government could promote a specific religion. Professor Laycock recognized this fact, but acknowledged that “[i]n 1791, almost no one thought that government support of Protestantism was inconsistent with religious liberty, because almost no one could imagine a more broadly pluralist state.” Elsewhere, he added that if we were to adopt the framers’ position, “religious groups would be expected to quietly endure state-sponsored Protestantism.”

Thus, Professor Laycock’s assertion that the framers adopted the broadest view (most akin to strict separation) is apparently inconsistent with his acknowledgment that the framers seemed to favor a view that permitted government promotion of Protestant-

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26 Id. at 918. Professor Laycock is incorrect in asserting that “almost no one could imagine a more broadly pluralist state.” Id. Madison did recognize the need for a more pluralist state, specifically as related to governmental respect for religious exercise. See The Federalist No. 10 (J. Madison) (B. Wright ed. 1961). Madison expressly noted that

[t]he influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source.

Id. Rives, Madison’s friend and biographer, stressed that Madison argued (in conjunction with the debates over the assessment bill, which gave rise to Madison’s Memorial and Remonstrance) that

[a]s the benefits of the [assessment bill] were to be limited to Christian societies and churches, it would devolve upon the courts of law to determine what constitutes Christianity, and thus, amid the great diversity of creeds and sects, to set up by their fiat a standard of orthodoxy on the one hand and of heresy on the other, which would be destructive of the rights of private conscience.


27 Laycock, supra note 3, at 920.
ism (a view similar to that espoused by Justice Story). He attempted to reconcile this inconsistency by asserting that the framers treated government-supplied financial aid to religion differently than they did non-financial governmental acknowledgment or accommodation of religious exercises.28 Under Professor Laycock's view, the framers failed to understand the different ways in which they treated financial and nonfinancial aid to religion, and, therefore, placed nonfinancial aid near the Story view on the continuum, and financial aid at the other end, near the strict separation view.

Professor Laycock offered three reasons why such a distinction may have occurred: (1) opposition to taxes was omnipresent; (2) taxes to aid churches were associated with earlier, disfavored unitary establishments; and (3) the tax for churches split the Protestant denominations, with the Baptists and Quakers opposing even a nonpreferential system.29 While plausible, these speculations are questionable both historically and theoretically.

As a theoretical matter, it is curious that the framers would find themselves at the opposite ends of the continuum without recognizing the inconsistent nature of their positions. To reach this anomalous result, Professor Laycock was forced to deprecate the capacity of the framers to examine issues closely and to draw precise distinctions based on their theoretical underpinnings. I think that he erred in reaching this conclusion. The framers were largely natural lawyers who examined the broad theoretical dimensions of their decisions, whereas we as interpreters are the positivists, members of a generation inclined to examine issues in a formalistic and specific fashion, with little regard for their broader theoretical

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28 Id. at 913-18. He argued that “there were widespread objections to tax support for churches,” id. at 917, but that there was “rampant” governmental support for Protestantism in nonfinancial matters, id. at 913. Hence, he concluded that the appeal to the Framers' practice of nonfinancial aid to religion is an appeal to unreflective bigotry. It does not show what the Framers meant by disestablishment; it shows what they did without thinking about establishment at all. I believe that the relevant intention of the Framers is the one they thought about. . . . The Framers' implicit distinction was between financial aid and other aid. If both their intentions are followed, all financial aid will be forbidden, whether or not preferential. But unlimited financial [sic; I believe Professor Laycock intended to use the term “nonfinancial”] aid will be permitted even if it is preferential and coercive.

Id. at 919.

29 Id. at 917.
implications. It is therefore strange for Professor Laycock to conclude that the framers could not sense the inherent contradiction of their financial/nonfinancial aid distinction when they were far more concerned with theoretical principles than we.

Even if Laycock is correct, I believe that there is a more plausible reason for the apparent ambiguity and inconsistency of the framers’ positions: the real disagreements over theory, generally and as it applied in various contexts, were reserved for future determination by the ambiguous nature of the language of the first amendment. Furthermore, it would seem more in keeping with human nature to understand the framers as seeking coherence in their views and thus moving gradually along the continuum, rather than leaping from one end to the other, according to whether or not government aid of a financial nature was involved.

I believe that the more likely explanation, in terms of financial and nonfinancial aid, is that the framers largely disagreed as to whether Story’s view or a version of nonpreferentialism should control in both areas. Given that there was some haste evident in adopting and ratifying the first amendment, as part of the Bill of Rights, its broad language masked such disagreement. In doing so, the framers left the issue of which view should prevail—Story’s view or a version of nonpreferentialism—open for later generations. Masked disagreement over positions next to one another on the continuum is more likely than masked disagreement over positions at opposite ends of the continuum. Constitutional theory, like the common law, is more likely to move incrementally from one position on the continuum to the next, rather than taking major swings from one end of the spectrum to the other. Therefore, without concrete evidence (none of which is offered) supporting Laycock’s view that the framers vacillated between ends of the continuum depending upon whether financial or nonfinancial aid was involved, it is more likely that the framers vacillated between positions that were much closer on the continuum.

It should be noted, as well, that intangible, nonfinancial aid

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See generally Smith, supra note 2, at 463-78 (arguing deferential view of original intent analysis inconsistent with framers’ and ratifiers’ intent to maximize liberty). It is odd, therefore, that Laycock would disparage the framers for what I consider to be one of their primary strengths: their capacity to comprehend broader, theoretical implications attending their deliberations.

Id. Nevertheless, while the framers often masked theoretical differences with broad language, they generally believed that they were, at a minimum, setting in motion a Bill of Rights that would promote their aspiration for individual liberty. Id. at 466-78.
often contains a financial aspect. Consider the following examples of "nonfinancial" aid which the First Congress extended contemporaneously with the first amendment's adoption: appointing a chaplain, supporting sectarian education on Indian reservations, providing for religious objects on public property, and permitting public property to be used for religious purposes. All these instances demonstrate the specious dichotomy between financial and nonfinancial aid. Whenever government acts, it implicates resources, rendering the distinction between financial aid and nonfinancial aid fairly meaningless. It strains credulity to believe that the framers, who were so thoughtful in other areas, failed to discern the false dichotomy between financial and nonfinancial aid. Nevertheless, to resolve my disagreement with Professor Laycock over theory, it is necessary to examine the provision's history in greater depth and to determine whether or not it supports Professor Laycock's assertion that the framers thought of issues related to religious liberty in a theoretically flawed fashion.

Given the general nature of the language used in the religion provision, and the theoretical differences between Professor Laycock and myself, it is necessary to examine the accuracy of Professor Laycock's assertion that the First Congress rejected four drafts of the establishment clause that "explicitly stated the 'no preference' view." If Professor Laycock's assertion has historical support, then his position that the framers held dichotomous views regarding financial and nonfinancial aid may well debunk the nonpreferentialism myth. If, however, the evidence indicates that the framers used general language to veil the disagreement between those espousing Story's view and the nonpreferentialists, his thesis that nonpreferentialism falsely construes original intent is, then, seriously flawed.

Professor Laycock began his analysis by noting that "[t]he first motion in the Senate clearly presented the 'no preference' position." That motion, as amended, provided that "Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed." Laycock began his analysis by noting that "[t]he first motion in the Senate clearly presented the 'no preference' position." That motion, as amended, provided that "Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed." Laycock, supra note 3, at 879.

32 See R. Smith, Public Prayer, supra note 16, at 96-105 (identifying some "nonfinancial" governmental accommodations of religion that occurred contemporaneously with adoption of first amendment).
33 Laycock, supra note 3, at 879.
34 Id.
35 Id. at 880 (citing 1 Documentary History of the First Federal Congress of the
cock acknowledged that this proposal was "first rejected, and then passed." He concluded, nonetheless, that later in the day, the Senate "appears to have abandoned the 'no preference' position," with its adoption of a provision very much like the religion provision ultimately adopted and ratified. This second provision, as adopted by the Senate, provided that "Congress shall make no law establishing religion, or prohibiting the free exercise thereof." A week later, the Senate adopted another version, which Laycock referred to as "the narrowest version ... considered by either House." That provision provided that "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."

As I have previously discussed in significant detail, the interrelationship of the various provisions dealt with in the House and the Senate debates leads to an analysis clearly reaching a different series of conclusions than does Laycock. For present purposes, however, I will focus on the weaknesses in Professor Laycock's own analysis. Although Laycock acknowledged that the Senate first adopted a nonpreferential position, he suggested that it later appeared to abandon that view. He offered nothing other than the variations in textual language to support this contention. He proceeded to argue further that this "rejection" of any nonpreference view is evidence that nonpreferentialism misreads history. Laycock asserted that the First Congress adopted a view that would prohibit all financial aid to religion, although he again relied on the ambiguous language of the ultimately adopted religion provision to support his view.

However, the action of the First Congress is better explained by recognizing that the predominant views of the framers were the Story and nonpreference views, and that the framers relied on general language to mask their disagreement, leaving selection between the views open for future determination. The framers of the

United States of America 151 (Senate Journal) (L. de Pauw ed. 1972) [hereinafter Documentary History]).

36 Id. (emphasis added).
37 Id.
38 Id. at 881 (citing Documentary History, supra note 35).
39 Id.
40 Id. (citing Documentary History, supra note 35, at 166).
41 R. Smith, Public Prayer, supra note 16, at 75-96. I will dispense with rehashing that analysis in this Article, although I am convinced that the history reveals a different series of conclusions than those Laycock reaches.
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Bill of Rights, particularly James Madison (its author and leading proponent in the First Congress), were anxious to get them adopted because mounting Antifederalist opposition threatened the Constitution as a whole. Given this exigency, it is more likely that the framers were willing to compromise on general language to obtain a broad base of agreement between the nonpreferentialists and the Storyites, who favored government promotion of non-denominational Christianity. Such a compromise was probably struck by proponents of two somewhat compatible views, as opposed to being struck by two distinct groups at extremes of the theoretical continuum. Indeed, it is quite unlikely, despite Professor Laycock's protestations to the contrary, that the framers suddenly discarded a view which had once commanded a majority of the Senate in favor of a compromise between polar opposites. It is more likely that the framers used the language's ambiguity to embody a compromise of more moderate views, particularly one that had already received majority support in the Senate. At any rate, Professor Laycock disproportionately relies on the ambiguous shifting of textual language used in the Senate, House, and Conference Committee to support his claim. He is right, nevertheless, to assert that the framers did not "specifically intend[] to permit government aid to religion so long as that aid does not prefer one religion over others," if by that he means that nonpreferentialism was adopted to the exclusion of the Story view. While the framers may have never specifically intended to adopt a nonpreferential view, such a perspective is nonetheless legitimate, given the amendment's history and the framers' apparent masking of the existing disagreement between those espousing the Story and the nonpreferentialist views.

Professor Laycock also disagreed with my "speculation" that the Senate drafts, which he characterized as "nonpreferential," were not in fact purely nonpreferential. In particular, he averred:

42 Id. at 77-78. Madison revealed his fears, in this regard, when he argued that the House must quickly consider the Bill of Rights, despite the exigency of the pending judiciary bill. Madison stressed that
[a]lready has the subject [of consideration of the Bill of Rights] been delayed much longer than could have been wished. If after having fixed a day for taking it into consideration, we should put it off again, a spirit of jealousy may be excited, and not allayed without great inconveniences.

1 ANNALS OF CONG. 731 (J. Gales ed. 1789) [hereinafter ANNALS OF CONG.]

44 Laycock, supra note 3 (emphasis added).

4 Id. at 882.
“Smith speculates that the Senate drafts were rejected only because they would have permitted aid to a coalition of two or more religions in preference to the rest. Reasonable construction would have . . . eliminated any risk.”\textsuperscript{45} I in fact argued with regard to the Senate version (which Laycock claimed to be “clearly” nonpreferential) that Madison, who is a nonpreferentialist, might have found that version unacceptable because “it might not prohibit Congress from favoring a predominant group of religious sects over some minority sect or sects.”\textsuperscript{46} Madison’s concern with precisely that issue is exemplified by arguments in his \textit{Memorial and Remonstrance}.\textsuperscript{47} “Who does not see that the authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of all other sects?”\textsuperscript{48} Madison understood the subtle differences between Story’s position, which was proffered as promoting only nondenominational Christianity, and the nonpreferentialist position, which would accommodate \textit{all} religions equally. Madison and other nonpreferentialists, therefore, might well have opposed the Senate version because it leaned too far in the direction of Story’s position. Madison undoubtedly would have preferred the religion provision with its ambiguous establishment clause.\textsuperscript{49}

Laycock’s next major argument concerned the lack of support for nonpreferentialism within the congressional debates over the religion provision.\textsuperscript{50} Although noting that the “debate adds little”\textsuperscript{51} and that “it was ambiguous concerning nonpreferential aid,”\textsuperscript{52} Professor Laycock asserted:

\textsuperscript{45} \textit{Id.} at 882 n.9.
\textsuperscript{46} R. \textit{Smith, Public Prayer, supra} note 16, at 87.
\textsuperscript{47} See J. Madison, \textit{Memorial and Remonstrance} (1875).
\textsuperscript{48} \textit{Id., quoted in W. Rives, supra} note 26, at 636. In the course of his \textit{Memorial}, Madison observed that “the first wish of those who enjoy this precious gift [of Christianity] ought to be that it may be imparted to the whole race of mankind.” \textit{Id.} at 639. However, he added that the assessment bill would lessen the likelihood of such conversion because the bill “at once discourages those who are strangers to the light of revelation from coming into the region of it, and countenances by example the nations who continue in darkness in shutting out those who might convey it to them.” \textit{Id.}
\textsuperscript{49} Despite Professor Laycock’s contrary contentions, the Senate version more closely resembles the Story view (promoting nondenominational Christianity) than nonpreferentialism. Laycock offered no support otherwise.
\textsuperscript{50} Laycock, \textit{supra} note 3, at 888-94.
\textsuperscript{51} \textit{Id.} at 885.
\textsuperscript{52} \textit{Id.} Again, Professor Laycock seems to be acknowledging, at a minimum, that the debate was sufficiently ambiguous to leave open the possibility of nonpreferentialism.
The heart of the argument [for nonpreferentialism] is Madison's puzzling comments about a national religion and compelled worship. Madison's tactic was not to argue with Sylvester and Huntington [who had both argued that too strict a reading of a religion provision might lead to results harmful to religion], but to reassure them and their sympathizers by portraying the establishment clause in the narrowest possible light.\(^5\)

He even cited Madison's comment regarding the populace's great fear that "one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform."\(^5\) Although this was the "heart" of the debate in the House, Laycock failed to explain why the debate did not draw distinctions between financial and nonfinancial aid to religion. He did, however, assert that Madison's statements "are obviously inconsistent with modern interpretations of the establishment clause, [and] . . . with the view that only preferential aid is forbidden."\(^5\) Professor Laycock inaccurately and incomprehensibly concluded that Madison's comments render nonpreferentialism a false claim regarding the intentions of the framers. At a minimum, nonpreferentialism remains a tenable view of interpreting Madison's fear that "one sect might obtain preeminence" over another.\(^5\) The more appropriate reading would eliminate strict separation, rather than reject nonpreferentialism, as Laycock does. Madison's comments regarding the fear that one or more sects might combine together and deprive others of their religious liberty—thereby denying them equal liberty—appear to offer significant support for nonpreferentialism. At best, Laycock may properly conclude only that the debates indicate nonpreferentialism as one among a few legitimate readings of the establishment clause. This clause, which precludes both perspectives at the ends of the continuum—that government may promote a specific religion and that government must remain strictly separated from religion—seems to leave both the Story view and each of the nonpreferential variants intact.

Professor Laycock turned next to the debates in the revolutionary states. In these debates he found intellectual historical support for his thesis that nonpreferentialism constitutes a false

\(^5\) Id. at 891.
\(^5\) Id. at 892 (citing ANNALS OF CONG., supra note 42, at 731).
\(^5\) Id. (emphasis added).
\(^5\) Id.
claim regarding original intent. In particular, and appropriately, he focused primarily on the Virginia debates, which he considered to be the "most important." Within the Virginia debates, he placed particular emphasis on Madison's *Memorial and Remonstrance*. The *Memorial* was drafted and circulated to oppose the initial adoption of a resolution that "the people of the Commonwealth, according to their respective abilities, ought to pay a moderate tax or contribution for support of the Christian religion, or of some Christian church, denomination, or communion of Christians, or of some form of Christian worship." Laycock incorrectly characterized the resolution as nonpreferential. It is clear that it was preferential in precisely the sense articulated by the Story position because it favored support for Christianity.

Laycock asserted that Madison led the charge against nonpreferentialism and in support of no aid to religion, in the penning of his *Memorial*.

He acknowledged that Professor Cord and I have argued that nonpreferentialists, who opposed the bill on the ground that it was preferential, may have cast some of the votes against the Assessment Bill. He responded by asserting that such an argument is conceivable, but it is wholly unrealistic. It is anachronistic to view aid to all denominations of Christians as preferential in 1786. There were hardly any Jews in the United States at that time, and no other non-Christians to speak of. Indeed, when it suits his purpose, Cord correctly states that aid to all Christians was viewed as nonpreferential in the late eighteenth century. That some Virginians could imagine the effects of establishment on non-Christians only shows how far Virginians had thought through the problem.

Cord may have asserted that nonpreferentialism included such aid, but I have not, nor apparently did Madison. It is a twist of logic

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57 Id. at 894-902.
58 Id. at 895.
59 See supra notes 47 and 48.
60 W. Rives, supra note 26, at 600.
61 Laycock, supra note 3, at 897-98.
62 Id. at 898 (footnotes omitted).
63 See Smith, supra note 26, at 585-94. In the debates, Madison clearly was concerned with "equal liberty" for all religious groups. He repeated this theme throughout the *Memorial and Remonstrance* and his arguments in opposition to the assessment bill. Id. For a textualist like Professor Laycock, it is curious that he would ignore the unmistakable longing of the *Memorial* and assert that votes were swayed by strict separationist, rather than
for Professors Laycock or Cord to acknowledge that Madison raised issues concerning the religious favoritism of the bill, but to argue, nevertheless, that nonpreferentialists necessarily would (almost mindlessly) endorse the bill. Support for the bill more likely indicates that the longstanding opposition to the establishment of Anglicanism in Virginia had declined in inverse proportion to the increasing support for the Story approach as a more acceptable substitute. Indeed, the bill was initially adopted by a vote of 47-32 (a vote attesting to the desire of many to support direct aid to Christian churches); that support dissipated, however, when opponents argued that the bill was preferential.64

Part of Professor Laycock’s problem with the Virginia debates, in particular, and the history of the framing of the first amendment, in general, centers on his inability to distinguish between the Story view and the various nonpreferential views. Absent recognition of this distinction, it is easy to misidentify or obscure a particular conception’s placement along the continuum of possible views regarding religious liberty and the interpretation of the religion provision. A better interpretation of the historical facts suggests that the definitional lines between the view that government could aid Christianity generally and the nonpreferential view were becoming more refined. Certainly, one can argue that some opposition to the Assessment Bill came from those who opposed aid in any instance, although Laycock and others offer little evidence to support such an assertion. This “strict separationist” group, if it existed at all, would have opposed the bill from its outset and consequently could not have been the group Madison solicited for support when he circulated his *Memorial and Remonstrance*.65

When the change in terms of nonsupport for the bill grew, it likely came from nonpreferentialists leaving the ranks of those favoring a view similar to Justice Story’s, rather than from those who wholly opposed any aid. If so, to assert that opposition to the Assessment Bill somehow demonstrates nonpreferentialism’s incompatibility with original intent disingenuously overstates the case. Rather, it demonstrates the ascendancy of nonpreferentialism; at the time of the dispute over the Assessment Bill, non-

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65 Madison would have been seeking to sway those supporters of the resolution who encouraged equality or nonpreference in religious aid, not those who opposed any aid whatsoever.
preferentialism had emerged as the middle ground between Justice Story's view and strict separationism. In addition, in disputes over establishment issues, nonpreferentialism provided the critical balance in building voting coalitions.

The Story view, however, clearly remained quite viable in the states at the time of the adoption of the religion provision of the first amendment, as Laycock implicitly acknowledged: "State aid to religion was both preferential and coercive."\(^{66}\) It seems at least plausible that proponents of the view that government may promote nondenominational Christianity struck a compromise with the advocates of some variant of nonpreferentialism. In all likelihood, then, those positions provide the legitimate perimeters for purposes of original intent analysis.

By the time the United States Supreme Court first addressed the issue of religion in *Terrett v. Taylor*,\(^7\) the Story and nonpreferential views had clearly set analytical boundaries. In *Terrett*, the Supreme Court struck down an effort in Virginia under its constitution to divest the Episcopal Church of its property. An act of 1776 had confirmed the church's rights to its lands, some of which had been acquired as a result of financial and related assistance received by the church when it was the established church in Virginia. In deciding the case, Justice Story stated that:

> although it may be true that 'religion can be directed only by reason and conviction, not by force or violence,' and that 'all men are equally entitled to the free exercise of religion according to the dictates of conscience,' as the bill of rights of Virginia declares, yet it is difficult to perceive how it follows as a consequence that the legislature may not enact laws more effectually to enable all sects to accomplish the great objects of religion by giving them corporate rights for the management of their property, and the regulation of their temporal as well as spiritual concerns. Consistent with the constitution of Virginia the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe. But the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the sup-

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66 Laycock, supra note 3, at 916.
67 13 U.S. (9 Cranch) 43 (1815).
pport of ministers, for public charities, for the endowment of churches, or for the sepulchre of the dead.\textsuperscript{68}

Story's dicta, with its references to aiding equally “all sects to accomplish the great objects of religion,” lends support to the notion that nonpreferentialism was accepted doctrine.

If Professor Laycock were content to argue only that nonpreferentialism was not expressly and unequivocally adopted by the framers of the religion provision of the first amendment, I would agree with him. Nonpreferentialism was but one among a few disparate views masked in the form of an apparent compromise which gave rise to the language of the religion provision of today. Eliminated from the continuum were only the view endorsing government promotion of a particular religion and the view mandating strict separation (under which religion could receive no assistance from the state).\textsuperscript{69} Our religion clauses clearly would not allow the establishment of a particular national religion. The exclusion of strict separationism, although less clear, develops from its relative historical weakness when compared to the data supporting the Story and the various nonpreferential views.

II. \emph{Texas Monthly, Inc. v. Bullock}: The Ascendancy of Nonpreferentialism in Establishment Clause Analysis

In addition to his assertions regarding an alleged lack of historical support for nonpreferentialism, Professor Laycock has argued that nonpreferentialism “does not go away despite repeated rejection by the United States Supreme Court.”\textsuperscript{70} Once again, Professor Laycock has overstated his case. In its recent decision in \emph{Texas Monthly},\textsuperscript{71} the Court strongly indicated that nonpreferentialism is alive and well.

The facts in \emph{Texas Monthly} are simple. Texas adopted a statute, under which it exempted from a sales tax “[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith.”\textsuperscript{72} Thus, the case presented the question of whether the exemption

\textsuperscript{68} Id. at 48-49.
\textsuperscript{69} R. SMITH, \textit{PUBLIC PRAYER}, supra note 16, at 56-57.
\textsuperscript{70} Laycock, supra note 3, at 876.
\textsuperscript{71} 489 U.S. 1 (1989).
\textsuperscript{72} \textsc{Tex. Tax Code Ann.} § 151.312 (Vernon 1982) (amended 1989).
violated the establishment clause of the first amendment since Texas denied a like exemption for other nonreligious publications. The Court answered this question in the affirmative.

At first blush, it would appear that the Court had rejected the nonpreferential view—the view that government could aid religion so long as it did so in a nonpreferential manner. However, as previously noted in the course of constructing the continuum, there are three nonpreferential views: (1) nonpreference among religions; (2) nonpreference as to matters of conscience; and (3) nonpreference between religion and nonreligion. Interestingly enough, all the Justices adopted one or another version of the nonpreference theory as the basis for their respective opinions; the ultimately predominant view appears to have been the view that government may aid matters of conscience, provided it does so in a nonpreferential manner. To understand how this variant of nonpreferentialism prevailed among the differing positions taken by the Justices, it is necessary to examine each opinion.

Justice Brennan delivered a plurality opinion in which Justices Marshall and Stevens joined. Previously, in Walz v. Tax Commission, the Court sustained a property tax exemption which applied to religious properties, as well as to the property of a wide array of nonprofit organizations. Therefore, for the plurality, the question Texas Monthly presented concerned "[h]ow expansive the class of exempt organizations or activities must be to withstand constitutional assault...." After noting that this "depends upon the State's secular aim in granting a tax exemption," Justice Brennan answered the question as follows:

If the State chose to subsidize, by means of a tax exemption, all groups that contributed to the community's cultural, intellectual, and moral betterment, then the exemption for religious publications could be retained, provided that the exemption swept as widely as the property tax exemption we upheld in Walz. By contrast, if Texas sought to promote reflection and discussion about questions of ultimate value and the contours of a good and meaningful life, then a tax exemption would have to be available to an extended range of associations whose publications were substantially devoted to such matters; the exemption could not be reserved for publications dealing solely with religious issues, let

74 Texas Monthly, 489 U.S. at 15.
75 Id.
alone restricted to publications advocating rather than criticizing religious belief or activity, without signaling an endorsement of religion that is offensive to the principles informing the Establishment Clause.\textsuperscript{76}

Justice Brennan strongly rejected the view that government could offer financial aid, in the form of a tax exemption, to religious groups alone, even if such aid were offered in a nonpreferential manner. However, he indicated that such aid could be extended to religious groups, so long as they were part of a larger class.

Justice Brennan’s opinion seems to suggest that a statute exempting religious groups along with others would be constitutional if it swept as widely as the property tax exemption in \textit{Walz}; alternatively, a statute intended “to promote reflection and discussion about questions of ultimate value or the contours of a meaningful life” could appropriately include religious groups without “signaling an endorsement of religion” only if the exemption extended to “an extended range of associations whose publications were substantially devoted to such matters.”\textsuperscript{77} This view falls somewhere between nonpreference as to matters of conscience and the broader view that government may aid religion and nonreligion, so long as it does so in a nonpreferential manner. It certainly appears, however, to be closer to the nonpreference as to matters of conscience view. In any event, Justices Brennan, Marshall, and Stevens evidently would support aid to religion on some nonpreferential basis.

In contrast, Justice White's concurring opinion curiously offers little in terms of establishment clause analysis. Justice White argued that the exemption in \textit{Texas Monthly} violates the press clause of the first amendment.\textsuperscript{78} Nevertheless, Justice White joined the majority in \textit{Walz},\textsuperscript{79} and apparently would favor aid to religious groups or individuals on some nonpreferential basis in cases that do not pose problems under the press clause.

Justice Blackmun wrote a separate concurring opinion in which Justice O'Connor joined. He stated:

It is possible for a State to write a tax-exemption statute consistent with both values [free exercise and establishment]: for example, a state statute might exempt the sale not only of religious

\textsuperscript{76} \textit{Id.} at 15-16 (footnote omitted).
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.} at 26 (White, J., concurring).
\textsuperscript{79} \textit{Walz}, 397 U.S. at 672-73.
literature distributed by a religious organization but also of philosophical literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong.\textsuperscript{80}

Justices Blackmun and O'Connor opt for the nonpreference as to matters of conscience view. Such a view resembles the one articulated by Justices Brennan, Marshall, and Stevens: a statute written broadly to include publications about a "good or meaningful life" might suffice. At the conclusion of his opinion, however, Justice Blackmun enigmatically stated:

\textit{[A]t oral argument, appellees suggested that the statute at issue here exempted from taxation the sale of atheistic literature distributed by an atheistic organization. . . . If true, this statute might survive Establishment Clause scrutiny. . . . But, as appellees were quick to concede at argument, the record contains nothing to support this facially implausible interpretation of the statute.\textsuperscript{81}}

Justice Blackmun seems to imply that merely including atheistic groups within the ambit of the statute would satisfy establishment clause analysis. This slides away from the view of nonpreference as to matters of conscience and toward the view of nonpreference as to matters of religion on the continuum. It is therefore unclear which variant of nonpreferentialism Justices Blackmun and O'Connor espouse—a nonpreference as to matters of conscience approach or a nonpreference as to religion theory. At a minimum, however, the two Justices would accept the nonpreference as to matters of conscience view. This is particularly significant because without their opposing votes, the Texas statute would have been upheld as constitutional.

The dissenters, Justice Scalia, Chief Justice Rehnquist, and Justice Kennedy, clearly disagreed with Justice Brennan's reading of the \textit{Walz} case. Justice Scalia, writing the dissenting opinion, asserted that in \textit{Walz}, "[t]he Court did not approve an exemption for charities that happened to benefit religion; it approved an exemption for religion as an exemption for religion."\textsuperscript{82} It should be noted, however, that Justice Scalia drew a significant distinction between direct subsidies to religion, disfavored because they divert

\textsuperscript{80} Texas Monthly, 489 U.S. at 27-28 (Blackmun, J., concurring) (emphasis added).

\textsuperscript{81} Id. at 29 (Blackmun, J., concurring) (citations omitted).

\textsuperscript{82} Id. at 38 (Scalia, J., dissenting) (emphasis in original).
income from believers and nonbelievers alike, and exemptions permitted because "the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions." Such a distinction arguably is specious; tax exemptions could be seen as indirectly diverting money from nonbelievers because they are forced, along with believers, to recoup the tax revenues lost due to the exemption of religious groups. However, the distinction seems to carry weight in the decisions and may provide some support for Professor Laycock's assertion that nonpreferentialism is not supported in the case law related to direct subsidies to churches. The subsidy cases do indicate that some aid is acceptable, particularly when offered to a class broad enough to include (1) religion and nonreligion, or (2) some variant of aid to support matters of individual (as opposed to institutional) conscience. Thus, while exemptions elicit different treatment from direct subsidies, aid is nonetheless extended in both circumstances—albeit perhaps in a manner closer to nonpreference between religion and nonreligion than to nonpreference as to matters of conscience or religion.

However, Professor Laycock's assertion that the Court has rejected nonpreferentialism is an overstatement. In Texas Monthly, each of the Justices opted for one of the versions of nonpreferentialism or some hybrid of the three. The variants of nonpreferentialism control much of the case's analysis. Professor Laycock has erred in part precisely because he failed to understand the possible variants of nonpreferentialism.

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83 Id. at 43 (Scalia, J., dissenting) (citing Giannella, Religious Liberty Nonestablishment and Doctrinal Development, 81 Harv. L. Rev. 513, 553 (1968)).
85 See Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 488-89 (1986) (handicapped student receiving neutrally available state aid under Washington statute to pay for religious education did not parley any message of state endorsement of religion); Mueller v. Allen, 463 U.S. 388, 398-99 (1983) (Court held first amendment not violated by Minnesota statute providing tax deduction for education expenses regardless of whether school was public or not, stating deduction "that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause"); Board of Educ. of Cent. School Dist. No. 1 v. Allen, 392 U.S. 236, 248-49 (1968) (New York education statute requiring local public school authorities to lend textbooks free of charge to all students including those in private schools does not violate establishment clause); Everson v. Board of Educ. of Ewing Township, 330 U.S. 1, 17 (1947) (first amendment not violated by New Jersey statute which allocated tax dollars to pay for bus fares of parochial school students as part of general program under which fares of pupils in public and other schools were also paid).
Texas Monthly is particularly instructive because it highlights the Court's similar confusion in discerning among the three variants of nonpreferentialism. The three variants nonetheless predominate and should be examined closely.

Given that Justice Souter has replaced Justice Brennan on the Court, the future of nonpreferentialism is unclear. As currently constituted, the members of the Court seem to hold the following views: Justices Marshall and Stevens hold a weak, fairly broad variant of the nonpreference between religion and nonreligion view; Justices Blackmun and O'Connor hold a weak, fairly broad variant of the nonpreference as to matters of conscience view; and Chief Justice Rehnquist and Justices Scalia and Kennedy hold the nonpreference as to matters of religion view. Like Justice Souter, Justice White's view is somewhat unclear; their views may well decide future cases. They will probably either align with Justices Blackmun and O'Connor, or with Chief Justice Rehnquist and Justices Scalia and Kennedy,86 having recently demonstrated some propensity to do so.87 If the latter, the nonpreference as to religion view—which permits the democratic branches of government the broadest latitude in aiding religion—may predominate. On the other hand, should Justices White and Souter lean toward either Justices Marshall and Stevens, or Justices Blackmun and O'Connor, the nonpreference as to matters of conscience view would control.

This stance can appropriately anchor establishment clause analysis. In a prior article, I argued that the nonpreference as to matters of conscience view better enables courts to fulfill the liberty-maximizing purpose of the establishment clause.88 I argued, as well, that such a view comports with the aspirations of the framers.89 In contrast, however, some members of the Court seem less

86 See Witters, 474 U.S. at 481 (Justice White joining in majority decision which took conservative stance); Mueller, 463 U.S. at 388-89 (same); N.Y. Times, Oct. 3, 1990, at A1, col. 4 (Justice Souter likely to align with conservative wing of Court); Wash. Post, Sept. 10, 1990, § 1, at A1 (same).


88 See Smith, supra note 2, at 502-06.

89 See id. at 510.
inclined to base such a view on a liberty-maximizing rationale and appear more inclined to accept it as a theoretical means of deferring to the majoritarian branches of government at both the state and federal levels. Such a movement away from the libertarian aspirations of the framers toward a rationale permitting extensive governmental involvement in religious matters should be cause for some alarm.

It has long been curious to me that the current cadre of conservatives on the Court indirectly support government power because they willingly discount the provisions of the Bill of Rights and emphasize theories that permit their deference to majoritarian impulses. We should fear this movement on establishment as well as free exercise grounds. It may portend a move by the Court to permit extensive government aid to religion under the guise of nonpreference, but in fact defer to the government’s desires to assist religions established in the mainstream and supported by a majority of the electorate. Indeed, the deferential shift along the continuum might continue to the point that Story’s view will predominate because it would empower the government (i.e., the majority) to act as it desires in matters of religion. This, regrettably, would continue the Court’s apparent trend to consider the liberty of minority religions to be a “luxury . . . we cannot afford.”

III. Conclusion

While Professor Laycock indulged in some hyperbole in his ar-

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90 See, e.g., CNN v. Noriega, 111 S. Ct. 451, 451 (1990) (Court denied petitioner’s writ of certiorari despite strong dissent asserting trial court’s ability to enjoin publication of information allegedly threatening criminal defendant’s right to fair trial requires threshold showing that suppression is only means of averting high likelihood of harm); Burnham v. Superior Court, 110 S. Ct. 2105, 2116 (1990) (Court deferred to state assertions of jurisdiction despite party’s due process claim); Employment Div., Or. Dep’t of Human Resources v. Smith, 110 S. Ct. 1595, 1606 (1990) (“leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred”); Lyng v. Northwest Indian Cemetery Protective Ass’n, 485 U.S. 439, 452 (1988) (“government simply could not operate if it were required to satisfy every citizen’s religious needs and desires”); Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (“It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution . . . prohibits . . . ‘endorsing’ prayer”).

92 See Gregory & Russo, supra note 8, at 288.

93 Paulsen & Smith, Free Exercise After the Peyote Case: “A Luxury . . . We Cannot Afford,” 11 CHRISTIAN LEGAL SOC’Y Q. 18, 19 (Summer 1990) (discussing Smith, 110 S. Ct. 1595).
ticle, he thoughtfully contributed to the scholarship and raised issues that deserve further analysis. In particular, I believe that he succeeded in his effort to derail the assertion that the framers expressly intended to adopt a nonpreference view to the exclusion of all others. His conclusion that nonpreferentialism constitutes a false claim about original intent is overblown, however, insofar as it is intended to debunk any historical claim whatsoever which nonpreferentialists may have to legitimacy. Similarly, Professor Laycock's assertion that the case law fails to support nonpreferentialism is inaccurate; nonpreferentialism, of one form or another, appears to apply to financial aid cases, though I would concede that the nonpreference between religion and nonreligion view approximates Professor Laycock's preferred view of "perfect neutrality."

Court-watchers would benefit by examining the underpinnings of the various nonpreference views, since nonpreferentialism is his-

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83 In a recent article, Professor Laycock elaborated on his theory of "substantive neutrality." See Laycock, supra note 7. In this thought-provoking article, Laycock highlights three theories of "neutrality," which he defines as the requirement that the religion clauses impose on government "to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance." Id. at 1001.

Professor Laycock seeks to distinguish between notions of "equality"—treating religions equally—and his notion of neutrality:

Is it sufficient for government to treat people equally when it imposes penalties and distributes benefits—to treat people equally in all tangible ways? Or do we also require government to be neutral in intangible ways as well—to be neutral in its speech and symbolic conduct? This distinction is critical to debates about religious neutrality. I will call it the difference between equality or neutrality. When I say government should be neutral towards religion, I mean to include the claim that it should not express an opinion about religion. But this is a controversial claim. Nothing in the concepts themselves will tell us whether the religion clauses commit government to neutrality in this sense, or only to equal treatment.

Id. at 997.

Professor Laycock seems to acknowledge that neither neutrality nor equal treatment, essentially a form of nonpreference, are mandated by the text of the religion clauses. This implies that neither view is precluded— a position that he was earlier unwilling to take. Despite this apparent concession, I wonder whether "substantive neutrality" adds anything truly substantive to the nonpreference between religion and nonreligion or the nonpreference as to matters of conscience views. Laycock seems to opt for a version of the former. See id. at 1015-16.

Professor Laycock's substantive neutrality theory does, however, focus on actual equality of impact, as well as facial equality. Establishment clause analysis in Laycock's view must look beyond the apparent equality of treatment to its actual impact. This insight is equally helpful for nonpreference analysis. Many times an act may appear on its face to be nonpreferential, when its implementation, in reality, is not. I agree; the courts must look beyond facial nonpreference to actual nonpreference or equality of impact.
torically legitimate and is becoming increasingly descriptive of what is occurring in the cases. As Professor Laycock noted, however, the cases involve other concerns. For example, the discussion of coercion—i.e., whether a statute is coercive in its effect—seems to indicate that, to some limited extent, the establishment clause bars any aid to religion that coerces nonbelievers.⁹⁴ A theory of coercion, like Professor Laycock’s “substantive neutrality” and the Court’s endorsement theory, may constitute helpful adjuncts to the Court’s nonpreferentialist doctrines. Such theories may help maintain actual, as opposed to mere facial “nonpreference.” However, while coercion may be a significant factor—indeed, it is arguable that if aid is coercive or substantially lacking in neutrality, it cannot be nonpreferential—it hardly maps the entire establishment clause terrain. That terrain must include an analysis of theories of nonpreference from an historical, theoretical, and practical (decisinal) point of view.

⁹⁴ See, e.g., Laycock, supra note 3, at 921; see also County of Allegheny v. ACLU, 109 S. Ct. 3086, 3102-03 (1989) (Court relied on Justice O’Connor’s endorsement theory originating from concurring opinion in Lynch v. Donnelly, 465 U.S. 668 (1984)).