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August 1, 2011: Maybe There is No Such Thing As Establishment of Religion

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Title: Maybe There is No Such Thing As Establishment of Religion

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8/1/2011—On July 27, Austin Dacey, the noted atheist and author of *The Secular Conscience*, published an essay on [Religion Dispatches](#) in which he argued, a little tongue in cheek, that there is no religious freedom.

What Dacey meant was that religious claims to exemption from generally applicable laws—think the exception during Prohibition for wine for religious use—do not differ intrinsically from any other claim for exemption for any other reason of conscience.

I basically agree with this position, which a number of academic lawyers have been making, to the effect that free exercise of religion should protect claims of conscience generally. The issue has not been that significant for two reasons. First, the Free Exercise Clause itself has been emasculated by the Supreme Court and provides little protection to anyone. Second, where religious exemptions exist, courts have tended to apply them generously to anyone with a religion-like claim.

But I have been thinking that this equality position entails more than its proponents realize. I wrote a letter to that effect to *Religion Dispatches*. The letter follows:

To the Editor:

As always, Austin Dacey raises provocative issues in his recent piece, "There is No Religious Freedom." But this time, Dacey does not take his analysis far enough.

Dacey argues that religion has no special claim to exemption from law or recognition in law. Government should not be supporting religion per se and whatever secular values religion may be said to be furthering, should be supported by government whether founded in religion or nonreligious traditions. Thus, there is no religious freedom, there is just freedom.

But the logical conclusion of this argument, is that there is no religion either. There are just normative claims of various kinds—"radical normative pluralism," as Winnifred Fallers Sullivan puts it in Dacey's article. We just happen to call some of these normative pluralisms "religious."

It should also follow that there is no "establishment of religion." Government would just be furthering one normative pluralism or another. Undoubtedly for historical reasons, government should not be permitted to endorse the normative traditions associated with Christianity or other recognized religions, but government should be permitted to endorse the nondogmatic values that these traditions further.

Dacey might agree with this. But I wonder if he would go the next step. Let us say that the nondogmatic value we want expressed is that the government should obey fundamental norms of right and wrong, should be bound by human rights. If religion is not special, then why not express that value, at least sometimes, through a formula like "one Nation under God"?

If you say that the value can only be expressed through language not associated with traditional

religions, you are not following the equality-based solution that Dacey says he supports, but are favoring one of the normative pluralisms over the others.

If religious freedom is the same as any other kind of freedom, then establishment of religion is the same as any other normative claim by government. Since governments make normative claims all the time, which I believe Dacey supports, there is no reason for a special bar on establishment of religion.

I would not take the argument that far, myself. But it is certainly worth considering. Dacey has emailed me that he wants to respond to my letter, but I have not seen his response yet. Stay tuned.