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Secularism, Religion, and Liberal Democracy in the United States

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This essay is divided into three categories: some brief remarks about forms of secularism, an outline of American constitutional law as it relates to religion, and a discussion from the standpoint of political philosophy of the proper place of religion (and other similar perspectives) in making political decisions within liberal democracies. Because the audience for whom the oral comments from which the essay is derived was mainly non-American, the middle part of the essay sets out many propositions familiar to anyone acquainted with this branch of constitutional law. And because of the informal nature of the original presentation, I offer my own views without extensive citation or detailed analysis. Except for the first part on secularism, everything in the essay is defended in two volumes I have written on the religion clauses,[1] and the third part adopts much of the actual language of one chapter.[2] With some frequency, I footnote to chapters in the books to provide the reader an easy way to assess what I have said. In these chapters, one can find references to relevant cases and significant scholarly work.

I. VARIETIES OF SECULARISM

Secularism can be a confusing and slippery term. In some of its modern uses, it can refer broadly to social values or to the political order, and it can mean a kind of hostility or negative attitude toward religion or a sort of neutrality or indifference.

Communist countries in the twentieth century were, for the most part, explicitly antireligious. They did not strive to stamp out traditional religion altogether, but they discouraged it and taught Marxist atheism in the schools. One who wanted to rise in the Party or government

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1 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS (2006) [hereinafter FREE EXERCISE]; 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2008) [hereinafter ESTABLISHMENT].

2 ESTABLISHMENT, *supra* note 1, ch. 23.

would not openly be a churchgoer. In much milder form, I think that modern Turkey and France have similarly tried to counter traditional religion and its influence, at least in political life, although without explicitly endorsing atheism.

As far as the law is concerned, the United States is secular in a very different sense. The basic idea is that the government is to leave religious practice free and to stay out of religion. Just as government is not to exercise religious authority, so also religious leaders are not to exercise political authority. But people can be openly religious and succeed in politics; indeed, someone who admits to atheism is highly unlikely to succeed. And it has never been broadly assumed that religious groups should refrain from political involvement. In our recent history, the most active religious groups have been theologically conservative and on the political right; but religious leaders on the left were vital in the abolitionist movement against slavery, in the civil rights movement of the 1960's, and in opposition to the Vietnam War. And one might expect their influence will increase with the Obama administration.

Whatever may be the stance of law and government, I believe we can think of cultures as being heavily religious or secular. In Puritan Massachusetts, religion was at the center of social life, and in the nineteenth century, ordinary sermons of clergy were routinely reported in the press. That no longer happens. Although most citizens sincerely say they are religious and that religion is important in their lives, much popular culture, and also elite culture if there is a difference, is dominantly nonreligious. It is a rare movie or T.V. show that seriously treats issues about religion, although various books with religious themes sell widely.

As with the law, our secular culture is not antireligious. It is more nearly indifferent to religion as such. However, many political liberals, both those who themselves have no religious convictions and those whose theology is liberal, do tend to be dismayed over theologically conservative evangelical Christians, partly because these Christians tend to support politically conservative measures, such as restrictive abortion laws and a refusal of equal rights to gay people, and tend to reject well-established scientific theories in favor of biblical literalism.

Many Americans have a vague idea that religion is essentially a private matter—between a person and his or her God (or some analogue of God)—and sometimes secularism is understood as relegating religion to the private realm. Many other Americans participate actively in corporate religion and think religion speaks to broad aspects of social life. One might believe that religious groups, whatever other ways they may reach out to the broader culture, should stay out of politics, but such a view is neither part of our history nor any present consensus. I

return to the subject of religion and politics after summarizing some of the basic law in the United States as it touches religion.

II. CONSTITUTIONAL AND RELATED NORMS IN THE UNITED STATES

A. *The Two Religion Clauses*

The First Amendment to our Federal Constitution says, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof" before going on to protect freedom of speech and freedom of association. These original clauses left states free to establish religion if they chose, and about half the states then had some form of establishment. The last of these ended in 1833.[3]

According to the Supreme Court, the post-Civil War Fourteenth Amendment made most of the Bill of Rights, including the religion clauses, applicable against the states.

The Free Exercise Clause protects freedom of belief and worship. The government cannot penalize people or deny them privileges because it disapproves of their religion. It can, however, prohibit harmful actions even if they are aspects of religious ceremonies. It can, for example, prohibit child sacrifice or snake handling.

The two clauses together are understood to require equal treatment of various religions, and to forbid discrimination on religious grounds by the government. Statutes passed by Congress and the states extend a rule of nondiscrimination to private businesses, hotels, restaurants, hospitals, and so on. The two clauses together are also taken to forbid courts from deciding what version of a religion is the true one or is most faithful to a tradition. Suppose, in the present Anglican controversy over the ordination of gay priests and bishops, a local Episcopalian church withdraws from the national communion. A court must resolve the dispute over who gets the church building on some basis other than faithfulness to Anglican tradition and practice.[4]

B. *Free Exercise*

The big issue over free exercise concerns laws that are not themselves directed against religious practice. If a law, say against

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[3] *Id.*, ch. 2.

[4] Two recent Episcopalian cases decided by highest state courts are *Episcopal Diocese of Rochester v. Harnish*, 899 N.E. 2d 920 (N.Y. 2008), and *In re Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009).

using peyote, is generally valid, do members of a religion have any free exercise claim to use peyote in worship services? For roughly three decades the Supreme Court, and courts below it, entertained such claims.[5] The linguistic standard was that the government could stop such behavior only if it had a "compelling interest" that could not be satisfied in another way. The compelling interest language was always misleading; noncompelling interests were taken to be strong enough. But in 1990 the Supreme Court essentially wiped out the free exercise right altogether. If a law was generally valid, that was the end of the inquiry. Legislatures could grant exemptions if they wished, but the Constitution did not require them. Congress and some states have responded by putting the compelling interest language into legislation. Thus, a small Brazilian sect was able to import a tea for its worship that contains a forbidden hallucinogenic substance.

When exemptions are granted on the basis of religion, courts need to make some inquiries that can be difficult. What counts as religion? Are those making a claim sincere? How strong is the burden on their religion? How strong is the government's competing interest?

This treatment of exemptions is one strong indication that the secularism of our law, if one calls it that, is not hostile to religion; indeed, it treats liberty of religious practice as a very important value.

C. *Nonestablishment*

In the modern law of the religion clauses, there are certain tensions between free exercise and nonestablishment. Promoting free exercise may sometimes seem to involve an establishment of religion. For the most part free exercise and nonestablishment go together. The historical establishments to which early Americans responded included outright limits on the exercise of other religions, or at least various privileges available only to members of the established church.

We can understand free exercise values as involving the importance of allowing people to profess their beliefs about transcendent reality and engage in the religious practices that seem right to them. Giving people the freedom to choose in this area of life is one vital aspect of personal autonomy. At least within modern cultures filled with diverse citizens, protecting religious freedom also promotes social harmony. And it is one crucial recognition of the equality of citizens. By and large I think these values are best served when the government refrains from establishing any religion.

Can religious liberty exist *with* establishment? Of course. Many

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[5] FREE EXERCISE, *supra* note 1, at 29-33.

countries in Europe maintain established churches and afford religious freedom to their citizens. But three cautions are in order. First, these establishments have become progressively mild over time. Second, I believe nonestablishment is *more* enhancing of religious liberty than even mild establishment. And, third, the comparative vitality of religion in the United States and most European countries suggests that over time nonestablishment contributes to religious belief and practice, that the clumsy hand of government does more to stifle religion than to enliven it.

One major area of Establishment Clause litigation concerns the government's involvement in forms of devotion, which I take broadly here to include the placement of religious symbols on public property. The most important cases in this domain have involved public schools. The general position is that the government should not be undertaking or sponsoring devotional exercises.[6]

One notable exception to this position is the government sponsorship of religion in the military and in prisons. In closed environments controlled by the government, free exercise may be possible only if there is a degree of government sponsorship. This is a domain in which absolute nonestablishment would impinge on free exercise. There is room for argument about the details of various programs, but some government support of religion is needed.

Another exception to any strict rule of nonsponsorship concerns the content of many government ceremonies. President Obama's inauguration had a lengthy invocation and benediction, with specific references to God and Christ. The practice of such ceremonies, which fit the religious convictions of most Americans, undoubtedly conveys a degree of approval of the religious ideas expressed.

About displays of religious texts and symbols by the government or on government property, the Court looks to see if a display conveys a religious message. It is all right to include the Ten Commandments with other notable examples of fundamental laws; it is all right to include a crèche with secular symbols of Christmas. But public school authorities cannot require that the Ten Commandments be placed in all classrooms; the crèche cannot be displayed in a manner that reflects approval of its religious message.

Decisions to this effect were preceded by the Court's rulings that public schools could not engage in devotional prayer and Bible reading. Although these rulings are still highly controversial, they seem to me undoubtedly right.

One problem is that there is no universal prayer and no version of the Bible acceptable to everyone. Public schools in the nineteenth

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6 ESTABLISHMENT, *supra* note 1, chs. 4-7.

century were really nondenominational Protestant. The instruction and prayers were of a kind most Protestants could approve, and Bible reading was from the King James Bible. This was one reason why Roman Catholics regarded themselves as unfairly treated and Catholic parents were urged to send their children to parochial schools.

But even if one could find a form of prayer and version of the Bible acceptable to all Christians and Jews, that would still leave as outsiders Muslims, Hindus, Buddhists, atheists, and agnostics. Some minority children and their parents might not mind the exposure to the country's dominant religious practices, but for others it would be seriously offensive. There is no doubt that a government that undertakes the devotional practices of a part of its citizenry, even a large minority, is establishing religion.

The government cannot teach or promote particular religious ideas as true or sound. This principle is reflected in the cases banning displays of crèches and the Ten Commandments that involved implicit assertions of religious truths. A minority of Supreme Court justices has claimed that it is all right for American governments to endorse or promote the notion of a beneficent God, a notion shared by Christians, Jews, and Muslims; and it is possible that subsequent appointments to the Court will turn that minority into a majority. I think that shift would be unfortunate.

The crucial battlegrounds for the teaching of religious ideas are our public schools.[7] Let me begin with three preliminaries. First, schools can no more teach atheism or agnosticism as sound than they can teach the truth of Christianity. Second, in their instruction about science, morality, and political theory, schools will inevitably teach some ideas as true that conflict with the doctrines of some religions. In teaching that the earth is not the center of the universe and that discrimination by gender and race is unjust, a school will run afoul of the opinions of some religions. This conflict is unavoidable. What the school cannot do is directly to teach the truth or falsity of the religious ideas themselves. Third, although schools cannot teach religious truth, that does not mean they must refrain from teaching about religion, or introducing religious texts in courses in literature, or including religious music at concerts. Religion is a crucial aspect of Western culture and other cultural traditions around the world. Any education that neglects it is inadequate. But all these forms of including religion in education can avoid assertions of theological truth and falsity.

The main controversies over teaching religion in the United States have occurred with respect to creationism, evolution, and intelligent design. Few doubt that evolution should be taught; it is by far the

[7] *Id.*, chs. 8-9.

dominant scientific theory about the development of animal and plant life. As the Supreme Court has held, creationism in a version that fits the literal text of Genesis does not belong in science courses, even as an alternative to evolution. The main problem is *not* the possible mention of God; one could talk about spontaneous generation without mentioning God. The basic problem is the lack of real scientific evidence that the world and its creatures all developed in a few days or that the major varieties of plants and animals appeared at the same time.

The issue of intelligent design is more complex, indeed a lot more complex than the proponents on each side make it. No doubt, many of the present advocates of intelligent design are creationists, trying to get a piece of the pie since they can't have the whole pie. In Pennsylvania, a district court rejected a reference to intelligent design mainly on the basis that the aim of the school board was religious. But that does not quite tell us what the theory itself claims.

What it claims, I believe, is that there is a limit to science, itself established by scientific evidence, and that the most plausible way to account for what science cannot explain is an intelligent designer. So understood, the theory is neither based on religious premises nor is itself really a scientific theory.

Let me explain. We are talking here about intelligent design as a theory that is a competitor to undiluted evolutionary theory, not a view that one can accept every claim of dominant scientific views and still believe that all of existence points toward an intelligent creator.

According to this competitor version of intelligent design, when one compares evolutionary theory with the known facts about the world, one can see that neo-Darwinian evolutionary theory falls short in explaining all that has developed. Evolution may explain a lot, but it can't explain everything, and its very premises make it unlikely that it will fill the gaps in the future. When we reflect on what may be needed to fill the gaps, an intelligent designer (or designers) is the most likely explanation. So put, the theory rests on facts discovered empirically or in a scientific way.

Why is this not a scientific explanation? Because what it uses to fill the gaps does not tell in an empirical way what causes the designer to act or will lead to his future action. It provides an explanation that goes beyond science to tell us what science cannot explain. It is about the limits of science. Once one understands that, it is easy to see why no one should expect positive evidence for intelligent design.

If the theory does not yield a scientific explanation, isn't it nevertheless appropriate in science courses to teach about the limits of science? Put this way, I think the answer is yes.

However, it is an extreme stretch to offer intelligent design as *the* alternative to neo-Darwinian evolution. First, it is quite possible that

neo-Darwinian theory can, or will in the future be able to, explain all that it aims to explain. And if some revision or supplement to the theory turns out to be needed, we have no basis to suppose that it will be beyond science. Science has again and again proved able to explain things that once seemed beyond science. At most, intelligent design is one possible explanation for any gaps that present evolutionary theory may leave. I think it should be constitutionally permissible for a science teacher to mention it in that way, although given the overwhelming assurance of scientists that evolutionary theory is as complete and as persuasive as many other scientific theories, the more prudent course is to mention that some believe it leaves gaps, without getting into just how those gaps might be filled.

A qualification of sorts to the principle that the government cannot promote religious ideas: A degree of equal treatment has been said to be required by the free speech clause. If a government makes space available to private persons to express all sorts of ideas, or a school makes space available for clubs after school, it cannot exclude religious ideas or religious clubs.[8]

The majority of Supreme Court cases under the Establishment Clause have involved financial aid to parochial schools.[9] The Supreme Court has moved from being very restrictive about such aid to approving a significant voucher plan in 2002, under which private nonprofit schools could receive a significant percentage of the tuition costs for students from relatively poor families. The vast majority of schools benefiting were religious.

To understand this development, it helps to clarify two points and to draw an important distinction. The first point is that a state or municipality can, if it chooses, finance only public education; it need not help pay for private education, however onerous the resulting burden on parents who feel their children must be educated in religious or other nonpublic schools. The second point is that a state cannot favor religious schools over other nonprofit private schools.

The important distinction is between pre-college education and other benefits religious groups provide. Although disagreement exists over whether religious groups should be able to use religious criteria in hiring for programs supported by public money, few doubt that religious adoption agencies, hospitals, and soup kitchens may be aided along with nonreligious ones.[10]

It is only aid to parochial schools that has generated intense controversy. For much of the country's history, the great majority of these schools have been Roman Catholic. Many have seen in the

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[8] *Id.*, ch. 11.

[9] *Id.*, ch. 19.

[10] For issues that do arise with such aid, see *id.*, ch. 18.

resistance to aid an indefensible anti-Catholic bias, and it would be foolish to deny that element. But the full explanation is more complex. The ideal of the public school as a melting pot that draws in children of all religious and national and ethnic backgrounds, and produces citizens of a single nation, has long had a powerful hold; and public schools over the years have helped to create a country that enjoys a degree of unity out of incredible diversity. It is also true that if one goes back to the nineteenth century, one finds statements by popes that are hostile to liberal democracy, and perhaps it was not until the Second Vatican Council that the Church outside the United States fully embraced central ideals of liberal democracy.

Whatever the full explanation, from the late 1940's onward, the Court took the position that only fringe aids, ones that did not support religious teaching, were permissible. Towns could pay for bus transportation and the loan of secular textbooks, but could not help pay the salaries of teachers. After a steady erosion in this separationist approach, the Court seven years ago upheld extensive voucher aid, funneled through parental choice. Schools could spend the money as they chose.

Many state constitutions contain stricter limits on aid to religious education, and in a case involving college education that seemed likely to be for the ministry, the Supreme Court sustained that stricter approach against a claim that it violated the Free Exercise Clause by treating religious education worse than other education.

D. *Exemptions and Establishment Limits*

Whether exemptions come from the Free Exercise Clause or statutes, there are Establishment Clause limits.[11] The Court has rightly held that it violates the clause if burdens that are too great are imposed on private businesses or individuals.

A more controversial issue is just how nonreligious people who have analogous claims should be treated. The Supreme Court managed to avoid that constitutional question for conscientious objectors to military service by reading the statute adopted by Congress to include the nonreligious objectors, a reading that contravened the language and bore no resemblance to the intent of Congress. I believe in some circumstances, nonreligious claimants must be treated like religious ones, and I think this is true of objection to military service, but for other subjects, such as the use of proscribed drugs at meetings, legislatures may draw the line at religious use in worship services.

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[11] *Id.*, ch 16-17.

IV. RELIGIOUS PREMISES AND THE POLITICS OF LIBERAL DEMOCRACIES[12]

I turn now to an issue about which the religious clauses of our constitution have little to say directly. Suppose citizens or officials rely on religious premises in adopting laws to protect animals, help the poor, or restrict abortions. The aim is not to promote religion or endorse a religious view but to do what is just or good from one's religious perspective. Does that offend some idea of what liberal democracies, or a particular liberal democracy, should be like? This has been regarded in recent decades as a significant issue of political philosophy.

Influenced by the writings of John Rawls, political philosophers have debated whether political decisions in liberal democracies should be based on public reasons, reasons accessible in the right way to all citizens. It is generally assumed that reasons grounded in religious premises fall outside the domain of public reasons. If citizens and officials improperly rely heavily on religious premises in advocating and adopting laws, we could think of that as a misguided "establishment" of religion, although not one necessarily covered by the Establishment Clause.

People who challenge the injection of religion in politics adopt what we may call—with some oversimplification—an "exclusive" position. Religion should not be the basis for crucial political decisions. In the politics of pluralist liberal democracies, decisions (they claim) should be made on grounds that are shared premises of that form of government and on forms of justification and ways of determining facts that are accessible to all citizens. Whatever is the exact mix of the rational, nonrational, and irrational in religious understandings, no religious perspective is shared by all citizens, no perspective rests on methods of justification and determining facts that are accessible in the required way. To some extent, religious belief depends on faith, personal experience, and distinctive tradition; adherents of one religion cannot present "logical" arguments that alone will persuade outsiders to their views. Religious belief and practice is fine for individuals and communities of faith, and religious perspectives may enrich our cultural understandings. But at least when citizens are coerced, the state acts unfairly unless it has reasons that have force for all citizens. Religious reasons, along with other grounds such as those based on simple personal intuition or on comprehensive views like utilitarianism, do not fall into this category. They should not undergird laws in democratic countries. This is a matter of fairness, and also of political stability.

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[12] *Id.*, ch. 23.

Neither citizens nor officials should present religious reasons in public debate; neither group should rely on such reasons.

Some brief clarifications about this "exclusive" position can help avoid confusion. First, it concerns politics, not broader public culture. Second, no one claims that people will be wholly uninfluenced by religious understandings. Any claim of that sort would be extremely naive. People should discuss political issues in public without reliance on religious premises and they should try to make up their minds accordingly. Third, the claim is not that religion is foolish superstition and therefore deserves no place in our political life. Of course, all arguments based on foolish superstition should be avoided, but if that were the basis for excluding religion, the exclusion would have to rest on persuasive argument that religion is foolish superstition. A high percentage of Americans identify themselves as religious; one can't reasonably suppose they should avoid religion in politics because religion is foolish.

Finally, we have to be careful about what the "exclusive" position entails. What is mainly being urged is "self-exclusion." No one proposes that anyone can be punished or silenced for making religious arguments; indeed, guarantees of free speech and free exercise protect such arguments. The proposal is that people should refrain from making religious arguments because they do not fit with how liberal democracies should work.

I have remarked that it is something of an oversimplification to call this position "exclusive." The exact nuances of what is claimed differ among those who support this general approach. Rawls made clear in his later writings that a person could appropriately offer religious or other nonpublic reasons if she also offered public reasons and believed that those alone were sufficient to justify the political stance she advocated. Thus, an advocate of legislation protecting animals against abuse could supplement public reasons she believed adequate to support the restraint with further reasons based on her religious convictions.

When he was still a senator, Barack Obama suggested a position that is both more and less constraining.[13] He said that believers could not be expected to leave their religious convictions at the door but should translate those concerns into "universal rather than religious-specific values." This position is more constraining in supposing that explicitly religious reasons should not be offered in support of political stances in the public square; it is less constraining in allowing people to advocate views even if they doubt that they can be sustained by

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[13] Senator Barack Obama, Call to Renewal Keynote Address (June 28, 2006), *available at* http://obamaspeeches.com/081-Call-to-Renewal-Keynote-Address-Obama-Speech.htm. He takes a similar position in THE AUDACITY OF HOPE. *See* BARACK OBAMA, THE AUDACITY OF HOPE 195-226 (2006).

persuasive public reasons. To revert to our advocate of animal rights, so long as she can present plausible universal reasons, she can appropriately support the legislation even if she believes in her heart of hearts that those reasons would not be sufficient to justify the legislation.

I do not mean to suggest that President Obama has worked out all the nuances of this issue in great detail, but the expressed thoughts of the person who is now the most important political figure in the United States hold interest for that reason alone, and they suffice to illustrate two ways in which the "exclusive" position can vary.

The competing "inclusive" position is that citizens and officials should be able to rely on whatever sources of understanding seem to them most reliable and illuminating. If a respected religious authority like the Pope, or a divinely inspired text, or one's personal sense of how God relates to human beings, suggests that we should help those who are less fortunate, why should that not count for our position on welfare reform and medical insurance? People do not feel whole if they try to divorce their deepest sources of insight from their political stances. Moreover, shared premises and methods of justification are too thin to resolve many political issues; they just do not settle enough in a society as diverse and divided as our own. Fairness consists not in exclusion, not even in self-exclusion, but in everyone relying on what they find is most convincing. Indeed, the ability to rely on one's religious convictions is part of the free exercise of religion. A full airing of all those views will enrich everyone's understanding. People can often learn from others who do not share their fundamental religious beliefs. A healthy democracy will not be unstable if religious arguments are part of political discourse.

For the inclusive position, only one clarification is required. A defender of that position need not claim that every ground for a political position is appropriate. Some grounds may be contrary to premises of liberal democracy. We now suppose that racism and other denials of equal worth fall into this category. But religion has never been so regarded in the United States.

As I have put it so far, the controversy about religious grounds seems fairly straightforward, if not easy to resolve; but matters are in fact much more complicated. No one claims that it is only religious reasons that are excluded by public reasons, and deciding which reasons count as public is not simple. Perhaps we might do better to think of reasons that are more or less public. And I shall argue that it should make a crucial difference for whether one should rely on nonpublic reasons whether he or she is an ordinary citizen or an official and, if an official, engaging in public discourse or employing grounds of judgment.

Theorists disagree over exactly what makes reasons nonpublic. Among the candidates that have been suggested are ideas of the good (or controversial ideas of the good), nonrational grounds, reasons that are not widely accepted, and comprehensive views (roughly, overarching philosophies of life).

Some of the difficulties with deciding what count as "public reasons" may be illustrated with reference to natural law theory, a theory that relies heavily on premises claimed to have rational force apart from any religious beliefs, but also makes various assertions that do not seem persuasive to many observers.[14]

Whatever the exact range of public reasons, they do not include reasons drawn from biblical revelation or church authority.

It is sometimes asserted that the requirement of public reasons applies only to some subset of political decisions. One notion is that coercive laws, in particular, should be based on public reasons, since people should not be compelled on the basis of reasons that are not persuasive for them. But what of a government refusal to fund stem cell research? We know that the government would fund this research were it not for a concern about embryos. If it refuses to fund embryonic stem cell research, many scientists will not do that work, and sufferers of diseases like Parkinson's and Alzheimer's may not receive critical medical benefits that might otherwise have become available down the road. Can it be that the government needs public reasons if it is to coerce people not to hunt an endangered species of wolf, but that it can curtail potential life-saving medical assistance on the basis of nonpublic reasons? That would be paradoxical.

The stem-cell illustration also helps to show why we should not draw a sharp distinction, as Rawls suggests, between ordinary political issues and constitutional essentials and basic questions of justice. By this categorization, whether to fund embryonic stem cell research is an ordinary issue, whereas restricting abortion involves a basic question of justice. Needless to say, the status of embryos is crucial for both issues. To tell people they can use religious reasons to decide whether embryos count for the first issue but not for the second would be confusing and hard to justify.

Most proponents of public reasons have assumed that any constraint applies to all liberal democracies and applies in the same manner to officials and citizens, and in the same manner to grounds of judgment and public discourse.[15] My position differs on all three

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[14] The sentence in text collapses a much more complex analysis I offer in ESTABLISHMENT, *supra* note 1, at 500-20.

[15] For a discussion of various arguments about how public reasons apply to citizens, see Paul J. Weithman, *Citizenship and Public Reason*, *in* NATURAL LAW AND PUBLIC REASON 125 (Robert P. George & Christopher Wolfe eds., 2000).

scores. This subject in political philosophy, like many others, needs to be addressed in terms of the particular histories and cultures of various societies. My view about the United States at present relies heavily on distinctions between advocacy and justification, on the one hand, and grounds of judgment, on the other, and between officials and ordinary citizens.

When we think about how we make up our minds and how we discuss issues, we realize that monitoring our discourse is a lot easier than restricting our bases for decision. Moreover, other people hear our discourse, but they cannot know our full grounds of decision. These truths have great importance.

Most people would be hard put to try to carry out a program of excluding their deepest religious convictions from their political judgments. They could not disentangle what they believe because of underlying religious convictions from what they would believe if they relied only on premises of liberal democracy and shared techniques of understanding (or on some other sketch of what exactly constitutes public reasons).

Speaking without reference to religious convictions is not difficult. Members of our law faculty share an assumption that school problems are to be resolved in terms of values that are not explicitly connected to particular comprehensive views. I have yet to hear a specifically Jewish, Christian, atheist, or Benthamite argument for a faculty decision. Yet, when decisions involve the point of legal education, I doubt that colleagues try rigorously to remove the threads of their religious understandings about the nature of society and education for a profession.

If it is working, a constraint of public reasons is reciprocal. People restrain themselves partly because they respond to the restraint of others. People can tell easily whether arguments are being made from explicit religious premises; they will know if restraint on their part matched. If they try to purge their silent deliberations of religious influence, they cannot be sure if others are similarly motivated. And once someone realizes just how arduous this purging exercise is, he will question the success of others, even if he thinks they are trying. Such uncertainties are a poor basis for reciprocity.

Consider some differences between officials and ordinary citizens. Officials have a lot more to do with the law that gets made and applied than do citizens; there are a lot more citizens than officials. Officials are used to making judgments and offering reasons that do not include all that is relevant in their personal lives. Citizens are less used to practicing such restraint. Perhaps a highly educated, participating citizenry could learn to draw distinctions between what matters for most aspects of life and what matters for politics. But that is not our

citizenry. When officials practice restraint, that impinges much less on a population's religious liberty than when citizens do so. Official restraint more greatly affects the quality of political life. These basic distinctions—between advocacy and judgment and between officials and citizens—suggest that if any self-exclusion is justified, it is self-exclusion for officials in their public statements.

Among officials we can divide roughly between those who apply law and those who either make law or exercise ordinary discretionary judgment. Among those who apply law, judges and quasi-judicial officials often provide reasoned justifications for their decisions. At this stage of American history, one does not often find explicitly religious grounding in opinions, even when courts reach beyond standard legal sources to comment on the social benefits or harms of a possible ruling. By an explicitly religious grounding, I mean reasoning in this form: "Given a true religious proposition, these conclusions about social good follow." Some examination of religious sources might be acceptable to show the community's attitudes toward a practice or its deep moral assumptions, and judges might employ familiar religious stories to illustrate a point, but none of these is a reliance on religious grounds in the sense that I mean. Although judicial opinions are rarely completely candid about the strength of competing arguments, one expects judges to rely on arguments they believe should have force for all judges. In our culture, this excludes arguments based on particular religious premises.

When we turn to legislators, we may start with the proposition that if an explicit religious grounding were placed in the preamble to a statute, that should be viewed as a promotion of religion that would violate the Establishment Clause. Although the use of religious language increased among legislators and executive officials during the administrations of George W. Bush, it is still true that members of Congress typically do not make religious arguments on the floor of Congress or before their constituents. There is, however, no accepted understanding that they should avoid giving any weight to their own religious convictions, and to those of constituents, in the formulation of their positions. I believe legislators should give greater weight to reasons that are generally available than to those they understand are not, but some reliance on religious and similar reasons is appropriate, especially since the generally available reasons are radically indecisive about some crucial social problems.

If legislators rely on religious understandings more than their public advocacy reflects, are they not lacking in candor? Does restraint impoverish discourse and leave voters less well-informed than they might be? Realism counsels that much of what legislators say is far from fully candid, so self-restraint about religious grounds is hardly a

major contributor to lack of candor. In any event the value of self-restraint overrides this drawback and whatever reduction in information voters suffer. Legislators should not deny religious bases that motivate them, but they should not develop public arguments in these terms.

What I have said about legislators also applies to the president, and to governors and mayors, when they propose and support legislation or carry out executive responsibilities (including foreign policy).

Because citizens are not used to practicing self-restraint of this kind, and because most citizens have little involvement in the political process, I do not think they should regard themselves as constrained to avoid relying on religious grounds or to avoid stating those grounds as the main basis of their positions.

Religious leaders and organizations have a special place. They properly develop religious grounds as these relate to political problems, and they also properly take part in direct efforts to win support for particular positions, although it is usually unfortunate when religious leaders endorse parties or candidates.

As I have noted, much of the theorizing about public reasons and religious reasons has been cast in terms of liberal democracies in general. The history of western liberal democracies, forged out of religious division, shows that differences in religious views can be a source of intense conflict, but we can imagine people of various religious views who seek to learn from one another and who trust one another's social judgments. These people might welcome religious perspectives in political discourse. On the other hand, one might not recommend an explicitly religious politics as the most fruitful approach for a newly constituted Northern Ireland or for the fledgling, fragile union that may be emerging in Bosnia. Much depends on history, culture, the religious and other broad views that people hold, and their degree of mutual tolerance and respect. Specific principles of self-restraint should be offered for particular political orders, not in gross.

The United States is a country of great diversity in culture and religion. The percentage of our people that is neither Christian nor Jewish increases steadily, with immigration policies that no longer discriminate egregiously against Asians. Outright religious conflict is rare, but religious differences remain a source of distrust and tension. Religious convictions are intense and widespread enough to influence politics and to disturb people with their influence. That is partly why some restraint may be needed.

When we think about the difficulties of figuring out what reasons *are* public ones, we might be drawn to a skeptical conclusion that any theory of public reasons founders completely on the impossibility of specifying just what reasons are public. But standing against this skeptical rejection of any ideal of public reasons is the law. Is not the

law, and I mean here assessment of what the law provides, a domain in which a theory of public reasons is realized? If so, does that not raise the possibility at least that politics could be a domain of public reason?

Within the law, judges are supposed to rely on reasons that have force for other judges, and the reasons need to be accessible—accessible both in the sense of being comprehensible and in the sense of being capable of being grasped on the basis of rational thought, not faith or intuition. So the law limits relevant reasons; it requires that reasons be understood by rational analysis and have a force that is generally understood.

Without doubt, the distinctive character of law, and the authoritative sources of law, lead to some reasons counting within the law and others counting little or not at all in many contexts. For example, the practice that misguided precedents are deemed to have force is an aspect of common law jurisprudence.

But American lawyers may usually argue to judges that, in an otherwise close case, one interpretation of a precedent or a reading of a statute will promote justice or human welfare better than another. In fact, the domain of relevant arguments in law is not much narrower than the domain of relevant arguments in politics, although differences in weight are critical. The considerations that determine whether reasons are excluded resemble those that have been suggested for political life by proponents of public reason.

The point is easiest to illustrate for determinations that judges must make that do not depend much on authoritative statutes or precedents. In virtually all states, the main standard for determinations of child custody is the "best interests of the child." Suppose a judge must decide whether to place a child with her father or with her mother, who is living with another woman in an intimate relationship. The judge should not refuse custody to the mother because the Bible condemns homosexual relations as sinful. Nor should the judge announce the truth of greatest happiness utilitarianism as the basis for resolving what is in the child's best interest. The basis for excluding these possible reasons is very similar to the arguments put forward by public reasons theorists in respect to politics: the reasons do not have appropriately general force and they rely too heavily on controversial overarching views.

If the law is a domain of public reasons, then it is at least possible that in politics, people do have, or should have, a sense that reasons should be public, and it is possible that that sense could strengthen and sharpen over time, or that it could dissipate in the face of challenges that God should not be removed from the public square.

As I have indicated, my own sense is that the constraint of public reason applies primarily to the public expressions of officials, and that saying just what count as public reasons in various contexts is no simple

matter. The issues about public reason are predominantly not ones of constitutional law, but the position I have taken fits well with the law of our religion clauses and with secularism, in the senses of secularism that genuinely apply to the United States.