

RELIGION AT A PUBLIC UNIVERSITY

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INTRODUCTION

On March 6, 2007, the College of William & Mary announced a “compromise” solution to its polite civil war over the historic Wren Chapel.¹ In a joint statement with President Gene Nichol,² the Board of Visitors declared that permanent display of the Christian cross within the Chapel would resume.³ The cross would be moved, however, from its former place at center stage on the Chapel altar.⁴ Accompanying the relocated display would be a plaque “explaining the College’s Anglican roots.”⁵ The compromise further provided that, when needed during certain worship services, the cross could be moved back to the altar.⁶ When needed for other worship services, “[o]ther religious symbols, ... stored in the sacristy when not in use, will also be welcome.”⁷ The Board of Visitors observed that, in this way, the “Wren Chapel will continue to play its unique historic and affirming role in the life of the College.”⁸ The compromise was unanimously recommended by the William & Mary Committee on Religion in a Public University, and the Board of Visitors “accept[ed]” and “immediately” began to implement it.⁹ President Nichol said that he “fully embrace[d] it.”¹⁰ Peace was restored to campus.

But was forging a “compromise” the *right* way to deal with the Wren Chapel display and the issues it raised? Part I of this Essay argues that, according to President Nichol’s definition of what was

1. Press Release, Joint Statement by Gene R. Nichol, President, Coll. of William & Mary, and the William & Mary Board of Visitors, President and Board Accept Committee Recommendation on Wren Cross (Mar. 6, 2007), *available at* <http://www.wm.edu/news/?id=7456> [hereinafter Joint Statement of the President and Board].

2. President Nichol resigned from his position on February 12, 2008. *See* Press Release, Statement from Gene Nichol, President, Coll. of William & Mary (Feb. 12, 2008), *available at* <http://www.wm.edu/news/?id=8672>.

3. Joint Statement of the President and Board, *supra* note 1.

4. *Id.* (“The [permanent display] case shall be located in a prominent, readily visible place.”).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

at stake, “compromising” was wrong; it was tantamount to accepting defeat of an important moral principle. This Part also shows how Nichol’s organizing moral principle—that everyone should feel equally welcome in the Wren Chapel—is wrong, too.

Part II criticizes Nichol’s reliance upon *feelings*—of being unwelcome—as the relevant data for applying his principle. In fact, *both* sides described their positions principally in terms of *feelings*—of belonging to or of estrangement from the College according to one’s feelings about the Wren Chapel. This bipartisan conceptualization of the issue was wrong, and it also made compromise *inevitable*.

Part III revisits Nichol’s position. Nichol did not present the controversy as a matter of constitutional law, nor did he cite legal compulsion in favor of his view. His arguments nonetheless mimic a leading Establishment Clause test for unconstitutionality: the so-called “endorsement” test first articulated by Justice O’Connor in 1984.¹¹ This Part criticizes the endorsement test on grounds that apply to Nichol’s asserted reasons for moving the cross. This Part also proposes an alternative constitutional norm about religion, including religion in public universities.

Part IV shows that, although the “compromise” ended a disagreement, it resolved no disputed issue and shed no light on the wider problem to which Nichol and others expressly connected the cross imbroglio: “the role of religion in public universities in general.”¹² The key missing ingredient in the Wren Chapel debate was any articulated conception of William & Mary’s basic mission, its institutional common good as a public university. This common good has nothing to do with the rhetoric of inclusiveness. This common good is not about anyone’s feelings of belonging, of being “welcome,” or of alienation upon seeing the cross, contrary to the arguments of both Nichol and his critics.¹³ William & Mary’s mission consists of an objective, critically justified account of the university’s common

11. See *Lynch v. Donnelly*, 465 U.S. 668, 690-93 (1984) (O’Connor, J., concurring).

12. Gene R. Nichol, President, Coll. of William & Mary, State of the College Address (Jan. 25, 2007), available at <http://www.wm.edu/news/index.php?id=7262> [hereinafter State of the College Address].

13. See *infra* Part I.

good. *This* is the principle of the university constituents' unity, and the justifying principle of all the university's authoritative acts.

Part V describes three principles that govern and specify the role of religion in a public university. Part VI defends the claims made in Part V against an objection arising from a particular understanding of how universities are related to the truth, including the truth of religion. This objection founds upon a mistaken extension of the axiomatic skepticism of the internal intellectual life of the College, as a "marketplace of ideas," into an overall institutional stance.

Finally, the Conclusion tries to answer the questions raised by the Wren Cross controversy in light of the three principles specified in Part V.

I. NICHOL'S PRINCIPLE OF EQUAL "WELCOME"

President Nichol touched off the campus debate in October, 2006, when he decided to end permanent display of the Christian cross on the Wren Chapel altar.¹⁴ The Wren is a College-owned campus building with long-standing ties to the Episcopal Church. Its specifically Christian character was, and is, indelible and obvious. All parties to the controversy agreed that the Wren Chapel is a unique and special space, due to its long history as an adjunct of the College, its sublime appearance, and its religious ambience. Nichol characterized the Wren Chapel as William & Mary's "most revered space."¹⁵

Nichol justified his decision on the basis of negative reactions to it. His anecdotal reasons included that some a capella singers were "discomfited" by the cross,¹⁶ and that a Jewish student "vow[ed] never to return" to the Wren Chapel.¹⁷ The instigating object of these reactions shifted, however, with the reports. Some of

14. Nichol confirmed in an October 27, 2006 e-mail to students that, earlier that month, he had ordered the cross removed from the altar save on Sundays. E-mail from Gene R. Nichol, President, Coll. of William & Mary, to Students of the Coll. of William & Mary (Oct. 27, 2006), *available at* <http://www.savethewrencross.org/nicholsemail.php>.

15. E-mail from Gene R. Nichol, President, Coll. of William & Mary, to William & Mary Faculty, Staff, and Students (Dec. 20, 2006), *available at* <http://www.wm.edu/news/index.php?id=7102>.

16. *Id.*

17. *Id.*

the anecdotes pertained to the Chapel and some specifically to the cross. Nichol remarked, in relating the reports, upon the “fact” that the Chapel was “only available as a Christian space.”¹⁸

Nichol announced that the Chapel status quo was therefore “contrary to the best values of the College.”¹⁹ He said that the “unmistakable message that the Chapel belongs more fully to some of us than to others” had to be corrected.²⁰ It was “essential [that the Wren Chapel] belong to everyone” at the College.²¹ It had to be “equally open and welcoming to every member of this community.”²² Nichol focused on the cross because it was “in the heart of our most important and defining building.”²³ He implied that display of the cross entailed the existence of a caste system at William & Mary: “insiders and outsiders”; those who are welcome and those who are “only tolerated.”²⁴ But “[i]n the College’s family there should be no outsiders.”²⁵

For Nichol, one “outsider” was one too many; nothing less than a robustly equal—and universal—sense of belonging to William & Mary through the Wren Chapel would do. “Compromise” could only be, for Nichol, a betrayal of principle.

Nichol’s position is mistaken. It is not mistaken *because* it is not amenable to compromise. Some moral requirements really do permit no exceptions; one “exception” would indeed be one too many. The most basic human rights of students and everyone else at the school must be respected, no matter what. No college should permit certain forms of human experimentation or tolerate faculty-student sexual relationships. The problem with Nichol’s position is that precisely those features that make it uncompromising are deeply mistaken.

Before looking more critically at Nichol’s position, it is good to stop and take it in whole. In outline form it is this: upon hearing

18. *Id.*

19. Gene R. Nichol, President, Coll. of William & Mary, Statement Before the Board of Visitors (Nov. 20, 2006), *available at* <http://www.wm.edu/news/index.php?id=7026> [hereinafter Statement of Gene R. Nichol].

20. *Id.* Of course, the needed “correction” could well have been for the College to schedule fewer non-religious events in the Chapel.

21. *Id.*

22. E-mail from Gene R. Nichol, *supra* note 15.

23. *Id.*

24. *Id.*

25. Statement of Gene R. Nichol, *supra* note 19.

that some students had negative reactions to the Wren Chapel, Nichol concluded straightaway that assuaging those feelings was his overriding obligation. The external stimulus or occasion of those feelings would have to be fixed, or removed if necessary. And that was that. This is a very odd and most improbable way to think.

To see how odd, try substituting in our narrative for a “cross in the Chapel” some other aspect of collegiate life—football, or an observatory, or an art gallery, or a sexually explicit show, or a dogmatic professor—and ask: what would Nichol do?

Let us say, for example, that a few students report that football is a stupid and violent game that perpetuates a macho culture on campus. They say further that football makes them sick, especially when the team loses. Would Nichol terminate the football program without further ado? Or suppose that some other students complain that the campus observatory is an expensive investment in useless gazing—a morally offensive line item, the opportunity costs of which include leaving many urgent terrestrial problems unattended. Would Nichol shut down the observatory? Let us say now that still other students complain of an upper-class bias at this public university supported by all taxpayers. They cite as Exhibit A the art gallery’s big budget for modern art, which these students find offensive and uselessly effete. Would Nichol sell all the paintings, and give the proceeds to the poor?

We need not speculate about what Nichol would do in the case of a sexually explicit show. A “Sex Workers’ Art Show” occurred on the William & Mary campus during the course of the cross dispute.²⁶ In response to widespread criticism of the College’s willingness to give it space, Nichol said, “I don’t like this kind of show and I don’t like having it here But it’s not the practice and province of universities to censor or cancel performances because they are controversial.”²⁷ Of course, the objection was not *that* the show was controversial, and that it should be cancelled for that reason. The objection was, basically, that the show was degrading and immoral, and that the College for *that* reason should give it no quarter. Neither the *fact* that the show became controversial nor objectors’

26. FOXNews.com, College of William and Mary Hosts Sex Worker Show on Campus (Feb. 23, 2007), <http://www.foxnews.com/story/0,2933,254142,00.html>.

27. *Id.* (alteration in original).

feelings of disgust were the basis for the objection. Nichol nonetheless decided that, in this case, strong feelings of estrangement from William & Mary would have to be tolerated for a greater good.

Finally, what if a large number of students petitioned Nichol to fire a strident and, in their view, dogmatic feminist professor who made them feel like menacing neanderthals in class? Assume that the complainants are all male. Would Nichol begin disciplinary proceedings against the professor to assuage these students' injured psyches? Or would he stand fast by the status quo, patiently explain the concept and value of academic freedom to the disgruntled students, and frankly advise them to accept such intellectual bumps as part of the college experience?

We can be sure that none of these deeply felt student reactions would lead Nichol—or any other public college president—to straightaway grant the relief requested. Even after due consideration, most university administrators would turn dissidents away empty handed. These scenarios do not imply that Nichol was wrong to move the cross upon hearing some student complaints about it. They show, however, that his decision was either a knee-jerk reaction, or that it rested upon unacknowledged heavy analytical lifting.

Assuming that Nichol would not jettison football, astronomy, art, or academic freedom even if each of them irritated a lot of students, we can be sure that he would be depending upon *some* set of considerations and arguments that distinguishes all of them from the cross. For Nichol's conclusion about the Chapel surely implies or presupposes that the cross—if not larger elements of the Wren Chapel's Christian ambience—is not worth the price of irritating anyone.

Let us now look carefully, and more critically, at the moral norm that Nichol articulated and upon which he crucially relied: that there should be no "insider" or "outsider" at William & Mary, no "second-class" citizens inhabiting the campus. Call the subject matter of the remainder of Part I the *reality* of anyone's understanding of himself or herself as opposed to, or in lively tension with, the college at which he or she studies or works. The reader will see more clearly what I mean by *reality* in the following paragraphs. In the next Section, this Essay considers the aggravating factor of Nichol's

reliance upon reported *feelings* as sufficient evidence that someone is an “outsider.”

A. “*Outsiders*” Are Inevitable—And Not Always Regrettable

The *reality* of estrangement is often a reaction to some practice that the institution is duty-bound to continue. Outspoken professors often irritate students and frequently rankle faculty colleagues. Sound college leadership nevertheless recognizes that these negative reactions are a price that must be paid. Indeed, academic freedom often costs colleges alumni donations and support. Academic integrity and standards lead to even more feelings of being an “outsider” and second-class. Students who receive failing grades, professors who teach poorly and publish rarely, and maybe the losing football coach whose players rarely graduate all *should* feel alienated. They are not fulfilling their responsibilities to the college and, maybe, to themselves. They ought to receive signals that they are underachieving, that they are not good enough.

Many valuable contributors to the life of a public university understandably—though not inevitably and surely not deservedly—feel unwelcome and underappreciated. They feel like second-class citizens, and in a certain limited sense, they are. The dining hall waitstaff, dorm janitors, secretaries, other clerical help, and groundskeepers, among many others, understandably feel unappreciated when they look at the university’s website, which celebrates the feats of professors and white-collar employees. They look at their paychecks and feel underpaid. They look in the mirror and see “outsiders.”

Responsible university leadership must do what it can to ameliorate these feelings, to convey to all who make the place what it is the gratitude to which their efforts entitle them, and to publicize the invaluable contributions of the blue-collar staff to the whole university community. But neither justice nor the common good requires equal pay and renown for famous researchers and campus security, even though the gap between the two groups on most campuses is scandalous and should be dramatically narrowed. One has to expect that many of the less-celebrated campus workers

will, no matter what, think they are taken for granted. In truth, they are more easily replaced than accomplished professors.

Important campus symbols and rituals may also be worth the price of alienation. If precisely the controversy at William & Mary happened instead over display of the American flag, or just because the campus's "most revered space" is called a "Chapel," or because the university is named for two long-dead, rich, white Christian monarchs, neither President Nichol nor the Board of Visitors would have removed the source of alienation. Even now, some students might object to the College's "most revered space" and its still pungent Christian ambience. What would Nichol and the Board of Visitors do then?

Sometimes college leadership has to hazard estrangement it causes by sticking to its own limited competence. Suppose that hundreds of William & Mary students stage a "sit-in" in the Wren Chapel next week, demanding that the College condemn the war in Iraq. They presumably would be denied their demand, no matter how disaffected it would make them feel. This unpopular administrative decision would be justified, not as agreement with the war, but because of the institution's particular character as educational, and not political.

Take the example now of another Virginia public institution of higher learning. Suppose that a pacifist somehow enrolled at Virginia Military Institute (VMI). He or she would surely possess bad feelings about the cannons strewn about the campus, about the cult of "Stonewall" Jackson that envelops the institution, and all the other martial trappings of that military school. These feelings arise naturally; there is no doubt that, in every useful sense of the term, our pacifist is an "outsider." Yet, there is nothing necessary, inevitable, or, perhaps, wise about a state-supported military training college. It could be different; aside from Virginia, only a few states have them.²⁸ Virginia, and South Carolina, which supports

28. South Carolina is the only other state that maintains a separate military academy in The Citadel. Several states support dual-purpose institutions that have both a corps of cadets and a traditional student body. They are: Georgia (North Georgia College), Texas (Texas A&M), Vermont (Norwich University), and Virginia (Virginia Tech).

The Federal government supports the national service academies (Army, Navy, Air Force, and Coast Guard). Unlike the state-supported military schools and corps, these academies require graduates to serve in the U.S. military upon graduation. As such, the example of the

The Citadel. Someone might therefore address the obviously bad fit between our uncomfortable pacifist and the contingent and, maybe, debatable mission of VMI with an open question: which of the two must adapt? But very few would, and I do not. The decision to found VMI as a military institution was made long ago, and if it is to be revisited, it should not be—and surely *will* not be—because a pacifist feels unwelcome there. VMI simply is not the place for everyone. And there is an end to it.

B. Volunteer “Outsiders”

Nichol was motivated to move the cross by some idea about equality: everyone should feel “equally” welcome at the Wren Chapel. No one should be an “outsider” or a “second-class” citizen. But the fact is that not everyone *wants* to be an “insider.” Many cultivate in exquisite detail their position as “outsiders.”

There are contrarians in almost every group of people. Contrarians are people who oppose the best efforts of others to make them feel at home. Many persons in any institutional setting will consciously seek to establish an identity precisely *over and against* the institution most dominant in their lives. Anyone who has raised teenagers knows that parents are often a negative reference for their offsprings’ fitful attempts to establish their own identities. Anyone who has lived on a college campus will recognize that many students strive to “define” themselves precisely as *out of the mainstream*. They *want* to be rebels, nonconformists. They show it in their dress, attitude, demeanor, habits. Does anyone think that the “goths” on campus really want to be ghouls? Or do they just want to be different, and, most especially, *not* what the authorities want them to be? Many college students who are, in truth, quite conventional and predictable will protest, if challenged, that they most certainly are not.

There is, in other words, an unpredictable dialectic between institutional membership and personal identity. This is especially the case with young adults; the dialectic is especially unpredictable

protesting pacifist on campus would be inapposite, as pacifists are not permitted to matriculate at any of the national service academies.

when it comes to religion. Put the case of young adults and religious identity together, and you have real turbulence.

How so? Religious believers characteristically affirm the existence of transcendent realities that become, for them, overriding sources of meaning and value. Religions vary greatly in their tendencies to motivate adherents to immerse themselves in this world as a form of religious duty. In some faith traditions, good works are the keys to salvation. In others, the whole material world constitutes a vale of tears, a source of irredeemable misery, and an impediment to the spiritual quest. In these faith traditions, *escape* from this world is the key: withdrawal from mundane affairs and cultivation of that detachment we associate with the connotations of terms such as “otherworldly” and “sectarian.” Depending on where a particular faith tradition falls along this axis, that faith stimulates more or less ambivalence about earthly attachments, human institutions, and identification with mundane projects.

Religious belief *fosters* “outsider” consciousness. The language of faith is often the language of dissent. The stance of belief is often the stance of opposition—of antagonism towards human authority and institutions, especially towards public authority and institutions. Religious people are often ambivalent *precisely* about feeling welcome and comfortable “inside” this earthly city. This ambivalence is perhaps most intense about the *state’s* institutions.²⁹

Christians have an especially rich vocabulary for expressing this ambivalence. Christians say of themselves that they are “in’ the world but not ‘of’ it,” that the Kingdom of God is “already but not yet,” and that they “live between the times.”³⁰ They describe themselves as “pilgrim[s]” and “sojourn[ers]” because they have no final resting place here.³¹ They express the leading social consequence of this reality as the distinction between two Kingdoms, or as that between the “City of God” and the “City of Man,” and the difference between things that are Caesar’s and things that are God’s.³² Stated more discursively, and perhaps most famously, by

29. See generally R. LAURENCE MOORE, *RELIGIOUS OUTSIDERS AND THE MAKING OF AMERICANS* (1986).

30. Gerard V. Bradley, *Church Autonomy in the Constitutional Order: The End of Church and State*, 49 LA. L. REV. 1057, 1074 (1989).

31. *Id.*

32. *Id.* at 1057, 1085.

Pope Gelasius I in his late fifth century letter to Byzantine Emperor Anastasius: “[T]here are [two powers], August Emperor, by which this world is ruled ... the corrected authority of the priesthood and the royal power.”³³ This distinction is the conceptual and historical progenitor of our First Amendment’s separation of church and state.³⁴

Imagine, now, how the ordinary ups and downs of human development between the ages of eighteen and twenty-two supervene upon these religious variables. Mix equal measures of a state institution such as William & Mary, religious environs such as the Wren Chapel, and the personal identity difficulties of young adults, and the result is one potent cocktail indeed. Add a top-shelf satisfaction level—everyone feels equally at home, or as if they really belong—and you have a recipe for failure.

C. “*All in the Family*”

The rhetorical counterpart of Nichol’s “equally welcome” moral norm was a nest of images he used to describe the unity of those involved with William & Mary. He describe them as “family.”³⁵ He stressed repeatedly how the Wren Chapel defined everyone, and that it must do so “equally.”³⁶ All of these images, and the same-class citizenship norm they were meant to burnish, grossly misrepresent the extent and nature of the bonds that distinguish the William & Mary community.

It is right for any group’s leaders to stress that all human relationships are to be governed by justice and charity. This is true for colleges as well as for families, and for corporations, labor unions, neighborhood groups, communes, sports teams, cities, and states. This truth, however, does not mean that the New York Yankees or all Albanians are just like “families.” It is also true that leaders of all kinds of organizations today inappropriately use familial imagery, and that they do so without apology or shame.³⁷ This

33. *Id.* at 1085 (quoting J. MURRAY, *WE HOLD THESE TRUTHS* 202 (1960)).

34. *See id.*

35. *See supra* text accompanying note 25.

36. *See supra* text accompanying notes 22-23.

37. Two such examples are the “FedEx family” and the “Notre Dame family.” *See, e.g.*, FedEx: Careers, <https://gatewaybeta.fedex.com/us/careers/companies/> (last visited Mar. 30,

growing practice does not make such rhetoric right. Promiscuous family-speak may be harmless at retirement dinners or during misty-eyed reunions. But it is often harmful, and even insidious, because the unity of a family is very different than the unity of a college, including the College of William & Mary.

Families are characterized by parental authority; unconditioned love and loyalty, which thus do not depend upon successful performances; daily interaction outside the sway of formal rules; and immunity from interference by law and public authority, in that families are largely unregulated and thus “private.” None of these features characterizes a public university. Authority at a university is a combination of consensus, especially among faculty, and ordinary workplace norms within the administration. *In loco parentis* went out long ago even in cases in which it made considerable sense, as it does in the residential life of students. Families are bound up by ties of affection and love that, if they were cultivated by leaders of public institutions, would lead to intolerable and even legally actionable relationships. Universities are heavily regulated nonprofit legal corporate entities, encumbered by reams of red tape concerning student records, health and safety, employment policies, tax matters, and fundraising practices. Families are not.

Any college that pays more than lip service to itself as a “family” is headed for ruin—and for a lot of lawsuits. Yet any college that pays only lip service communicates deep confusion about its identity. Lip service to “family values” is inescapably manipulative as well. It is a rhetoric that always misleads because it is not true, can only be *selectively* employed, and is trotted out usually by those in charge to stifle criticism of them or to otherwise get their way.³⁸

Nichol’s usage of “family” is not pardonable because it was not an isolated rhetorical flourish. His *entire* argument was suffused by hyper-inflation of what William & Mary means, and of what binds together its constituents. Nichol’s key strategic claim was that

2008) (inviting job-seekers to “[j]oin the FedEx family”); Wally Suphap, The Notre Dame Community: A Divided Family (Dec. 12, 1997), *available at* <http://www.nd.edu/~frswrite/mcpartin/1998/suphap.shtml>.

38. Besides, in even the best of real families there are favored sons and black sheep. Remember the Old Testament story of Joseph and his coat of many colors? In even the most highly motivated and select group of co-workers, there can be petty jealousy and envy. Remember the New Testament story of the apostles vying for pride of place in Jesus’s eyes?

the Wren Chapel “defines us. And it must define us all.”³⁹ Taken literally, the claim is nonsense. Neither William & Mary nor the Wren Chapel “defines” anyone. *Everyone* associated with William & Mary is very largely defined by beliefs, experiences, relationships, and circumstances that have nothing whatsoever to do with William & Mary. These defining influences include one’s parents, upbringing, religious and ethnic heritages, pre-college education, friends and aspirations, and, of course, one’s religious beliefs.

Perhaps Nichol meant to say that everyone associated with William & Mary is partly defined by association, and that part of everyone’s William & Mary experience has to do with the Wren Chapel. Nichol might also have meant to say that the association should be positive for everyone. This is an unattainable, if not absurd, aim. Neither Nichol nor anyone else can *make* the Wren Chapel into a positive point of reference for everyone. Everyone’s identity—self-definition—is a work in progress, the product of interplay between oneself and one’s surroundings, a process of invention, discovery, reaction, adjustment, and reevaluation, both conscious and unconscious. Even the person whose identity it is neither commands nor wholly understands the process. Much less is it possible for anyone else to control what a particular experience means to me, or to you, or to anyone else.

In any group in which membership is vetted only for a limited set of skills (say, hitting a baseball or nailing the SAT), or owes largely to status (for example, a craft worker or a Virginia resident), it is foolish to expect “equal” reception of *any* symbol’s allure. There is no reason whatsoever to think that, if one assembled the one hundred smartest or fastest people in Virginia, they would all somehow equally view the Mona Lisa, *The Godfather*, or even *Seinfeld* positively. It is just as naïve—and maybe very strange—to expect that if the Wren Chapel were stripped bare of all furnishings—or filled to the brim with the finest materials—it would stimulate positive responses in all the College’s students, staff, faculty, and alumni.

Closing official communications with the exhortation, “Go Tribe”⁴⁰—as Nichol did during the cross fracas—might help solidify a group

39. Statement of Gene R. Nichol, *supra* note 19.

40. E-mail from Gene R. Nichol, *supra* note 15.

by striking the right chord for some hearers. But for those who judge the phrase to be lame, sophomoric, laden with testosterone, slightly offensive to Native Americans, or simply false because the unity of the campus does not, in truth, resemble that of a “tribe,” it is off-putting, and makes them feel like “outsiders.” Indeed, this example illustrates how Nichol’s unity overreach is intrinsically unstable. Members of a college community do not enter a family or a tribe, and do not think of themselves as doing so. Many of them will therefore reject, more or less vehemently, leaders’ attempts to tell them what their bonds to others on campus amount to. Is not a stakeholder who rejects the leadership’s definition of his or her community as a “family” an “outsider?”

These observations do not mean that modifying any symbol’s presentation is always wrong or irrational. It is rather to say that doing so in order to render its effects uniform and uniformly positive is empirically impossible. These observations do not implicitly deny the fact—and it is a fact—that many leaders, especially college heads, cultivate group cohesion by setting up iconic symbols and rituals, and then by encouraging attachment to them. Colleges have bonfires, fight songs, statues, and scenic founding narratives for these reasons. College leaders promote sports teams partly to foster community solidarity around something hopefully noncontroversial. These practices are understandable and morally unobjectionable. But, if this is what President Nichol was trying to do with the Wren Chapel, he made an exceedingly poor and miscalculated choice of icons.

II. THE MISPLACED RELIANCE ON “FEELINGS”

Opposition to Nichol’s decision to remove the cross from the Wren Chapel altar arose immediately after he announced it.⁴¹ The ensuing debate chiefly pitted Nichol, with much support among the faculty, against influential alumni and donors.⁴² Critics claimed the Wren

41. Within days of the announcement, alumni began organizing to “seek the reversal” of Nichol’s decision. Save the Wren Cross, <http://www.savethewrencross.org/about.php> (last visited Mar. 30, 2008).

42. See Andrew Petkofsky, *Petition: Help Save W&M’s Wren Cross; Discussion Is Lively as Bid Is Launched To Return Relic to Chapel*, RICHMOND TIMES-DISPATCH, Nov. 9, 2006, at B-2.

Chapel as a focal point of *their* identification with William & Mary. For them, Nichol's move was about inclusion and exclusion.⁴³ But Nichol's decision made *them* feel like second-class citizens.

Critics connected to *their* William & Mary through "storied traditions,"⁴⁴ and the Chapel of their memory was central to those traditions. The Board of Visitors articulated this intimacy between past experience and contemporary identification in a February 8, 2007 intervention: "We love [the College's] history and tradition.... We love our experiences and the memories that have made indelible marks on our lives.... It is the depth of this feeling that explains why so much passion has come to the surface over this issue."⁴⁵

The implicit stipulation on both sides was that *all* the students, faculty, alumni, and Board members were valued institutional stakeholders. All of their respective senses of feeling welcome and of being "included" or "excluded" were presumptively valid. Certainly Nichol affirmed this universal entitlement; it was the linchpin of his position. No one's feelings were to be critically evaluated and disregarded as groundless, overblown, or hysterical. None was to be affirmed as intrinsically more important or correct than another's. These were the obvious ground rules in the Wren Chapel debate. The cross was therefore jinxed to be Janus-faced, pointing this way and that—"out" and "in"—at the same time.

Critics adhering to their "storied traditions" pushed Nichol back two steps. He retreated perceptibly from his earliest explanation for moving the cross, to make the Chapel somehow welcoming to nonreligious people and a venue suitable for what he called "secular" events. Nichol also set in motion a process to have his decision reviewed. On January 25, 2007, he announced the creation of a "presidential committee" to study the "role of religion in public universities," and the "use of the historic Wren Chapel" in particular.⁴⁶ Nichol said, adumbrating the eventual "compromise," that the

43. See Save the Wren Cross, Letters to Nichol, <http://www.savethewrencross.org/blog/index.php?catid=6&blogid=1> (last visited Mar. 30, 2008).

44. E-mail from Gene R. Nichol, *supra* note 15.

45. Press Release, Coll. of William & Mary Bd. of Visitors, Statement of the College of William & Mary Board of Visitors (Feb. 8, 2007), *available at* <http://www.wm.edu/news/?id=7324> [hereinafter Board of Visitors Statement].

46. State of the College Address, *supra* note 12.

committee “will be balanced.”⁴⁷ He presented the faculty co-chairs as, somehow, the embodiment of that balance.⁴⁸

The cross controversy took shape at a busy intersection of conflicting emotional and psychic aspirations and attachments. The basic subject matter comprised feelings of being included or excluded, feelings made incompatible by virtue of their common stimulus: the Chapel, and especially its cross. For some stakeholders—the students whose reports Nichol cited—the cross impeded full embrace of William & Mary. For others, the cross facilitated and cemented their embrace. The William & Mary of *their* affections had a religious heritage. Recollection of it was part of the College’s “storied traditions.”

What is most remarkable about this set of understandings is the utter opacity of the religious symbol at its center, a symbol universally recognized and understood in our society to be about a particular set of religious claims. For most people in our country—be they Christians or not—the cross is transparent for certain affirmations about Jesus’s suffering and death. At William & Mary, however, the conversation never really penetrated the brass surface of the cross. It was functionally not only Janus-faced, but Sphinx-like.

Nichol said at one point that, for “Christians, like me, the cross conveys an inspiring message of sacrifice, redemption and love.”⁴⁹ But he treated this account as his *private* understanding. He did not attribute it to any other party. He stated that those who complained about the display “did not say, of course, that the cross is an offensive or antagonistic symbol.”⁵⁰ The problem was that the cross was not *their* symbol. It was somebody else’s.

Nichol’s opponents did not defend the cross as a symbolic representation of certain religious truths. One alumnus referred to

47. *Id.*

48. *Id.* The committee was co-chaired by Dr. James Livingston, Professor Emeritus of Religion, and Alan Meese, Ball Professor of Law. William & Mary, Religion at a Public University, http://www.wm.edu/committee_on_religion/ (last visited Apr. 1, 2008). I do not know either of the two faculty chairs. But I would be very surprised if they were not well-known around campus, respectively, as—in some important sense—a “conservative” and a “liberal.”

49. E-mail from Gene R. Nichol, *supra* note 15.

50. *Id.*

his “faith,” but spoke of it *within* Nichol’s rhetoric of inclusion.⁵¹ This alumnus said that Nichol essentially had called the “most potent and important symbol of any Christian’s faith ... exclusionary and unwelcoming.”⁵² In doing so, “the president has clearly pronounced that my family, and its Christian faith tradition, is no longer welcome here.”⁵³

“Storied traditions” was the lodestar phrase of Nichol’s opponents. Now, considered as the practices and beliefs of times past and the memories we have of them today, “traditions” can be—and frequently are—a valuable component of personal and corporate identity. “Traditions” help to distinguish any community or person as unique beings. But even the most cherished “traditions” are not debate winners—or losers, or stoppers. They are not trump cards. “Storied traditions” are subject to continuing critical appraisal and reevaluation in light of sound moral norms and contemporary facts, including, to a limited extent, the hostile feelings a “tradition” might today engender. This can easily be seen if one substitutes for the cross at the center of this controversy the Confederate battle flag, or the hard-drinking fraternity hazing rituals of yesteryear.

Facts about the past and current affection for them are not, to put it differently, *reasons* for action, any more than feelings of exclusion are. All these feelings and facts may serve as premises in a chain of reasoning that ends in the conclusion that “the cross shall be moved,” or the conclusion that “the cross shall remain.” But there is no logical possibility of any “ought to” conclusion emerging from any string of strictly factual premises, including premises involving “storied traditions.”

The Wren Chapel cross controversy was a zero-sum game. Subtract the cross and you subtract some people’s affection; leave the cross alone and you suffer the continued loss of others’. One person’s exclusion was another person’s inclusion. The “debate” at William & Mary consisted of registering everyone’s feelings on this or that side of the ledger. And there was an end to it. But

51. Bob Thompson, Alumnus, Coll. of William & Mary, Address to William & Mary Rector, President, and Board of Visitors (Feb. 8, 2007), *available at* http://www.wm.edu/committee_on_religion/statements/thompsonfeb8.php.

52. *Id.*

53. *Id.*

simply stacking up feelings of one sort—alienation—against those of another sort—affection for tradition—leads nowhere. One could, I suppose, pick one sort of feeling over another, and thereby settle the matter. But this settlement would have no validity or value, for it would be strictly a fact about you or me: “I am a traditionalist,” or “You like underdogs,” or “Neither of us lives in the past.”

Mutual concession was the only way out. There was no non-arbitrary way to side decisively with one set of stakeholders over the other. To do so would be a blowout, and could only be seen as the very uncharitable exercise of raw power.

We can see now that neither the instigating symbol nor the attraction or repugnance it engendered was transparent for any meaningful set of propositions or, even, sentences. The cross was reduced to an occasion of feeling or, at most, the subject of an intelligible stance. For example, “I connect with the College through the cross,” or “I don’t.” This posture exemplifies what I call the “transparency” problem in discourse and disagreement, and it is not only stifling of genuine debate, but it is subversive of genuine community.

Sometimes when one expresses one’s judgment that viewing hardcore pornography or recreational use of narcotics or adultery or abortion is wrong, one might say that it is “my” view or part of “my moral code.” This way of speaking is an innocent locution for the proposition, for example, “Pornography is simply wrong.” This way of speaking can be misleading, however, when used in our culture and law with their ambient moral subjectivism. When one says that pornography is wrong, one is heard to say that it is “my” morality that makes it wrong. The judgment that pornography is wrong is then a report of a fact about the speaker—me. Of course, “your” morality might be very different. The relevant fact about you would be, too. How, then, do we talk about it?

Fortunately, no one really thinks that the fact of holding a view is a reason for holding it. No one says that “I oppose this practice *because* it is my view that I am opposing this practice.” People mean and usually say instead: “I am opposed to this practice because it is wrong in the following way ... and that’s my view.” People mean and usually make clear that the possessive in such sentences—“that’s my view”—is irrelevant to the validity of the proposition asserted.

Besides, most people who say that adultery, for example, is wrong, mean that it is wrong for everyone, that it is objectively and categorically immoral. Their statements of, "I believe that adultery is wrong," or "My view is that adultery is wrong," are transparent for the proposition that adultery is wrong. And they hold it on the strength of reasons for which the announcement is *transparent*.

Of course, the proposition that adultery is wrong could be false. If it is, its falsity is sufficient reason to discard the judgment and everything it might entail. That the conviction was *mine* is no reason for you or *me* to continue holding it. Once an asserted truth is exposed as false, *no one* should continue to hold it. This is how deliberation about what people living in a community should do normally proceeds: people give and receive reasons, pertinent facts, and arguments based thereon; they then expose flaws in each other's positions, with a view to all adopting what emerges from the exchange as the most reasonable proposal. As my colleague John Finnis describes in these situations, "[o]ne is looking not at oneself, one's attitudes and beliefs, as facts about oneself, but at the proposition(s) under consideration, the reasons there are for affirming it and the reason(s) it gives for action."⁵⁴

The rhetoric of inclusiveness may have the look and sound and feel of community about it. But, it really stifles deliberation, isolates people from each other, and undermines any attempt at genuine community. When a certain conclusion or belief is communicated as a fact about *me*, or as *mine*, or as an opaque feature of my *identity*, considerations of equality and common courtesy rule out critical engagement of the proffered position. Challenging such a position is tantamount to disrespecting or even attacking the person holding it. Because attacking *persons*, as opposed to their positions, is contrary to academic values, and is simply wrong, the rhetoric of inclusiveness strangles in the cradle any possibility of critically reasoning together about what to do.

A vicious and ultimately incoherent regress soon takes over. Someone will soon say that a negative judgment about, say, adultery is "just *your* view and it would be unfair to impose *your* view upon someone who does not share it," but this evades the

54. John Finnis, *On Hart's Way: Law as Reason and as Fact*, 52 AM. J. JURIS. 25, 52 (2007).

matter asserted: adultery is wrong *simpliciter*, for you and me and everybody. Saying “it’s just your view” is also self-refuting, for the judgment that imposing one’s view on others is “wrong” is, one could just as well say, merely *your* view of justice—and it would be wrong for you to impose *it* on me.

Shared commitment to a critically justified common good—and not individual feelings of belonging—is the *sine qua non* of any community. Deliberation together about *reasons* for action—and not the mutual disclosure of facts about oneself—is the lifeblood of that community. As Finnis says, “because the first-person (practical) viewpoint is concerned not, in the end, with facts about oneself but with reasons (for action) available to anyone like me, it is the domain of *common good*.”⁵⁵

III. NICHOL’S UNSPOKEN CONSTITUTIONAL RATIONALE

William & Mary is a state school. It is subject to First Amendment constraints in favor of religious freedom. Gene Nichol is an experienced academic constitutional lawyer. Nowhere did he cite, however, legal compulsion to justify his decision to move the cross. He did not cite the First Amendment or any church-state court opinion in support of his actions.

One reason for Nichol’s reticence may have been his knowledge that the constitutionally suspect state action was more likely the College’s *use* of the Wren Chapel, and not the Chapel itself. There is no doubt whatsoever that public universities may, consistent with the Constitution, have houses of worship for particular religions on campus, at least so long as the structures are maintained by the faithful and not the state. Indeed, *some* accommodation of students’ worship needs is more or less constitutionally required. Thus, negative student reaction to the presence of the Wren Chapel as an Anglican worship space at William & Mary would be inappropriate, maybe venal, and surely no reason at all to rearrange the Wren’s furnishings. In fact, the negative reactions cited by Nichol probably owe to the Chapel’s Anglicanism *only* in conjunction with the

55. *Id.*

College's promotion of it as everyone's most revered space. Clearly it is not.

Nichol nonetheless borrowed very heavily and, at times, verbatim from constitutional analysis to justify his decision about the cross. His master concept of all-around inclusiveness, as well as his language of "insider" versus "outsider" and "second-class citizenship," track step-by-step the so-called "endorsement" analysis. This Part first describes this constitutional doctrine and then criticizes it along lines revealing further weaknesses in Nichol's stance. This Part goes on to propose and defend an alternative constitutional norm, with particular regard to the role of religion in public universities.

The "endorsement" test was first articulated by Justice Sandra Day O'Connor in a 1984 opinion about the display of a Christmas nativity scene under public auspices.⁵⁶ In that case, the Supreme Court upheld Pawtucket, Rhode Island's crèche, but only because its religious content was muted by surrounding secular trappings—Santa's sleigh, reindeer, candy-striped poles, and the like.⁵⁷ The whole ensemble amounted, in the Court's view, to an inclusive seasonal display, and thus did not "endorse" religion.⁵⁸

The basic terms of the "endorsement" test were stated succinctly in a 2005 Ten Commandments case: "By showing a purpose to favor religion [as such], the government sends the ... message to ... non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members."⁵⁹ Showing such a purpose is to perform a prohibited "endorsement" of religion.⁶⁰

The engine driving this concept is that the government must always be scrupulously neutral "between religion and religion, and between religion and nonreligion."⁶¹ The first part of this neutrality

56. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

57. *Id.* at 671.

58. *Id.* at 671-72.

59. *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring))) (internal quotation marks omitted).

60. *Id.* at 883-84.

61. *Id.* at 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). As Edward Rubin has said, neutrality is "distinguishable from separationism, at least in theory, because it also forbids government from favoring secularism over religion," Edward L. Rubin, *Sex, Politics*,

—that among the many different faiths—represents a sound understanding of the Establishment Clause, going all the way back to the Founders. The other part is much more recent, and mistaken. Adumbrated in the 1947 *Everson v. Board of Education* decision,⁶² “neutrality” between religion and nonreligion became the constitutional master principle in 1962, with the first school prayer decision, *Engel v. Vitale*.⁶³ Its present status is debatable. The “endorsement” test as a rule of judicial decision is now precarious. It *may* command a narrow majority of the Supreme Court, in that four Justices—Breyer, Souter, Ginsburg, Stevens—are firmly committed to it, with Justice Kennedy’s commitment unclear, or wavering.

There is an uncanny resemblance between Justice O’Connor’s last use of the “endorsement” analysis and the Wren Chapel imbroglio, especially to the subtle but, in my view, ultimately misguided attempts to shroud religion affirmations in the mists of history. O’Connor said in *Elk Grove Unified School District v. Newdow*,⁶⁴ a case involving an atheist’s challenge to the Pledge of Allegiance, that the phrase “under God” “ties [us] to a history that sustains this Nation even today.”⁶⁵ She illustrated her point by reference to a passage from the 1989 case *County of Allegheny v. ACLU*,⁶⁶ in which the Court was concerned to not “sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens.”⁶⁷ But the *Allegheny* Court meant the lives of *today’s* citizens. *Allegheny* found room enough in the public square for a frank recognition of religion and its role in the lives of modern Americans. *Allegheny* was not about linking today’s secularized Americans with their more God-fearing ancestors, as O’Connor seemed to suggest in *Newdow*. O’Connor was at least flirting here with upholding the Pledge as a living affirmation of some propositions about God, Providence, and America today. But

and *Morality*, 47 WM. & MARY L. REV. 1, 35 (2005).

62. 330 U.S. 1, 18 (1947).

63. 370 U.S. 421, 443 (1962) (Douglas, J., concurring). See generally Gerard V. Bradley, *The Judicial Experiment with Privatizing Religion*, 1 LIBERTY L. REV. 17 (2006).

64. 542 U.S. 1 (2004).

65. *Id.* at 36 (O’Connor, J., concurring).

66. 492 U.S. 573 (1989).

67. *Newdow*, 542 U.S. at 36 (O’Connor, J., concurring) (quoting *Allegheny*, 492 U.S. at 623).

she could not quite let herself close the deal. She lapsed instead into treating “under God” as, in effect, a storied tradition, all the while struggling with the implications of her master principle—no endorsement of religion. It was as if O’Connor embodied *both* sides of the Wren Chapel debate.

O’Connor recognized that it was impossible to identify any “brief solemnizing reference [that] encompass[es] every religious belief expressed by any citizen of this Nation.”⁶⁸ Universal inclusion was empirically unavailable. To uphold the Pledge, O’Connor could have then turned to the Founders. For them, there was an objective common good in religion. There were common benefits to promoting belief in natural religion: religion was necessary to citizens’ moral virtue, and without citizens’ moral virtue, republican government was bound to fail. Whether some citizens felt left out or like they were second-class was not especially pertinent, for the Founders understood that everyone enjoyed the fruits of a God-fearing citizenry. But to reason this way is to abandon the whole “endorsement” conundrum. O’Connor was apparently not prepared to do so.

The “endorsement” test is, in one important respect, more supple than Nichol’s imitation version of it. The “endorsement” test in constitutional cases includes an evaluative qualifier or sorting tool. Nichol’s test did not. The legal standard asks about a “reasonable observer’s” reaction to the sight of public religion.⁶⁹ Some negative reports about government proximity to religion could therefore be disregarded as unfounded, misguided, even hysterical or picayune. Nichol did not approach any of the reports upon which he relied in such critical fashion.

The weakness in both the constitutional test and Nichol’s is still the same: it is tantamount to a heckler’s veto *because* it is untethered to any sound account of the relevant institutional common good.⁷⁰ As we saw in detail earlier, the fact that some people are put off, even reasonably so, by an act of public authority is no cause to abandon that course of action. It is, perhaps, an invitation to review

68. *Id.* at 42.

69. See *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O’Connor, J., concurring).

70. For a counter-argument, see Erwin Chemerinsky, *Why Church and State Should Be Separate*, 49 WM. & MARY L. REV. 2193, 2212-13 (2008) (arguing that the purpose of the Establishment Clause is to afford a heckler’s veto).

things in light of a mission, or institutional common good. But no more than that.

This Essay will now illustrate the point using the political sphere, its common good, and dissenters. People in America are free to join peace churches if they wish. But they all are compelled to pay taxes, a substantial portion of which support the defense establishment—and, in Virginia, VMI. This compulsion is not wrong. People in America are free to opt out of the industrial economy, as the Amish typically do. But it is not unfair to compel the Amish to pay taxes to support certain industries, or to underwrite the common good in legal institutions that supervise the modern economy and settle disputes within it. Some Christians forswear reliance upon the government court system altogether. These people believe that religion requires them to first settle disputes fraternally and, if that fails, turn the other cheek. Jehovah's Witnesses at one time denied the legitimacy of all governments as mockeries of God's undivided sovereignty over the whole universe. But making all these persons pay for government institutions, including mechanisms for dispute settlement, is not unfair. It is not unfair to make them serve as jurors or referees, either, though doing so might prove to be counterproductive. People in America are free to reject scientific medicine, as Christian Scientists do. But it is not unfair to make them pay Medicare and Medicaid taxes.

These examples all indicate that it is not unfair to make people pay their fair share to underwrite what is objectively in the common good. To argue otherwise is to give everyone, really, the opportunity to veto what could be and often is a program or practice essential to everyone's welfare—including that of the objector. Free-riding is usually unfair to those who pay the bills. And it would certainly be fundamentally unfair to the community for a pacifist to possess the right to disarm our military.

We will see in succeeding Parts that a public university is obliged by virtue of its supervision of a community's life to "endorse" religion, and that its task as an institution of higher education *at least* permits and strongly calls for this "endorsement." The "endorsement" test does not really work, in other words, if you apply it to public universities. The balance of this Part argues *against* a reading of the Establishment Clause in any factual setting to

prohibit “endorsing” religion. The “endorsement” test should be altogether rejected.

The Founders most certainly did not mean to prohibit government recognition of religion as a genuinely good thing, eminently worthy of promotion and encouragement by public authority. The Founders not only contemplated but actually *practiced* a creative partnership between government and religious institutions for projects of mutual interest which served the common good of political society. The side constraints, or restrictive bylaws, of these partnership agreements were, basically, two: no coercion of individual conscience, and no favor towards any particular sect.⁷¹

The latter constraint was the Founders’ most important insight into religious liberty as a civil right. They saw that the *truth* about sectarian matters—sacred doctrines, modes of worship, forms of church polity, and rules for church membership in good standing—did not pertain to the common good. These matters could safely be kept out of political life. They were not unimportant. Arbitrating them need not, however, be the civil magistrate’s task. Theologians might contend over the details of faith and worship, but to the statesman they could be treated as matters of opinion.

The most succinct Supreme Court statement of the Founders’ constitutional doctrine on religion is from *Watson v. Jones*.⁷² The general principle of constitutional law on religious liberty was that “[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”⁷³ The Founders engineered their constitutional plan for church and state around the word and reality of *sect*. Views on such distinctly religious matters as the content of creeds and books of doctrine; liturgy or modes of worship; styles of church governance—that is, hierarchical or congregational, or national, local, or regional; and internal church discipline—what qualifies or disqualifies an adherent for community membership—were all, *in the law’s eyes*, to be treated as neither true nor false. Doctrine, discipline, worship, and governance were within the province of *faith*, characteristic of the *sects*. Contending accounts of

71. For an Accommodationist interpretation of the First Amendment, see AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 32-45 (1998).

72. 80 U.S. (13 Wall.) 679 (1871).

73. *Id.* at 728.

these matters were matters of opinion. *Heresy* and *dogma* were theological concepts. They were not legally cognizable. The doctrines of Presbyterians, Catholics, and Jews, for example, were neither “dogma” nor “heresy”—even if adherents of those faiths said so of the others, and even if, because some of the doctrines were incompatible, one or more of them actually had to be false.

The Founders took the possibility of religious *truth* seriously. They put “sectarian” matters outside the competence of government, but they did not thereby denigrate them. They stipulated a sort of mental discipline for lawmakers. By and large they held that such matters were propositions: assertions that could be either true or false. The First Amendment meant that the truth or falsity of such matters had to be put aside in civil affairs; the First Amendment neither stipulated nor supposed that the truth or falsity of these things existed. The First Amendment said that the validity of these propositions was beyond the competence of public authority.

This is the constitutional principle governing religion in public universities: no siding with one or another particular faith, no institutional affirmation of the distinctive doctrines or disciplines of any church as true, and no endorsement of any set of putatively revealed truths. All such sectarianism is out of bounds. But this norm leaves constitutionally available what Part V argues is morally required of public university leaders—that they affirm the value of religion in both the collegiate community and the intellectual life of the school.

And thus the first principle of religion in public universities is that religion is viewed the same as at a nonpublic school, except that there may be no sectarian favor in a public university.

IV. THE FALSE “COMPROMISE”

Any compromise resembles the legal settlement of a civil action. Parties to any compromise, by definition, get less than they hoped for. But they also give up less than they might have lost. Parties to a compromise characteristically decline to admit—as do parties to a legal settlement—error or fault. Each party retains the right to stand by the principles and claims that he or she originally asserted.

The “compromise” over the Wren Chapel fits this description. It is a contingent and arbitrary settlement; evidently, it was the price of campus peace. The terms⁷⁴ are carefully scripted stipulations. But they are stillborn. They are untethered to any coherent viewpoint from which a deeper logic or sense may be gathered, or out of which a trajectory for future decisions could reliably be inferred. The conspicuous eagerness with which the parties describe it as, precisely, a “compromise”⁷⁵ further evidences their wish to brand it a mutual give-and-take. Everybody gained something; everybody lost something.

But not quite everybody. One is tempted to say that the “compromise” leaves atheists, agnostics, and anyone else whose religious beliefs are not on offer in the revamped Wren “outside.” This temptation must be resisted. Nothing in Nichol’s proffered rationale for moving the cross depends upon any objector’s religious beliefs, or lack thereof. Some reports Nichol cited contained information about an objector’s religion. Some did not. For instance, the faith commitments, if any, of those “discomfited” a cappella singers were never revealed.⁷⁶ Nothing in common sense or experience warrants the inference that objectors must have been non-Christians. Most Christians are not Anglicans, and many Christians might object to the very particular portrayal of their faith inside the Chapel. Additionally, nothing in the “compromise” quiets those whom Nichol described as alienated, not by the Chapel, but by its connection to the College.

Nichol reported that over eighteen months he had received a “number” of complaints that display of the cross is “at odds” with William & Mary’s “role as a public institution.”⁷⁷ These reports were not about a student’s personal identity so much as they are objections to William & Mary’s institutional self-definition. Their claim was that William & Mary was somehow caught up in religion, especially the one on display at the Wren Chapel, in a way that it should not have been. The “compromise” will not assuage their

74. *See supra* notes 3-7 and accompanying text.

75. *See* Joint Statement of the President and Board, *supra* note 1.

76. *See* E-mail from Gene R. Nichol, *supra* note 15.

77. *Id.*

objection. It did not reduce the Wren Chapel's religious character. Its pride of place at William & Mary is intact.

Now these "outsiders" may be further marginalized. After all, everyone else seems to have gotten over their slight and rejoined the campus team. Why can't they do so, too? The presence of these residual "outsiders" nonetheless makes the "compromise" unstable. Sooner or later this reconstituted "outside" group will speak loud enough to command the "inside" group's attention. Then the "outside" group may demand that the cross display case be moved into a side room or vestibule. They may not get their way. But there is nothing in the "compromise" that counts as an *argument* against them.

These objectors to William & Mary's relationship to the Wren Chapel made a claim about what the College really *ought* to be when it comes to religion. Their complaint deserved an answer. Indeed, the opinions of students and others on campus, and of alumni and donors off-campus, about the school's mission all should be taken seriously. Taking them seriously implies subjecting them to critical analysis, and considering them in light of normative criteria: the institution's bylaws, applicable local, state, and federal regulations, and, most importantly, the institution's statement of its common good. If a proffered opinion is sound, it should be incorporated into the mission statement, or bylaws, or some other authoritative document. If the opinion is unsound, it should be respectfully rejected.

It was no answer to these objectors to present terms that some influential group happened to ratify. The "compromise" renders the Wren Chapel and the William & Mary it "defines" a bit less Christian than it was, but still palpably religious. The "compromise" thus gives the institution a deep, even transcendent, meaning and significance—what could be called William & Mary's "civil religion." The parties seem to want to affirm an important and even central role for religion at the College. Their desire to do so is not wrong-headed. But presenting it as what those who count *desire*, or as an outcome brokered by those who strove mightily for "balance," is no answer to the objection.

What is missing from the resolution of the cross controversy is a critically justified account of religion's role at a public university.

The first ingredient of *that* is the concept of an objective institutional common good. A real answer to the objectors on grounds of institutional misidentity would include a reasoned statement of what religion has to do with William & Mary, a critical defense of that statement, and an argument for how it applies to the Wren Chapel Cross.

Every human community has a common good—a unifying principle, goal, or purpose toward which members of that community cooperate. Not every group of people, however, is a community. Folks jammed onto an elevator or into a subway car are not a community. They make up a crowd, an aggregate, just so many individuals brought together by each one's goal of getting home for the six o'clock news or, maybe, for a *Wheel of Fortune* re-run. Their *interests* converge. But they do not possess a genuinely common *good*. On the subway, no one's cooperation with the others is needed to satisfy anyone's goals. One would get home just as happily, or unhappily, if the train happened to be empty. In these situations, and in many others, because there is no genuine common good, there is no community.

The existence of a common good designates a group or crowd as a community. The content of its common good establishes it as the distinctive community it is. To describe a community's common good is to describe its identity or mission. Part of any community's common good is generic. In other words, the common good of, say, a business corporation as such is different from the common good of a university, of a family, or of a religious congregation as such; but, all business corporations have a common core mission. The rest of the common good of a community is particular. Its generic identity as a business corporation is the foundation of the distinctive common good of Verizon or Nestlé or Google.

Where does one find a statement of a community's common good? In constitutions, articles of incorporation, legislative charters, "mission" declarations, "statements of purpose," founding documents of principle, even in "vision statements." Some elements of a community's common good may be inferred from long practice, elements discernibly ratified over time by the community's leaders as part of their basic identity. As time goes by, special commissions or committees may propose amendments to a charter or other

authoritative articulation of that community's common good. Such bodies may clarify through careful review and criticism just what it is the outfit is really about.

Some examples of terse mission statements—and these refer to no particular existing institution: “A liberal arts college in the Jesuit Catholic tradition”; “A brotherhood of craft workers organized to promote fellowship among its members and to improve their working conditions through collective bargaining with management”; “An association of all those interested in the preservation of America's traditional civil liberties, willing to act through recognized political channels to preserve them against conspiracies to subvert them”; or, even, the Preamble to the Constitution of the United States or almost any other political constitution.

Communities supplement their foundational principles in various ways. A business corporation does so by the company's participation in a certain industry in a certain place. A university does so by adopting bylaws. They both do so by instigating practices to run the operation day-to-day, and by treating employees and customers in certain distinctive ways.

Universities are communities distinguishable from corporations and other types of schools by a distinctive common good. The core of any college's mission consists of cultivating intellectual virtues among its members, increasing everyone's knowledge of the truth, and developing students' human potentialities. William & Mary is no exception.

Colleges and universities fill out this generic identity with all sorts of emphases and additional touches. There are research universities and teaching colleges. There are public, private non-religious, and private religious kinds of each. Most institutions of all these kinds are distinguished further by species-distinguishing emphases. Sometimes it is special devotion to an area of knowledge: there are technical colleges, liberal arts schools, and universities especially devoted to teaching and research in the natural sciences. Public colleges and universities occasionally take on the complexion of industries important in the area—agriculture, mining, or high technology. Local color and the accidents of history may filter into a college's identity and imperceptibly become part, not of its basic purpose or common good, but of its distinctive way of performing

that mission. Williamsburg, the Wren Chapel, and, perhaps, Anglicanism achieved this status at William & Mary.

To say that any community's common good is divisive, or that it creates "insiders" and "outsiders," is—strictly speaking—incoherent. It is akin to saying that what unites the community divides it. This is as true of colleges as it is of other communities. Cries of "divisiveness" may nonetheless indicate that a group's identity is changing, or that some members think it is, or that the criers have lost track of what the outfit is fundamentally about. Then it is time for a community retreat, to get its members back on track. But once all the complaints have been investigated and when the community's common good has been ratified, cries of "division" do not suggest any institutional pathology. They rather signal the presence of those discussed in Part I: the failing student, the VMI pacifist, and so many others who *really are* "outsiders."

Knowledge of the truth and transmission of it. Cultivation of intellectual virtues. Development of students' human potentialities. These are the cornerstones of any university's *raison d'être*, its basic mission, its common good. There is an important and essential role for religion in this great undertaking. A frank recognition and candid defense of it was sorely missing in the William & Mary cross controversy. Once that role is clarified, stated, and defended, however, there is no more cogency in cries that religion divided the College than that a fetish for the life of the mind divided it.

V. TWO PRINCIPLES OF THE ROLE OF RELIGION IN A PUBLIC UNIVERSITY

The first principle of the role of religion in a public university is that its role is, in principle, no different than that at any university, save that no public university may affirm, ratify, or endorse any particular religion as true. This first principle does not itself settle any question about the role of religion on campus. It rather throws the questions at William & Mary, for example, into the same tradition of inquiry that other colleges mine for answers.

The second principle is this: public universities must and therefore should recognize religion as a distinct and irreducible aspect of human flourishing. They must and therefore should affirm that

religion is a genuine human good. Based upon this recognition, a university—including a public university—will promote religion on campus in suitable ways as an aspect of healthy collegiate life.

A. Campus Community Life

At any college or university there is a teeming of extra-curricular life: athletic teams, social functions (dances and the like), cultural events, and all the interactions of daily life outside the classroom and library. At residential colleges this life can resemble that of a small town, with postal services to the dorms, health care facilities, food service, on-campus bistros, ample shopping and workout spaces, and all of the other accouterments of community life anywhere.⁷⁸ Those in authority on especially, but not only, residential campuses need a broad and sound understanding of human potentialities—and what serves to develop them—if they are to do their jobs.

Saying this is not to say or imply that campus authorities should act *in loco parentis*. Saying this is not to imply or suggest that campus authorities' jurisdiction extends to all aspects of any student's well-being. Even the parents of an eighteen to twenty-two-year-old son or daughter should respect the freedom and privacy of that young adult. Most parents eventually learn to do so. Campus authorities' job descriptions regarding the collegiate—that is, community—life of students do not extend to taking charge of their character development or to punishing them simply for acting immorally. Their task is to maintain conditions conducive to each community member's pursuit of an education. These conditions include limitations upon what some students may habitually be inclined to do, and that which may seem innocuous or even "cool" to do: playing loud music in the dorm, dressing so immodestly as to distract other people from their work, or "putting down" people by ad hominem attacks. But campus rules prohibiting these acts need not be seen as "paternalistic." They are promulgated so that fair and considerate cooperation for the common good of the institution may more easily occur.

78. Some of the larger public campuses in this country are, in fact, the size of small cities.

Among the important activities that any college should promote and aid is the religious quest and life of the students. Campus authorities' role in this matter is subsidiary: it is to *assist* the student in carrying on his or her religious search and in fulfilling his or her religious obligations. Part of the reason for this important but ancillary role is the limited competence of campus authority. It is not their job to *make* people religious by, for example, requiring chapel attendance. In truth, no one really can *make* anyone else religious. Religion consists fundamentally of interior acts of assent to truths and of voluntary adhesion to a way of life. Someone has to freely and genuinely choose to embrace a faith as part of his or her own self-definition; otherwise, he or she is not really, or at least not fully and genuinely, religious, and might just be going through the motions.

But people commonly need some help in carrying on the religious life they have chosen for themselves. And various human authorities—political, cultural, social, or educational—can encourage others to engage the largest question of meaning and value—that is, the religious question. These authorities may promote and encourage religion in various non-coercive ways, and should practically assist and aid those who ask for it.

Colleges—especially but not only those that require on-campus residence for students—are obliged to help make chaplains, worship, and counseling available at convenient locations and at times appropriate to students' religious calendars. Colleges should also accommodate students' religious practices when they conflict with college-imposed obligations. Absent extraordinary justification, there should be no exams or other performances on religious holy days absent an opportunity to make up the work without penalty another time. Colleges should not obstruct students' access to religious speakers of the students' choices. Thus lecture halls and other facilities should be made available during noncurricular hours.

There is no need to further catalog a college's duties towards religion. The duties listed above, among others, are routinely performed by those running public colleges without serious objection around campus to their doing so. Some of the duties, such as equal access to campus facilities for religious speakers, are even legally

required.⁷⁹ It is important for present purposes to establish only that colleges have some such duties, and that performing them implies recognizing religion as a distinct and basic good. In other words, colleges must “endorse” religion if they are to do their job when it comes to sustaining collegiate life.

In order for a college to perform its important but subsidiary role, college authorities cannot remain “neutral” about religion in general.⁸⁰ They cannot discharge their duties in this area while affirming nothing of significance about religion. College authorities do not need to affirm a particular religion or to endorse any or every student’s version of what is true about God and faith. But they must pick out religion from the other voluntary undertakings of students, keep that understanding or definition of religion firmly in hand, and then do a great number of things to promote it. That is what I mean when I say that they have to recognize religion as a distinct and irreducible good.

College authorities cannot discharge these responsibilities by viewing religion under some nonreligious description—say, as one more “discussion group activity,” like the Debate or Forensic Clubs; as an “arts activity,” like a capella singers or the Savoyards; or as an “ideological club,” like the Greens or College Republicans. Worship and prayer cannot be assimilated to such undertakings. Colleges operate under self-imposed imperatives to promote religious activities on campus that they would never apply equally to, say, Gilbert & Sullivan. Besides, the law for good reason forbids discrimination in admission and in hiring on grounds of religion,⁸¹ but does not do so for taste in music.

College authorities cannot treat religion as simply another “private” student activity with which they had best not interfere. Even a college with a *laissez faire* approach to students’ sexual activities should not, and probably would not, say that exams must be scheduled around religious holy days—and also whenever

79. See 20 U.S.C. § 4071 (2000) (prohibiting the restriction of limited open fora on the basis of religious or other speech content).

80. For the opposite view, see Chemerinsky, *supra* note 70, at 2211 (arguing that a bedrock principle of religion in the public university is “that a public university should be strictly secular in all the university does”).

81. See, e.g., 42 U.S.C. § 2000e-2 (2000) (prohibiting employment discrimination on religious grounds).

students like to have sex. Colleges may choose not to interfere with students' sexual immoralities, even when concern for public decency and the sensibilities of other students would call for action. But the same colleges would scarcely promote such acts as they would religious activities, would never publicly advertise and house orgies as they would religious assemblies, and would never tell professors to accommodate students' sexual habits as they would tell professors to work around religious holy days.

B. Intellectual Life on Campus

The heart of every college's common good is its intellectual life. The collegiate atmosphere of the place is important, especially to the well-rounded development of students. But some colleges have no resident students. Some commuter schools have no real campus, and may only have scant traces of the student social and cultural life that make up other colleges' rich collegiate atmospheres. But commuter colleges are colleges all the same. Their core mission comprises those things that make up the mission of the largest residential institution: teaching, learning, scholarship, and student flourishing—which includes the transmission of extant knowledge, the cultivation of intellectual virtues, and—especially at research universities—what is usually called the “production” of new knowledge.

What is the role of religion in this core activity? Public universities are bound to be awash in the study of religion. They must not discriminate in faculty hiring against persons with religious convictions—even strong religious convictions. They must not discriminate against religious viewpoints.⁸² Given the prevalence of devout believers in the United States, these rules of nondiscrimination are likely to yield at any public university a significant number of professors who are devout religious believers. At any public university that teaches humanities and social sciences—which is to say, at almost any public university—the classroom study of religion is inevitable. Any decent curriculum in anthropology, literature, history, philosophy, international relations, sociology, music, or art,

82. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

among other disciplines, will include sustained encounters with religious people and ideas. These departments will probably list whole courses on religious matters, such as: “The Bible as History”; “Scripture as Literature”; “Islam in the Modern World”; “Sacred Music in the Middle Ages”; “Religion and Party Affiliation During Reconstruction”; “The Role of Missionaries in Colonizing Africa”; and the like. These courses do not presuppose the truth of any particular religion. They do, however, present serious people who sincerely believed in religious ideas. Teachers and students in these courses will take these people seriously and study their effects upon human affairs. Otherwise, what is the point of assigning their works, or works about them?

A public university should not have a theology department. Theology is classically described as “faith seeking understanding.”⁸³ Theology presupposes a definite set of faith commitments; the intellectual explanation and exploration of these commitments are the tasks of theologians. These tasks are best left to those who believe. It is not that public universities may not have professors who are theologians; it is that having one department of theology is hard to imagine without it being identified with a particular faith tradition. Avoiding endorsement of one faith over another would probably require several such departments.

Many European universities, on the other hand, have prestigious chairs in theology, often reserved for designees of some ecclesiastical authority. Public universities in America often have analogous professorships, and may consult ecclesiastical authority before filling them. The search committee for a chair in “Catholic Studies” might consider the opinion of a local Catholic bishop in the process, lest the college appoint someone whose reputation or status as a member of that church is poor, and thus defeat, at least partly, the value of the appointment. None of these practices raises an interesting constitutional question.

83. This statement is attributed to Saint Anselm of Cambridge. See Gareth Matthews, *Anselm, Augustine, and Platonism*, in *THE CAMBRIDGE COMPANION TO ANSELM* 65 (Brian Davies & Brian Leftow eds., 2004).

Many public universities have departments of religion.⁸⁴ They are usually populated largely by individuals who would qualify as theologians within a particular faith. These departments create no interesting constitutional problem, even though their presence implies that religion is a distinct phenomenon, that study of it is a distinct discipline, and that it is important enough for students to know about religion to justify creating a department to do so. They create no interesting problem because diverse faculty members and course listings alleviate the possibility of “endorsing” any particular faith. The only possible constitutional objection left would be to say that having a religion department “endorses” religion. Indeed it does. But the “endorsement” test must be mistaken if it entails that public universities must not recognize, teach, and study so large and so important a part of experience as religion.

A public university’s religion department should not be sectarian; it should not affirm or even favor any particular faith as true or valid. The First Amendment requires that. Even so, an American public university’s religion department is likely to “favor” courses about Christianity. Demographics, student interest, American history, and the tradition of scholarly investigation into that theological tradition all make this outcome likely. “Neutrality” among faiths in this context, as in many others, cannot be a raw numeric thing. Any such preponderance of Christian course offerings raises no constitutional problem, because it does not owe to the college’s conviction that Christian revelation is true.

There is, then, no real possibility of a public university’s religion department being thoroughly “neutral” about religion. That religion is a distinct and valuable intellectual subject matter is the department’s justification. Having a religion department entails that there is more to religion than its accompanying psychology, its political effects, its expression in art, music, and literature, and so on. Otherwise, courses in those departments would exhaust the matters worth studying.

84. See, e.g., University of North Carolina Department of Religious Studies, http://www.unc.edu/depts/rel_stud/index.shtml (last visited Mar. 30, 2008); University of Virginia Department of Religious Studies, <http://www.virginia.edu/religiousstudies/> (last visited Mar. 30, 2008); William & Mary Religious Studies Department, <http://www.wm.edu/religiousstudies/> (last visited Mar. 30, 2008).

When any university founds or maintains a religion department, it is not like adding or keeping any other department. Religion is not just another scholarly discipline. The subject matter of religion is not just one more aspect of nature—biochemistry, for example—or of social life—for example, political science. Adding gender studies or nuclear physics as a university's twentieth or thirtieth department does not alter the character of the place. It does not change or even greatly affect its intellectual culture. Adding a religion department does, or at least it should. Adding another social studies or natural science or humanities department does not, or not often, present a potential challenge to who anyone in that community really is, or, to put it prosaically, what it all means. Few people on any campus regard creation of an education or botany department as an existential challenge. Yet believers and unbelievers agree that whether you are one or the other makes a huge difference to one's identity.

The difference between a campus culture in which there is an institutional witness to the fact or possibility of a greater-than-human source of meaning and value to what we do, and one in which the school's horizon is limited to this world, is no matter of degree. The institutional difference is so large that "neutrality" between the two possibilities is scarcely imaginable. To put religion out there as a distinct—and, given its nature, obviously important—field of inquiry is to open up a world of possibilities that no other institutional move can possibly open. Many people on a given campus may oppose precisely such a move. It is likely that most, if not almost all of them, hold that religion is a fable. They hold that religion is a vast and awe-inspiring human projection, but that is all that it is. To adapt Gertrude Stein's opinion of Oakland, there is no there, there:⁸⁵ religion is a distinct but strictly human phenomenon, even though admittedly the humans being studied believed that there is a transcendent reality with which they sought some harmony.

To this challenge I submit this two-part response. The first part is that we may have come across an implication of the constitutional norm that binds public universities—an implication that puts

85. GERTRUDE STEIN, *EVERYBODY'S AUTOBIOGRAPHY* 289 (1937).

private schools in a different position. No law prohibits a group of dedicated atheists from setting up a school in which they mean to educate atheists; perhaps some readers think this describes many colleges these days. So long as these “free-thinkers” abide by nondiscrimination laws, they are free to define the common good of their institution in strictly materialist terms. As the Cornell astronomer Carl Sagan famously said, “The Cosmos is all that is or ever was or ever will be.”⁸⁶

The problem for public schools inclined towards Saganism is that the Constitution forbids them to disparage religion. The Establishment Clause’s neutrality norm prohibits entrepreneurial public school atheists from asserting, implicitly or otherwise, that religion is a delusion. Thus, public universities may not be at liberty to forego a religion department for the reason that religion is false. Such a decision may be justified by budgetary constraints, a rational division of labor among several schools in the one state system, emphases upon science or social studies, or lack of student interest—but not on grounds of a disbelief.

The first part of this Essay’s response, in other words, is that the law may, in some sense and other things being equal, call for a religion department at public universities. More important is the undeniable truth that the law surely permits it. Although it is reasonably clear that materialist or atheistic convictions may not be acted upon by those in charge of public university curricula and structure, belief in a greater-than-human source of meaning and value certainly may be. Leaders who do so believe, then, should—given the stakes involved and the impossibility of neutrality—create and maintain a department of religion, or provide some equivalent impetus for the integration of religion into campus intellectual life. This is the second part of this Essay’s response. It is also the third principle of religion’s role in the public university: public universities are *prima facie* obligated to create a department of religion, or its substantial equivalent, in order to satisfy their duty towards students to introduce them to all aspects of the truth about the universe in which they live.

86. CARL SAGAN, COSMOS 1 (1985).

VI. OBJECTIVE TRUTH AND THE MARKETPLACE OF IDEAS

The academic culture of universities is often said to be a “marketplace of ideas.”⁸⁷ The description is apt. In financial and commodities markets, there is no overarching or canonical set of indubitably right outcomes, no uniquely right or perfect end-state. The economic marketplace is the scene of constant buying and selling, bounded by rules of fair and orderly exchange. After that, to each his own. It is the realm of “private ordering.” In the sense established by these observations, there is no “truth” in the marketplace.

The intellectual collaboration that takes place on campus resembles such a marketplace. Academic exchanges operate according to norms of relentless, perpetual inquiry. There is no final resting place in view, no perfect resolution, no ending. Intellectual life at universities is governed by norms of scholarly exchange. Whatever emerges from discourse and debate guided by those rules is the state of play, at least for now. No higher pedigree of correctness is really within the world of the “marketplace of ideas.”

The rules of this intellectual marketplace are plentiful. They include respect for and willingness to listen to differing points of view; no *ad hominem* attacks and arguments, because the truth or validity of any proposal is logically independent of anyone who holds it; an abiding willingness to give reasons, argument, and evidence for any proposal one advances; and an understanding that nothing but the force of argument is to carry a conclusion to acceptance—neither coercion, nor inducements, nor anything else is a legitimate part of the search for truth.

A casual observer of our admittedly ideally depicted “marketplace of ideas” might look at it and say, “Truth is the enemy of free inquiry.” This naïve observer might say that there is no truth on campus, that there are only questions and no “answers.” This observer might therefore object to this Essay’s theses about institutional affirmations in favor of religion, saying, “That’s contrary to the nature of the place as a ‘marketplace of ideas.’”

87. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (observing that “[t]he classroom is peculiarly the marketplace of ideas” (internal quotation marks omitted)).

This objection founders upon a misunderstanding of the limited and axiomatic nature of the marketplace rules. The rules of campus inquiry—like those of economic markets—are not incompatible with the existence and the participants' affirmation of a great number of truths about the marketplace. The "marketplace of ideas" presupposes many truths, including some that market participants are free to debate and deny. This asymmetry might strike our casual observer as strange, and perhaps as incoherent. But the market as an intelligible practice that an institution might reasonably support, and as a practice worth any conscientious person's participation, surely rests upon an ample portion of such truths.

Among the truths that the market presupposes are: the possibility of discovering the truth through exchange; that rational discourse is the method by which truth is discovered; that inquirers are beings who deserve a certain respect; that inquirers are the sort of beings who respond to argument; that inquirers are also the sort of beings who are morally obliged to assent to truths once the reasons for doing so are made plain; and that inquirers will abandon false proposals once their falsity is demonstrated. After all, what is the point of setting up an exercise to discover truth if no one has obligations to the truth once it is discovered?

There is another sort of asymmetry in this marketplace's relationship to institutional affirmations of truth. Many questions of human rights, morality, authority, and the whole point of learning are freely debated at colleges as part of the intellectual give-and-take. Yet the institution is never in doubt about them. Examples of truths that colleges as institutions robustly affirm and stubbornly defend include moral norms about how to treat people. Therefore, even though individuals are free to dispute the premise, the college will surely see that there is no human experimentation or use of degrading epithets on campus. Large questions about the existence of morally legitimate political authority are mooted on campuses while the campus police enforce order in the lecture hall. People on campus are free to dispute, criticize, and even to reject the institution's mission statement. But their freedom to do so does not lessen the objective and obligatory character of the college's common good. Nor is it a criticism of the institutional action predicated upon it.

In *Rosenberger v. Rector & Visitors of the University of Virginia*, UVA's standard agreement governing aid to student groups provided that the benefits "should not be misinterpreted as meaning that those organizations are part of or controlled by the University, that the University is responsible for the organizations' contracts or other acts or omissions, or that the University approves of the organizations' goals or activities."⁸⁸ The institution, by this means, distinguished its viewpoint from that of the speakers it funded. It could therefore affirm what speakers denied, and vice versa. Even so, it is very unlikely that the University would ever approve a grant to a student group that put on black-face minstrel shows, or that promoted Holocaust denial, or that published a lampoon devoted entirely to caricatures of Muslims. The institutions' overriding obligations of basic human respect would trump the putative freedom of marketplace participants.

Much more could be said about the intricate relationship between the axiomatic skepticism of intellectual exchange on campus and institutional affirmations of truth, including the truth about religion. Those additional complexities are not necessary, however, to refute our casual observer's objection. Colleges and universities affirm a great many truths, and we are all the better for it. The "marketplace of ideas" is the better for it. So the objection fails.

CONCLUSION

Moving an object—any object, including the Christian cross—from one physical position to another is a chunk of behavior, an observable event in time and space, a raw datum. It is, so far described, an unintelligible occurrence. It is not yet a human act. The difference between raw behavior and a human act is the difference between saying "someone with a knife cut into the flesh" and saying "the surgeon began the operation," or "the assailant stabbed his victim," or "the coroner began the autopsy," or "the cook turned quickly and accidentally cut her helper's arm." Same behavior, different acts—with very different attendant moral evaluations and legal consequences.

88. 515 U.S. 819, 824 (1995) (internal citations omitted).

Consider the behavior described by onlookers as “he drove his car right into her and killed her.” A first-year law student might be snookered by his professor into demanding arrest and prosecution of the driver. But snookered only once. For the student will be immediately made to see that the same behavior *could* be murder, if the driver *meant* to kill the pedestrian; manslaughter, if the driver was drunk; criminally negligent homicide, if the driver was speeding and failed to heed a stop sign; civil wrongful death, if the driver failed to keep a proper lookout; or merely an accident for which the driver bears no legal responsibility. Same behavior, different acts, with very different moral evaluations and legal consequences. The novice law student jumped the gun. One cannot begin to morally and legally judge anyone’s behavior without more. That is because one cannot know what anyone is actually doing unless one knows what they are up to, what they are trying to accomplish. Human acts are identifiable by their object. What anyone is doing is a function of what they are thinking about and choosing to do.

So the question, Was President Nichol right to move the Wren Chapel Cross? is impossible to answer. Relocating the cross from Point A to Point B is a chunk of raw behavior. It is not yet a human act susceptible of evaluation. The question, Was President Nichol right to move the cross to make the Wren Chapel equally welcoming to everyone? is, on the other hand, quite intelligible. And the answer is no. What if he moved the cross to make everyone *feel* equally at home, or to, at least initially, secularize the Wren Chapel? The answer also is no. All these acts were seriously misguided, and rightly opposed, for the reasons presented earlier in this Essay.

Moving the cross could have been a very different act, with a different evaluative conclusion in tow. The College of William & Mary is not a Christian institution, much less is it an Anglican one. It is a public institution in which religion and the religious life of its members have important roles. But constitutional law, if nothing else, prohibits William & Mary from affirming the truth of Christianity, or of any other particular set of revealed truths. This is not to say that leaving the cross where it was in September 2006 would have been wrong. It is to say that, because William & Mary is legally disabled from consistently witnessing to the truth of Christianity, concern for the integrity of the Christian message

could have prompted calls to move the cross after, for example, the College sponsored a sex workers' gala.⁸⁹ Then, highly motivated, probably Christian, alumni might have demanded a separation of the College from the Chapel—or some sort of de-Anglicanization of it—precisely to protect the integrity of the faith. If the behavior of moving the cross were the act of forestalling scandal, supporting it could even be the duty of those alumni who criticized Nichol.

What should President Nichol have done in response to the complaints he received about the Wren Chapel? One reasonable response would have been to leave the cross alone. The complaints presented a golden opportunity for Nichol to clarify the role of religion and of the Wren Chapel at William & Mary. He could have started by emphasizing that William & Mary is a public institution that does not endorse Anglicanism, or Christianity in general, over other religions. He could have further explained that the historical fact of the matter is, the College was blessed with a magnificent symbolic affirmation of the vital role that religion plays in the collegiate and intellectual life of the school. The Chapel's Christian provenance and appearance accented its appeal for many. But for everyone at the College this unique and revered space reflected the crucial place of religion in the school's common good, or mission.

Nichol might further have said that not everyone will find the Chapel endearing or inspiring, just as not everyone finds the College art gallery, or its historical relationship to Anglicanism or to the Old South, or its predominantly secular character edifying. Nichol could have proposed that the Wren Chapel—like every other building, class, and event on campus—is more or less “fully” experienced by different people. That is the way it goes with symbols.

Nichol might also have said that, though William & Mary may be unusual for being a state school that started as a sectarian institution, many of today's private secular universities started that way. Harvard and Yale are the most prominent of many examples. Institutions of this latter sort commonly retain and use buildings encrusted with the trappings of religious sponsorship long since abandoned. There is no big deal on those campuses about it. There need not be at William & Mary.

89. *See supra* notes 26-27 and accompanying text.

Nichol could have then confessed, as he did during the controversy, that for Christians such as himself, “the cross conveys an inspiring message of sacrifice, redemption and love.”⁹⁰ He clearly regarded this as a private meaning, but it need not be so cabined. Nichol might have said that the meaning of the cross was not exhausted on Christians. The cross, he could have said, possessed some meaning for everyone as an example or illustration of certain universal values, such as “love” and “sacrifice” and, perhaps, “redemption” of a sort. One does not have to affirm the truth of Christian revelation to affirm that, within the realm of human understanding, the man who died on the cross was put to death for his convictions, and possessed some sense of laying down his life for the sake of others.

Nichol could have added that the College’s “storied traditions” and the numeric preponderance of Christians at William & Mary made the Wren Chapel the right venue for many of the College’s high-end occasions. Religion almost always comes packaged in real sectarian trappings. It is not that there is no such thing as “natural” religion, the core philosophical truths about God available to human reason. It is that almost no actual believer stops there. Surely no worshipping community on campus does. The institution’s endorsement of religion must necessarily often be by and through favor towards local sectarian expressions such as the Wren Chapel. So long as necessary steps are taken to make clear that William & Mary is not an Anglican institution, this necessity is close enough to a virtue.

What about the complex behavioral mosaic described on the first page of this Essay—the “compromise?” Precisely as a “compromise” of incompatible feelings engendered by the cross, the settlement deserves harsh criticism. The terms agreed upon may still be supportable, though, so long as they are separated from the misguided process that gave them life. The terms announced are consonant with—though not required by—a sound understanding of religion’s role at a public university. These terms could be defended as an intelligible and prudent adjustment to better foster that role. Though the Board of Visitors did not say so, its intent appears to

90. E-mail from Gene R. Nichol, *supra* note 15.

have been to explain the preeminence of this particular religious symbol as an artifact of tradition and history, and not as evidence of the College's conviction that Anglicanism, or Christianity in general, was superior or favored—or true. If the Board had said that, it would have been close to right.

The compromise reflected the Board's conviction that the Wren Chapel needed to keep its Christian heritage to remain connected with some institutional stakeholders, including the many alumni for whom the Chapel as it was looms large in fond memories. The Board of Visitors also asserted that the Chapel needed to be a "living space" for all sorts of "religious and spiritual observance" in order to connect it to other stakeholders, perhaps chiefly contemporary students and faculty.⁹¹ The terms agreed upon made the Wren Chapel more suitable for non-Christian religious events, even as its traditional identity as a distinctively Christian space was maintained. If the Board's announcement had included a forthright affirmation of religion's central significance to the College's life and study today as ever, the stipulations described above would be supportable.

91. Board of Visitors Statement, *supra* note 44.