

Dædalus

Journal of the American Academy of Arts & Sciences

Summer 2020

Religion & Democracy

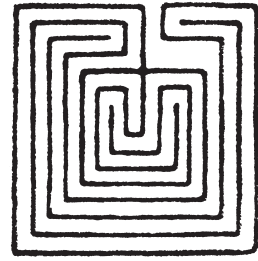
Robert Audi,
guest editor



with Kent Greenawalt
Samuel Freeman · Paul Weithman
Cathleen Kaveny · David E. Campbell
Stephanie Collins · Winfried Löffler
Lorenzo Zucca · T. Jeremy Gunn
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“Religion & Democracy”

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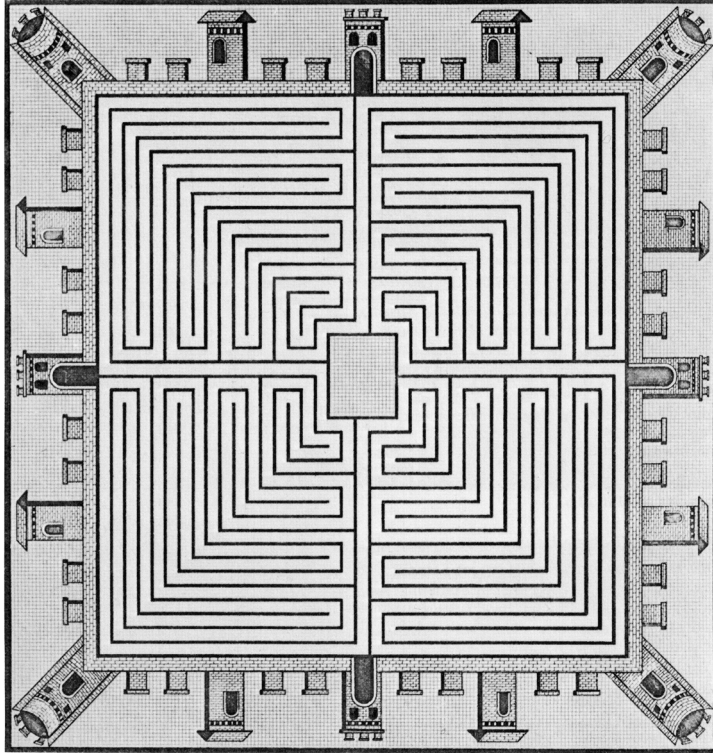
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Nineteenth-century depiction of a Roman mosaic labyrinth, now lost, found in Villa di Diomede, Pompeii

Dædalus was founded in 1955 and established as a quarterly in 1958. The journal's namesake was renowned in ancient Greece as an inventor, scientist, and unriddler of riddles. Its emblem, a maze seen from above, symbolizes the aspiration of its founders to "lift each of us above his cell in the labyrinth of learning in order that he may see the entire structure as if from above, where each separate part loses its comfortable separateness."

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Religion & Democracy: Interactions, Tensions, Possibilities

Robert Audi

Much of the world is seeing conflict between people whose views permit basing political actions and lawmaking on religious convictions and people whose democratic values oppose this. Democratic societies are in principle open to the free exercise of religion and, in constitution, they are characteristically pluralistic in both culture and religion. Religions are highly variable in their stance toward government, but many of the world's most populous religions, including Christianity and Islam, are commonly taken to embody standards of conduct, such as certain prohibitions, that cannot be endorsed by democratic governments committed to preserving liberty for the religious and the nonreligious alike. The present age is seeing much discussion of just how far religious liberty should extend in democratic societies and just what role religion should play in the conduct of citizens.

The most prominent range of problems concerning the tensions between religion – or certain religions or interpretations thereof – and democracy are institutional. They concern the relations that do or should obtain between “church” and state: between religious institutions or organized religious groups and government or its agencies. Institutional matters, however, are not the only ones important for understanding the relation between religion and democracy. Ethics and political theory also extend to standards appropriate to the conduct of individual citizens. Here the ethics of citizenship, as it is now sometimes called, focuses on how individual citizens should understand the role, in civic affairs, of religious convictions, especially their own convictions about how human life should be lived. This concerns not only deciding what to support by one's votes and public advocacy, but also how to conduct civic discourse. The essays in this issue of *Dædalus* – most of them based on contributions to a seminar sponsored by the Australian Catholic University in March of 2019 – address both institutional questions concerning religion and democracy and the ethics of citizenship as bearing on how individuals, religious or not, may best regard their role in the political system in which they live.

An entire book could be devoted to conceptual exploration of either democracy or religion. None of the essays in this issue undertakes that task, but all of them implicitly conceive religion in a way that avoids narrow-

ness. For instance, none of the authors assumes that a religion must be theistic or that a democracy must use a particular system for selecting government officials. This is appropriate, and here the explorations of religion in relation to democracy apply to all the commonly accepted instances of both religion and democracy. One minimal assumption about democracy shared by the authors is that the term properly applies only where political offices are held on the basis of free elections. It is more difficult to identify a minimal assumption about religion that is comparably shared. But an important assumption for the question of how a given religion is related to democracy is that it has an *ethic*: a set of standards indicating how one is to live. This assumption holds for the religions that have been and continue to be central in discussions concerning democratic governance. It holds for all the various religions referred to in the essays included here, and its importance is evident throughout the volume.

Stating the ethic of a religion is often very difficult. Even if it seems explicitly stated in scripture, the relevant texts are likely to exhibit ineliminable vagueness. It has often been noted, to be sure, that “Do unto others as you would have them do unto you” has equivalent or roughly equivalent forms in many religions; but it is highly vague. So is “Love your neighbor as yourself,” which appears in (among other religious sources) both the Hebrew and the Christian testaments of the Bible. It is also true that there is no sharp distinction between ethical and religious directives, such as those prescribing certain rituals. Even where their content is overtly religious, however, directives enshrined in a religion have *normative authority* for its practitioners. For at least the orthodox practitioners of certain kinds of religion, it is wrong to act otherwise and to do so is criticizable or even punishable. Some religious directives – arguably all those that are genuinely moral – are meant to apply to everyone, including people outside the religion. This holds for the prohibitions of killing, lying, and theft that are prominent in many religions.

Inevitably, there will be conflicts between what, for some religions, is obligatory or impermissible and what, for some democratic governments, may not be enforced or prohibited. Prohibitions of divorce and abortion are examples, since both are considered morally wrong in some religions and a legal right in some democracies. These conflicts raise two important kinds of questions: first, institutional questions about what laws and practices should bind government and, second, individual questions about what we, as citizens not holding public office, should support, either through persuading dissenters to join us or through voting for laws requiring their conformity to the standard.

So far, one might think that the relation between religion and democracy is important only because conflicts are inevitable. That is not so. But is religion of special concern for democratic societies for any similarly important reasons? There are at least three kinds of consideration indicating that it is.

Suppose we take seriously the idea that democracy is a form of government that is, as Abraham Lincoln put it in the Gettysburg address, “of the people, by the people, for the people.” Surely the “for” here is normative: in any sound democratic theory, government must serve the people in a sense that entails caring about their good. This is distinct from, though it entails, caring about their rights. It also concerns their well-being. No specific view of the “common good” is required by the minimal conception of the good of the people in question here, but support of material well-being, at least minimal education, maintenance of certain public goods, and preservation of the conditions for free elections are uncontroversially included. If we add to this that many pursuits people deeply feel to be part of their sense of identity deserve protection, then it appears evident that protection of religious liberty may be of special concern for a democracy.¹ This is not to say that *only* religion can have this status. That seems a mistake. But historically, few pervasive, interpersonally significant commitments – at least if institutionally identifiable – have the role in one’s sense of identity that religion has for those who are genuinely religious. This is most evident where the religion in question has an ethic and, with it, a well-developed vision of the good life.

A second consideration supporting a special place for religion in democracy concerns its potentially positive role, by contrast with its need for protection. Institutional religions are social and indeed often *participatory* in the sense that they provide social roles and call for their fulfillment by groups of people. Some religions are, to be sure, strongly hierarchical in their authority structure; but even those can encourage or require a measure of partial or local governance. This can involve planning and directing parish activities, maintaining schools, serving the poor in or beyond one’s community, and overseas missions with educational or health care purposes. Such activities may be to some degree democratic, and they can provide training in, among other things, civic discourse, leadership, and policy-formation.

A third consideration is that religious institutions – and indeed, individuals representing religiously based ideas and ideals – can be a counterpoise to the power of the state. They can also be a source of diverse elements that can bring to civil society ideas and values that might not otherwise be recognized or given due consideration. If religions have sometimes been co-opted by dictatorships, they have also sometimes been powerful counterforces against tyrannical government, institutional oppression, and forced conformity to government-approved social norms. Secular ethics and political leadership can yield many of the same valuable contributions; but particularly where democratic governments are – quite properly – maintaining religious neutrality in their official actions, it is not difficult for government officials to overlook needs, policies, or normative issues that may be well articulated by religious citizens constructively participating in civic life. One issue here is the content of public education; another is the basis and appropri-

ate extent of religious accommodation, from tax exemption to waivers of inoculations to freedom from military conscription.

None of these points entails that a special concern with religion is necessary in every democracy. But the points do strongly support a case for that concern in the actual world as we have known it since the birth of democracy and, so far as one can tell, are likely to know it in the foreseeable future. We should be mindful, however, of nonreligious modes of life that may have or gain a similar status in democratic thinking. Certainly, we should bear in mind that protections of liberty and the general benefits of citizenship should be equally extensive for both the religious and the nonreligious. But here, too, as in the case of conscientious objection to military conscription in America, accommodating the religious can be the basis on which the need for broadening liberty rights is realized.

Exemption from military conscription is an accommodation of what is often considered a matter of conscience: religiously based pacifism. If democracies should not automatically give more weight to religiously based conscientious objections to what would otherwise be a legally enforced burden, should they give equal weight to *all* sincere claims of “conscientious” objections? Those who emphasize “freedom of conscience” as a human right can easily give that impression, but we should not conclude, nor should democracy presuppose, that there is a special insightful faculty – whether it is called conscience or something else – that has high moral authority in its own right. A moral judgment may represent genuine insight or deeply felt commitment whether or not it rests on a deliverance of conscience. Democracy respects our right to hold views of our own regardless of whether they come from a moral sense that apparently bespeaks conscience, a coolly reasoned position, a persisting intuition, or a religious view held in deference to authority. Democracy does, however, limit what we may do – or be excused from doing – on the basis of our views. This brings us to the delicate matter of the limits of liberty in democratic societies.

No simple formula can tell us exactly what liberties a democracy should protect. In at least the Anglo-American tradition, however, the “harm principle,” proposed by J. S. Mill in *On Liberty*, published in 1859, sketches one of the most influential standards:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control. . . . That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection . . . to prevent harm to others.²

In relation to religion and democracy, a plausible application of this might be called the *liberty principle*: Government should protect religious liberty to the high-

est level possible within a reasonable interpretation of the harm principle.³ Liberty in general, and not just religious liberty, is a constitutive standard in any sound democracy, but, for reasons such as the need to protect citizens' sense of identity, this religious liberty principle is one deserving a distinct place in framing democratic constitutions or crafting legislation affecting religion.

The liberty principle is not the only general standard important for church-state relations in democratic societies. A government that upholds the liberty principle may consistently treat different religions differently, at least in countenancing an established church. This is commonly taken to be undesirable for democracies, if democratically permissible at all, and there is wide acceptance of an *equality principle*. This principle requires that government must treat different religions equally. The principle thus implies nonestablishment as ordinarily understood: minimally, as prohibiting official state endorsement or favoritism of any religion or church. Particularly in a democratic society whose citizens do or would approve of such establishment, such a principle needs justification, as indeed it does in democratic theory. The strength of the case for the equality principle heavily depends on the kind and sociopolitical significance of the establishment in question.⁴

The multitude of relevant considerations supporting either the liberty principle or, especially, the equality principle cannot be considered here, but in my view *both* democracy and religion are better served if the liberty principle is integrated with an equality principle to the effect that (other things equal) government should treat different religions equally. Other things are not equal if a religion practices human sacrifice or violates basic human rights. These rights prominently include not only protection from bodily injury but also liberty rights. This is an indication that the liberty principle is a constraint on the application of the equality principle, as the latter principle may be on the former.

Neutrality among religions does not guarantee neutrality toward religion. If democratic societies should treat different religions equally, it does not follow that they endorse governmental neutrality toward religion. Preference for the religious over the secular, for instance, in granting exemptions or determining public school curricula, would still be possible. Nonetheless, there is a strong case for a *neutrality principle*, to the effect that government should not prefer the religious as such to the secular as such. Such neutrality is commonly understood to rule out public funding for religious institutions but not for comparable secular ones; but it does not rule out tax exemptions for religious institutions *qua* charitable, so long as secular counterparts receive the same exemption.

The broad topic of religion and democracy extends not just to standards for governmental policy in relation to religion but also to normative standards appropriate for religious institutions that aspire to a kind of constructive citizenship in a democratic society. In broad terms, if the state should

not interfere with the church, is there a comparable case against the church's interfering in the state? This is a controversial matter. It cannot be supposed that moral instruction and indeed moral leadership and role-modeling are outside the scope of religion – and of childrearing. Indeed, the kinds of rights the liberty principle must respect – rights prohibiting harms and government policies that threaten personal development and free expression – protect churches, parents, and, within limits, educators in public schools from restrictions on (peaceably) expressing and teaching their moral views.

Nothing said here is meant to imply that moral views are sharply distinguishable from political views, but, apart from reasonable interpretations of the harm principle, democratic governments should not prejudge citizens' moral views by framing policies that limit the (peaceable) free expression of churches, parents, teachers, and others. Given this commitment to free expression, and given the possibility of moral views having political implications, democratic governments cannot prohibit churches, parents, or, within limits, educators from expressing and arguing for their moral views. Where these become clearly political in the sense illustrated by supporting specific candidates for office, government may withdraw tax exemptions justified by charitable status, but the liberty principle protects free expression even in cases of this kind.

This conclusion concerning democracy conceived institutionally does not in the least oppose the idea that ethics constrains churches in relation to government. A major general point here is that not everything unethical should be illegal. If that were not so, the long arm and rough hands of the law could reach into private life to restrict individuals' personal behavior toward one another. Granted, that behavior is far too often marred by perfectly legal conduct that exhibits immorally broken promises or morally reprehensible domination of the weak or vulnerable in marriage and childhood. For much of this, comprehensive legal enforcement of morality is not the remedy.

A different example of how ethics may oppose or limit what law must tolerate, this time in the political realm, is assisted suicide. Suppose a church supports the view that it is morally wrong to assist in suicide. Preaching that view does not entail telling people to vote for legalization, since that adds the threat of legal coercion to the already protected use of forceful public argument that may dissuade people from asking for or supporting assisted suicide as a practice. Preaching that view in moral terms also does not imply that those who accept the view should treat a political position on it as decisive in determining whom to vote for. A political candidate with whom you disagree on this issue may share your positions on other issues of at least equal importance to you. The overall conclusion here is that moral positions come in many forms, differ greatly in political scope, and, especially taken in isolation, may or may not reasonably determine a political stance. The moral right of free expression limits governmental coercion, but it leaves open how cit-

izens should exercise that right in relation to political matters. Here clergy have both liberty as individuals and responsibilities as members of a profession: role obligations that set limits on their official conduct. These two elements can create conflicts, but surely the clerical responsibility to exercise moral leadership can be fulfilled without embodying or communicating political directives to parishioners and others who, in democracies, must exercise their freedom at the ballot box.

Even a good account of how religion and democracy should be related institutionally leaves much open regarding the *ethics of citizenship*: the standards appropriate to guide citizens in their sociopolitical conduct, particularly where their religious convictions favor some specific legislation affecting citizens with opposing views. A central question here is what kinds of reasons citizens in democracies should take as a basis of political decisions and, especially, for votes favoring laws or public policies that restrict liberty. Some principles most widely known in recent decades come from John Rawls. Among his many formulations of broad standards constitutive of political liberalism is this judicial principle:

[T]he court's role is not merely defensive but to give due and continuing effect to public reason by serving as its institutional exemplar. Public reason is the sole reason the court exercises. It is the only branch of government that is visibly on its face the creature of that reason and that alone.⁵

Immediately following this he clarifies its scope by proposing a more permissive principle for nonjudicial citizens: "Citizens and legislators may properly vote their more comprehensive [e.g., religious] views when constitutional essentials and basic justice are not at stake."⁶

Commentators have found it difficult to determine what should constitute public reason, but there is no doubt that – both in Rawls and in much work using the term in discussing him or pursuing political theory more generally – public reason represents a mode of thought and argumentation that, negatively, does not depend on either religion or some particular ideological or philosophical theory and, positively, is governed by standards appropriate to constructing and interpreting constitutions. Rawls's notion of a "comprehensive" view is also in need of analysis not possible here; but it is safe to say that it includes the worldviews of such major religions as the "Abrahamic" triad of Judaism, Christianity, and Islam. It presumably need not exclude positions that are simply comprehensive in scope, in a descriptive sense, provided they do not embody commitments to highly specific standards of conduct, such as standards for divorce, dietary restrictions, architectural patterns, and dress codes.

Rawls has qualified the quoted (nonjudicial) permissive standard in many ways. The same lecture countenances exceptions to this standard (for nonjudicial citizens) provided they "vote their comprehensive views" "in ways that strength-

en the ideal of public reason itself,” as might be illustrated by using a religion’s ethical texts to fight injustice of a kind definable in nonreligious terms, such as unfair restrictions on voter registration.⁷ Indeed, in the preface to a later edition of the same book, *Political Liberalism*, Rawls says (in what he considers a significant revision of an earlier formulation) that reasonable comprehensive doctrines “may be introduced in public reason [including decision-making in at least nonjudicial governmental contexts] at any time provided that in due course public reasons, given by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support.”⁸

A plausible and quite different standard, proposed by Kent Greenawalt (but perhaps in some ways anticipating Rawls’s most permissive formulation) is that

Legislation must be justified in terms of secular objectives, but when people reasonably think that shared premises of justice and criteria for determining truth cannot resolve critical questions of fact, fundamental questions of value, or the weighing of competing benefits and harms, they do properly rely on religious convictions that help them answer these questions.⁹

Given how common such judgments of irresolubility are, this principle is quite permissive in sometimes allowing religious convictions to determine law and policy without explicit restrictions on content or source. The principle does, however, require a *reasonable* judgment that shared premises cannot resolve the relevant question; and it apparently requires that actual legislation “be justified in terms of secular reasons.” This overall standard fits well both with Rawls’s emphasis on the need for nonpublic reasons to be introduced in a way that will “strengthen the ideal of” public reason, and with his later requirement that public reasons be introduced “in due course” for what might be legislated on the basis of other kinds of reasons. The question remains how far – if at all – Greenawalt’s position would allow lawmaking that is supported by religious reasons and not clearly justifiable by secular reasons.

A still more permissive position on basing political decisions on religious considerations is philosopher Nicholas Wolterstorff’s view that citizens may “use whatever reasons they find appropriate,” though he endorses three kinds of restraints:

When I say “Let citizens use whatever reasons they find appropriate,” I do not by any means want to be understood as implying that no restraints whatever are appropriate. . . . [F]irst . . . on the *manner* of discussion and debate in the public square. . . . Second, the debates, except for extreme circumstances, are to be conducted in accord with the rules provided by the laws of the land. . . . Third, there is a restraint on the overall goal of debates and discussion. . . . [It is] political justice, not the achievement of one’s own interests.¹⁰

This view allows that legislators might not have any secular reason for passing a law – unless, perhaps, the goal of political justice requires their having some secular reason, as one might reasonably think. Certainly Wolterstorff intends that

civility and respect in the manner of political discussion and in political justice as its goal will rule out much that other thinkers would rule out more directly. But he leaves open that there are kinds of religious reasons that might be an appropriate basis for lawmaking with no restrictions beyond those of this wide-ranging sort.

Is it possible to frame a principle in the ethics of citizenship that is more permissive than some formulations by Rawls but less permissive than Wolterstorff's and significantly different from Greenawalt's, even if only slightly less permissive than his? I have myself proposed a standard that has some kinship with all of those but contains elements they do not embody. Originally called "the principle of secular rationale," it can also be called "the principle of natural reason" to emphasize that, even if natural reasons are secular, they need not be anchored in a secular worldview and – on the positive side – they represent cross-culturally recognized standards of what has been called natural reason. It is illustrated both by judgments that are properly responsive to the evidence of the senses (such as evidence regarding what is seen or heard) and elementary logic, and by reasoning of the deductive and inductive kinds essential in both scientific inquiry and everyday life. This principle of natural reason expresses a kind of civic obligation:

Citizens in a democracy have a *prima facie* obligation not to advocate or support any law or public policy that restricts human conduct, unless they have, and are willing to offer, adequate secular reason for this advocacy or support (e.g. for a vote).¹¹

This principle has been widely misunderstood and should be briefly clarified.

A secular reason is one that does not evidentially depend for its normative force on religion or theology, but it may of course coincide with a religious reason in content, say in affirming the wrongness of killing and a right of free expression. That enslaving, silencing, and lying are wrong is common ground among the moral requirements of many religions and of an ethics anchored in natural reason. Moreover, *prima facie* here is not to be defined in terms of evidential plausibility: as an obligation to have adequate secular reason that is apparent but need not be real. The term indicates *defeasibility*. The standard posits a genuine obligation sufficient to justify the act in question if there is no conflicting reason of at least equal weight, but a *prima facie* reason is not absolute and can be overridden. Suppose only a governor's appeal to religious considerations could stop terrorists' attacks on stadiums filled with people. This could justify appealing to them.

A more subtle point is that the *prima facie* obligation in question is compatible with a *right* to act otherwise. There are, however, wrongs within rights: it may be wrong to exercise a right, for instance giving no charitable donations even though one can easily afford to do so and has no competing need. The principle of secular rationale (thus natural reason) is meant to reduce the range of legal coercions likely in a society that abides by the principle, and it should be supported by good reasons drawn from the ethics of citizenship, rather than instituted by law. The prin-

principle represents a kind of moral responsibility of citizens as such, but their liberty rights enable them to reject the responsibility. Others have a normative *claim* to their adherence, as charities may have a claim to contributions, but the ethical domain in question is that of civic virtue and optimal respect for others, not the realm of rights we may claim against others. In religious language with a meaning translatable into the terms of natural reason, if perhaps not clearly “public reason,” the realm of the principle of natural reason is that of “Do unto others,” not that of “Thou shalt not kill.”

This principle of secular rationale is (despite this name for it) also *doubly inclusive*: Although it calls for adequate secular reason to justify coercion, it in no way rules out religious or idiosyncratic reasons. It does not ask citizens to abstain from expressing these, nor imply that such reasons can never appropriately motivate political action, nor even imply that religious reasons cannot be evidentially cogent. The requirement is simply that *some* set of reasons for passing a law or public policy be both secular and adequate. This is not a limitation on the content of civic discourse itself. It may indeed be an admirable kind of civility to indicate publicly both one’s religious and one’s secular reasons: the former to be forthright about who one is, and the latter to assure others that one’s case does not depend on standards they do not or may not share, but on considerations appraisable using natural reason as (with some idealization) shared among all adult citizens.

To be sure, in giving reasons for a proposed law or policy, we are not being forthright about who we are if we are not significantly motivated by those reasons. Suppose one gives only secular reasons regarding the common good but is actually motivated by, for instance, a religious reason or considerations of self-interest. Civic virtue – even ordinary sincerity, some would say – calls for giving one’s “real” (motivating) reasons rather than rationalizing for purposes of persuasion. This point seems plausible, but alignment of one’s motivation with one’s proffered justification – even when lawmaking is at stake – is secondary to the need for having adequate (secular) reasons in the first place. As some cases of democratic compromise illustrate, it is more important that there *be* adequate reasons (thereby justification) for laws that restrict liberty (as most laws do) than that they be enacted on the basis of appropriate motivation.¹² Inadequate reasons, even from constituencies that oppose one another, may converge in support of a law or policy that is supported by good reasons that no one has brought forward and, with good luck, the converging rationalizations may motivate acceptance of the law or policy. But such a lucky convergence is not usual. A law passed without publicly receiving evidentially adequate support by reasons cannot be expected to be justifiable by sound standards, and its applications may be biased by the inadequate motivating reasons that led to its instatement.

These points should clearly indicate that the principle of secular rationale does not restrict freedom of expression. The relation between our reasons for advocacy and voting need not be expressed, and what we express in political discourse is

not limited to giving reasons, much less to giving only secular ones. It is a matter of judgment just how much of one's overall perspective, whether religious or not, should be expressed in arguing for laws or public policies. In some cases, bringing religious convictions into public discussion or political deliberation would be needlessly divisive; in other cases, this may be necessary to show that secular considerations favoring a policy fit with a religious position important in the discussion.

What of the notion of an *adequate* reason for a law or public policy? Evidential adequacy will always be contestable, but contestability applies to other indispensable concepts, including that of democracy itself and certainly to notions essential to it, such as liberty, equality, and the common good. We might say that adequacy of a reason entails that an action or belief based on it is *rational*, but this is of limited help. It can help to bring concrete aspects of the well-being of the people into view: the importance of food, clothing, shelter, and public health and safety is virtually uncontroversial. But even in these cases, there will be differences to be settled by comparing reasons for one policy or another. Determining which are adequate is a problem for any political theory.

The essays that follow represent diverse views and numerous insights. They are far too rich to permit brief summary, but what follows will indicate some of the points they make and some major issues they address.

Kent Greenawalt's essay, "Democracy & Religion: Some Variations & Hard Questions," is a kind of thumbnail retrospective presentation of ideas he has developed and defended in books and papers spanning half a century.¹³ He focuses on liberal democracy, with the United States as his central though not exclusive example. Given this concern with democracies like that of the United States, he naturally considers both establishment and free exercise questions concerning religion and democracy. On his view, the nonestablishment and free exercise norms in the United States Constitution "work together."¹⁴ He takes this to imply the kind of governmental neutrality toward religion that reflects the point that "people will feel more free about religion if they understand that the government will not favor or disfavor them based on their convictions."¹⁵ Greenawalt considers a number of court cases bearing on the nonestablishment and free exercise norms. He indicates how neither norm implies that there are no limits on free expression and that the two norms can conflict, as where legislative sessions are opened with prayers, which, even if nondenominational, may be seen as favoring a certain kind of religion.¹⁶ He is particularly concerned with showing how public education can do justice to the importance of religion as a subject of inquiry while avoiding governmental establishment of religious doctrines. His essay also provides a perspective on the ethics of citizenship as applied to religious citizens in their political conduct. Here he stresses both the difficulty of their avoiding reliance on religious considerations in certain cases and the range of instanc-

es in which some reliance on those considerations is not wrong. His position on accommodation of religious practices is similarly nuanced. It takes account of both the democratic commitment to protecting religious liberty where no harm is done and restricting the exercise of religion where it calls for accommodations that would require unwarranted governmental preference.

In “Democracy, Religion & Public Reason,” Samuel Freeman provides a broad account of how, in democratic societies, both government and individual citizens should view the place of religious beliefs in political matters.¹⁷ His overarching normative framework is that of public reason, roughly as that notion is understood by John Rawls but clarified and diversely exemplified in the course of the essay. Freeman goes to considerable lengths to clarify the way in which that reason-governed framework calls for governmental neutrality toward religion and, for individual citizens, giving a kind of primacy to public reason in lawmaking. Here Kant as well as Rawls is a major source for conceptions of free and equal citizens and of the “political values,” above all liberty and equality before the law, that should guide political decisions. As Freeman illustrates in relation to social contract theory as clarifying (perhaps partially yielding) the foundations of democracy, these political values make room for religious expression (within appropriate limits), but also limit the role that religiously based normative standards may have in determining laws and public policies. Religiously inspired opposition to oppression, as expressed by such religious leaders as Martin Luther King Jr., is consistent with public reason, but religiously based opposition to the civil rights of, for instance, gays is not.

Governmental preference toward religion is widely opposed by political theorists, but governmental deference toward it is quite different and raises different questions. The distinction between according preference toward religion and according deference toward it is not commonly observed, and Paul Weithman’s “Liberalism & Deferential Treatment” both clarifies it in new ways and brings it to bear on democratic theory. He conceives deferential treatment of religion as constituted by “forms of favorable treatment that are cultural rather than legal,” by contrast with preferential treatment as “the legal conferral of a status that is more favorable than that accorded to other organizations or systems of belief.”¹⁸ Deferential treatment of religion includes such behaviors as giving its teachings the status of social norms, giving leading religious figures the status of moral authorities, and according clergy “considerable latitude to act without official or unofficial scrutiny.”¹⁹ Weithman argues that deference of the kind in question encourages an unreasonable view (or set of attitudes): namely, “benchmark traditionalism,” an orientation that can produce or strengthen uncritical assumptions. He sees this orientation – in or outside government – as a failure to give due weight to public reason. But, unlike many democratic theorists who address the role of religion in governmental and narrowly political conduct, Weithman brings out how def-

erence toward religion, as a culturally pervasive attitude, can, even when well-intentioned, adversely affect both public discourse and political decision-making.

Cathleen Kaveny's essay, "The Ironies of the New Religious Liberty Litigation," is a natural companion to the essays just described and extends their work. Referring to several recent court cases of plaintiffs seeking religious exemptions, she articulates the not uncommon underlying admixture of political agenda with apparently religious zeal. But despite a number of legal gains, "social conservatives may have blunted their own most powerful critique of Western liberal society: its atomistic individualism, its reduction of morality to feelings, and its inability to think in terms of the common good rather than the contestation of interest."²⁰ Here she contrasts the quest for exemptions as a way to change legislation with Martin Luther King Jr.'s attempt to make law fair to *everyone*. In characterizing a positive redirection in understanding religious liberty and its accommodation, she outlines a kind of civic friendship that constitutes a better framework for decision-making in democratic communities than the "exemptionist mentality" that is currently prominent. Civic friendship centers on regard for one another's conscience and on reciprocity concerning the maintenance of liberal democracy.²¹ For civic friendship, especially in the case of employers, role relationships are central, and in those relationships, civic friendship seems a better framework than drawing more and more legal lines.

In "The Perils of Politicized Religion," David Campbell provides data that underline the urgency of the cultural elements Kaveny sees as needed for the flourishing of the ideal democracy, and for reducing the politicization – or as he suggests, weaponization – of religion. He documents a "secular turn" in American society, but he also sees evidence that "politics shapes religious views."²² One indication of such shaping is a significant change: in the period between the presidencies of Clinton and Trump, only 6 percent of white evangelicals, compared with 27 percent previously, affirmed "a connection between private morality and public ethics."²³ He also provides evidence of a "secular backlash," reporting that, for instance, "exposure to a Republican candidate who employs 'God talk' leads to an increase in Democrats who report no religious affiliation."²⁴ Given these and other data the essay brings forward, it appears evident that the religionization of politics in many realms of public life may be seen as a trend that "threatens the state of religious tolerance in America and muffles religion's potential to be a prophetic voice."²⁵

Even apart from the idea that organizations may be viewed as legal persons, democratic theory must address their status as candidates for religious exemptions from applicable laws. This issue is central for Stephanie Collins in her essay "Are Organizations' Religious Exemptions Democratically Defensible?" One guiding assumption she considers is how individuals' religious liberty claims might be "transferred up" to organizations they belong to, such as businesses they own or institutions in which they hold office. She describes several other assumptions. She

rejects both the idea that every liberty right of an individual member transfers up to the organization and the counterpart view that an organization's responsibility to do something, such as provide a controversial medical service, transfers down to all its members.²⁶ Once these and related points are shown, we can see that organizations' claims – say claims by churches for a legal right to give discriminatory preference for one sex over another in employment policy – cannot be automatically given the weight such claims can have in individual relations. The issue is even more complicated when a claim by individuals as members of an organization, such as physicians in a church-affiliated hospital, conflicts with a claim of other individuals, for instance patients, who seek equal treatment by that organization or protection of a liberty, such as a right to assisted suicide, that it seeks to restrict.

Public education is a major realm of church-state policy issues in democratic theory. The prevalent liberal-democratic position is that although public schools may require instruction *about* religion, as in history classes, it may not require instruction *in* a religion. In his “Secular Reasons for Confessional Religious Education in Public Schools,” Winfried Löffler argues that so long as secular students are offered educational alternatives such as courses in ethics (which may touch on religion in the neutral ways a history course may), a democratic government may require confessional religious instruction for those who identify as belonging to an eligible religion. He argues his case in reference to the Austrian public education system but takes his view to have wider application. For one thing, “religions – in their best forms – can be seen as powerful supporters of democracy and the ‘democratically virtuous citizen.’”²⁷ But he also argues that instruction regarding religion cannot be fully “neutralized anyway.”²⁸ This bears on the alternative view that public schools should simply teach about religion without any confessional instruction. He indicates how, in Austria, the relevant religions are selected, since not just any religion can properly figure in the curriculum; and he considers how the kind of education he supports can avoid preferential treatment of any one of the eligible religions.²⁹ Löffler grants that the system he defends is not the only one that may succeed in providing adequate public education about religion. He concludes that “to have it done via confessional religion teachers under the transparency conditions of public schools is not the worst” among the available options for democratic societies.³⁰

Liberty of conscience is a commonly cited right needing protection by any genuine democracy. But what is conscience? Here Lorenzo Zucca's “Conscience, Truth & Action” offers many analytical descriptions. On one view, which he associates with such powerful exemplars as Sophocles's *Antigone*, it is a source of moral knowledge, and that source may of course also be religiously authoritative.³¹ On a second view (not incompatible with the first), conscience is a faculty that has a motivational and emotional role, pricking and prodding us in various ways. Here Shakespeare's *Othello* is Zucca's literary exemplar, one whose delusion shows how conscience can motivate the wrong actions.³² On a third view,

“conscience is presented as a deliberative device: we engage in a calm, rational reflection on our feelings and duties and we attempt to organize our thoughts before we can allow ourselves to get into action.”³³ Shakespeare’s Hamlet is Zucca’s exemplar in this case. These conceptions of conscience provide rich sources of questions about the status of conscientious objections, whether religiously based or not. Zucca concludes that “Conscience can claim to be heard but does not systematically excuse whoever claims it.”³⁴ He does not explicitly appeal to “public reason” or any specific standards for adjudicating claims of conscience, but he does maintain that “conscience can only be protected by the law when it can show that the law is making a mistake that needs to be rectified.”³⁵ Conscientious objections made on a religious basis are no exception to this restriction.

The protection of human rights is an avowed aim of many democratic constitutions and an ideal in the leading theories of democracy. There is of course dispute about just what rights are included, but freedom of religion is typically among the least controversial rights needing protection. Its extent is certainly controversial, but few would deny that the liberty rights whose exercise does not harm others include many categories of religious expression. Here T. Jeremy Gunn’s essay “Do Human Rights Have a Secular, Individualistic & Anti-Islamic Bias?” – which focuses on the UN Declaration of Human Rights – is highly pertinent. Citing charges that the Declaration is so biased, he considers objections from representatives of Islam.³⁶ He finds no Quranic basis for the blanket charge in question. In making his case, he distinguishes between, on the one hand, rights people may voluntarily exercise, forgo, or in any case not claim, such as the right to leave a religion even if they have in some way promised to live within it permanently, and, on the other hand, the supposed right of a state to enforce conformity with the religiously ordained standard. He does not deny that, as in some other religions, there are some cases in which Muslims might deny that there is a right to act contrary to an Islamic requirement, but he suggests that the real issue for Muslim critics of the Universal Declaration “is not that it interferes with the ability of Muslims to practice their religion, but that *it interferes with their wish* (which has no basis in traditional Islamic law) *to enlist the modern state to compel compliance with religious law.*”³⁷ A major question his essay raises is whether, contrary to some of the cited critics of the Universal Declaration, human rights are *intrinsically* individualistic and, accordingly, whether any rights of governments as such derive from the rights of the individuals to whom governments are responsible.

A difficult question not pursued directly by any of the essays in this issue is whether any major religion is committed, by its scriptures or traditions, or by these in combination with other factors, to a specific conception of democracy and its role therein. Only one of the essays explores whether practitioners of a major religion, here Judaism, tend toward definite views of the relation between religion and democracy. In “Judaism, Pluralism & Public Reason,” Jonathan Jacobs

surveys both selected Jewish literature and related historical patterns. One of his conclusions is that “Notions of citizens of a democracy as ‘free and equal’ and meriting respect on the basis of the worth and dignity of all human beings come quite naturally to Judaism. . . . Biblical conceptions of the fellowship of humankind, the worth of the individual, the political imperative of ‘justice, justice you shall pursue.’” Beyond this, he sees a welfarist tradition: “the moral obligation to care for the widow, the orphan, the stranger, and the poor are anchored in Jewish sources.”³⁸ He does not view this anchoring as in tension with the ideal of governmental neutrality toward religion, which he finds consonant with Jewish tradition. Endorsing governmental neutrality toward religion, however, does not require that citizens “bracket, suspend, or otherwise disengage from values and commitments that might be basic to how people understand themselves and others, and how they understand what justice requires.”³⁹ Here he stresses the need for toleration rather than the constraints on political deliberation he sees in a Rawlsian conception of that realm. Indeed, “For neutrality to succeed, it is important that people acquire habits and attitudes of toleration.”⁴⁰ This point leaves open both the extent of religious liberty government must protect and the kinds of reasons citizens may take as a basis for lawmaking; but the emphasis on toleration seems fully consistent with the liberty, equality, and neutrality principles cited earlier,⁴¹ the UN Declaration of Human Rights, and a wide range of religious accommodations permitted by these two sets of standards.

The essays considered so far concern the theory of democracy in relation to religion and the focus has been on appropriate standards governing this relation in actual democracies. In “Religion & Transitional Justice,” Colleen Murphy explores how religion can be relevant to *achieving* democracy in a nondemocratic society that is transitioning from civil war or some other crisis toward democratic government. Here she pursues the question whether, as some have argued, forgiveness is an essential element in such peacemaking struggles. On this issue, she points out, not all injustices preceding transition can even be discovered in many such cases (hence cannot be forgiven), nor can all their perpetrators be punished if a transition is ever to be accomplished (thus making forgiveness a response that many may see as important for achieving transition). Forgiveness is an attitude (or stance) enjoined by certain religions and perhaps sustainable in transitional cases only with the support of religious attitudes or institutions. She acknowledges that “religion has been a root cause of conflict, a marker of those targeted for repression and the basis for privilege in an unequally structured institutional scheme.”⁴² But she also explores the possibility of an overlapping consensus among those in an “Abrahamic faith” and cites positions that they apparently supported in South Africa as it transitioned from apartheid.⁴³ Such a consensus could support an individual’s becoming a moral exemplar with the authority to chair, say, a truth commission. In some cases, this kind of authority may be needed

to move toward democracy. Here religious figures have played a prominent role in transitional justice, though the moral authority of such people “is a function of individual biography” and need not depend on their religion.⁴⁴

Patriotism has been considered a virtue, but it has also been seen as allied to a kind of nationalism that may be inimical to democracy as well as to international relations. In “Patriotism & Moral Theology,” John Hare draws on Immanuel Kant both in defending patriotism as compatible with democracy and in arguing that it can be supported theologically. Hare takes patriotism to be love of one’s country, not an attitude or stance toward one’s nation as a legal or institutional entity. Indeed, he strongly associates love of country and love of humanity and sees the moral theology of Kant as he understands it to support the latter and thereby a cosmopolitan perspective.⁴⁵ Hare also maintains, regarding at least the Abrahamic religions, that “Within Judaism, we should look at the Noahide Laws, for example; within Christianity, at the parable of the Good Samaritan; and within Islam, at the Mu‘tazilite position on duties to the stranger. . . . [I]t is the very same God who does both the including and the sending out . . . beyond the group to strangers in need.”⁴⁶ He illustrates this point by citing Germany’s accepting more than one million people seeking asylum. Must German patriots disapprove, and is the cosmopolitan stance here antidemocratic? Surely not. The essay views Kantian moral theology as supporting, both morally and metaphysically, the universal values that ground democracy in particular countries and their international cooperation in dealing with refugees and other matters of international concern.

The relation between religion and democracy is multifarious, and it has different facets for every distinct kind of religion and for every particular form of democracy. Religions differ in their ethical standards and in the political implications of their teachings. Clergy differ in their disposition to distinguish moral leadership from political guidance. Ordinary citizens differ in their religious commitments and, whether they are religious or not, in their attitudes toward religion. Democracies differ in the historical and cultural conditions that shape their constitutional and legal structures. A major challenge for political theory is to provide standards that appropriately respect both democracy and religion and secure the possibility of their mutual flourishing. This balancing task has numerous institutional dimensions, particularly in defining and realizing a separation of church and state. It also presents a multitude of challenges in framing standards in the ethics of citizenship for individuals. The task is difficult even where there is agreement on religious liberty as a right that democracies must defend, and even when this is understood to entail governmental neutrality toward the religious and the nonreligious alike. But the difficulty of the task is reduced by a clear well-reasoned study of points of tension between religious and democratic values. It is also reduced by examination of alternative frameworks for rational

resolution of conflicts that occur between church and state and, at the level of the civic interactions and political conduct of individual citizens, both in their public life and within their private thinking. The essays presented here are offered as contributions to advancing this perennial task.

AUTHOR'S NOTE

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ENDNOTES

- ¹ This statement reflects the “*principle of protection of identity*: the deeper a set of commitments is in a person, and the closer it comes to determining that person’s sense of identity, the stronger the case for protecting the expression of those commitments.” This is proposed and discussed in Robert Audi, *Democratic Authority and the Separation of Church and State* (Oxford and New York: Oxford University Press, 2011), 42–43.
- ² John Stuart Mill, *On Liberty* (Indianapolis: Hackett, 1978), 9–10. Mill is strongly opposed to parentalism and (for competent adults) excludes harm to oneself as a ground for interference. See esp. *ibid.*, 10 ff. The notion of harm is seriously vague, and there is

no simple way to determine just how free we ought to be even if the harm principle is sound so far as it goes.

- ³ In this section I draw on earlier work, especially as briefly represented in my *Democratic Authority*.
- ⁴ Several kinds of establishment, some more and some less likely to affect religious liberty or basic human rights, are considered in *ibid.*, 43–44. The legal literature on the “non-establishment norm” is extensive.
- ⁵ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1995), 235.
- ⁶ *Ibid.*
- ⁷ *Ibid.*, 247.
- ⁸ *Ibid.*, “Preface,” li–lii.
- ⁹ See Kent Greenawalt, *Religious Convictions and Political Choice* (Oxford: Oxford University Press, 1988), 12. This view is refined and defended in Greenawalt’s later work, but the kinds of comments I make here are not undermined by his further work on the topic. Some of the points I make are extended or given a wider context in Robert Audi, “Religion and the Ethics of Political Participation,” *Ethics* 100 (2) (1990): 386–397.
- ¹⁰ See Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Lanham, Md.: Rowman and Littlefield, 1997), 112–113. This volume contains essays by each author writing alone and responses of each to the other. For his account of justice, see, for example, Nicholas Wolterstorff, *Justice in Love* (Grand Rapids: Wm. B. Eerdmans Publishing Co., 2015).
- ¹¹ This formulation is drawn from Robert Audi, *Religious Commitment and Secular Reason* (Cambridge: Cambridge University Press, 2000), 86; though published earlier in Robert Audi, “The Separation of Church and State and the Obligations of Citizenship,” *Philosophy & Public Affairs* 18 (3) (1989): 259–296. The principle has been widely discussed.
- ¹² I have explained and defended this point in Audi, *Religious Commitment and Secular Reason*, 96–100.
- ¹³ These include—in addition to Greenawalt, *Religious Convictions and Political Choice*—the several, mostly later books listed in Kent Greenawalt, “Democracy & Religion: Some Variations & Hard Questions,” *Dædalus* 149 (3) (Summer 2020): n. 1, including *Religions and the Constitution: Free Exercise and Fairness* (2006); *Religion and the Constitution: Establishment and Fairness* (2008); *Does God Belong in Public Schools?* (2005); *Statutory Interpretation: Twenty Questions* (1999); *Conflicts of Law and Morality* (1987); *Exemptions: Necessary, Justified, or Misguided?* (2016); *From the Bottom Up* (2016); and *When Free Exercise and Nonestablishment Conflict* (2017).
- ¹⁴ Greenawalt, “Democracy & Religion,” 27.
- ¹⁵ *Ibid.*, 28.
- ¹⁶ *Ibid.*, 27.
- ¹⁷ Samuel Freeman, “Democracy, Religion & Public Reason,” *Dædalus* 149 (3) (Summer 2020).
- ¹⁸ Paul Weithman, “Liberalism & Deferential Treatment,” *Dædalus* 149 (3) (Summer 2020): 61.
- ¹⁹ *Ibid.*, 62.

- ²⁰ Cathleen Kaveny, “The Ironies of the New Religious Liberty Litigation,” *Dædalus* 149 (3) (Summer 2020): 84.
- ²¹ *Ibid.*, 81.
- ²² David E. Campbell, “The Perils of Politicized Religion,” *Dædalus* 149 (3) (Summer 2020): 90.
- ²³ *Ibid.*, 93–94.
- ²⁴ *Ibid.*, 97.
- ²⁵ *Ibid.*, 101.
- ²⁶ Stephanie Collins, “Are Organizations’ Religious Exemptions Democratically Defensible?” *Dædalus* 149 (3) (Summer 2020): 109.
- ²⁷ Winfried Löffler, “Secular Reasons for Confessional Religious Education in Public Schools,” *Dædalus* 149 (3) (Summer 2020): 125.
- ²⁸ *Ibid.*, 126.
- ²⁹ *Ibid.*, 128–129.
- ³⁰ *Ibid.*, 132.
- ³¹ Lorenzo Zucca, “Conscience, Truth & Action,” *Dædalus* 149 (3) (Summer 2020): 136–137.
- ³² *Ibid.*, 145.
- ³³ *Ibid.*, 137.
- ³⁴ *Ibid.*, 143–144.
- ³⁵ *Ibid.*, 146.
- ³⁶ T. Jeremy Gunn, “Do Human Rights Have a Secular, Individualistic & Anti-Islamic Bias?” *Dædalus* 149 (3) (Summer 2020).
- ³⁷ *Ibid.*, 161.
- ³⁸ Jonathan A. Jacobs, “Judaism, Pluralism & Public Reason,” *Dædalus* 149 (3) (Summer 2020): 170.
- ³⁹ *Ibid.*, 181.
- ⁴⁰ *Ibid.*
- ⁴¹ See pages 8–9 in this essay.
- ⁴² Colleen Murphy, “Religion & Transitional Justice,” *Dædalus* 149 (3) (Summer 2020): 187.
- ⁴³ *Ibid.*, 190–194.
- ⁴⁴ *Ibid.*, 197.
- ⁴⁵ John Hare, “Patriotism & Moral Theology,” *Dædalus* 149 (3) (Summer 2020).
- ⁴⁶ *Ibid.*, 212.

Democracy & Religion: Some Variations & Hard Questions

Kent Greenawalt

The ideas sketched here concern the nonestablishment and free exercise norms expressed in the U.S. Constitution, their application to governmental institutions from legislatures to prisons and the military, the place of religion in the curricula of public schools, and the proper role of religious convictions in lawmaking. A major concern of the essay is the problem of achieving an appropriate balance between governmental neutrality toward religion, as required by the nonestablishment norm, and governmental accommodation of religious practices that would otherwise violate ordinary laws, as required by the free exercise norm. A recurring theme is the complexity of the issues and the variability of possible solutions given differences in the history and culture of democratic societies.

When one asks about the relation between democracy and religion, we have some answers that seem fairly obvious and others that do not. My basic claims are that there are important variations within democracies, that these may affect aspects of the proper treatment of religion, and that even within a modern, liberal democracy like that of the United States, we have some hard questions that lack simple answers. Certain answers to these questions do seem true across the board; others do not. The latter require a more particular focus.¹

What does democracy in general entail? Perhaps we have no precise definition, but we can take democracy as a system of government in which all adult citizens have a right to vote. Assuming we are not talking about a minuscule political order in which ordinary people would directly determine prevailing law, citizens elect legislators, and the highest executive officials are either also subject to citizen votes or are chosen by legislatures. I think we can say that if it is a genuine democracy – that is, a country that recognizes the political rights of all citizens – it will allow people to choose whether or not to worship and essentially what form of worship to engage in. Of course, there can be some limitations if a form of worship is obviously harmful for those engaging in it or for others.

What people see now as counting as a genuine democracy has developed over time. The original United States may have been conceived as a democracy, although racial slavery existed in many states and women rarely had a right to vote. Under

contemporary conceptions, a political order with either of these factors might not be seen to be a genuine democracy. In respect to freedom of worship, one can imagine an exception if a particular religion and most of its followers are committed to violent acts against other citizens or overthrowing the basic political system.

The United States, like many other modern democratic states, has no established church. What does this nonestablishment norm imply regarding governmental favoring or endorsing some particular religion? Suppose members of a particular religion basically form a society. This was true for certain sections of the British Colony in America that were created by religious groups, some of which maintained influence in the early states. And to note something often forgotten, the original First Amendment instructed “Congress shall make no law respecting an establishment of religion.” This meant partly that Congress could not interfere with state establishments. If we consider those states to have been genuinely democratic, we would not see nonestablishment as required for democracies in general. To put this a bit differently, if the vast majority of people are members of a particular faith, government support for that faith does not seem at odds with basic principles of democracy, at least as long as nonadherents are both free to worship in a different way, or not to worship, and do not have their fundamental political rights, such as voting and running for office, denied because they do not adhere to the dominant religion. The fact that a particular religion is established might have little effect on the fundamental rights concerning a liberal democracy, although it can be in some tension with a maximum sense of religious freedom, having a tendency to yield some preferential treatment for those who are members of the established church. England, for example, for many years had both an established religion in the Church of England and been essentially a democracy, although it maintained its monarchy.

The free exercise principle is an important aspect of the general liberties afforded to citizens in modern liberal democracies. Exactly how special it is turns out to be a complex topic on which I will offer a few brief observations. One can ask about both how human perceptions figure and what our law now provides. For seriously religious persons, religious convictions and priorities can be central in their lives; they may care deeply about whether the government is interfering with these in any way.² In a diverse society, even people who do not themselves possess such feelings do well to recognize them in others. It follows that the government should be taking these convictions and sentiments into account, at least if a significant percentage of the population possesses them.

When one asks about existing law, matters are factually complex. In the case of *Employment Division v. Smith* in 1990, the Supreme Court decided that for most general laws not directed at religion, those with religious objections had no con-

stitutional free exercise right to special treatment.³ This has led to questions of whether the free exercise clause has become redundant, swallowed up by freedom of speech and association.⁴ But a great deal remains in the special status of religious exercise. Here are five aspects. *Employment Division v. Smith* does not cover all religious practices. Churches and other religious practitioners retain the right to limit their clergy to men and to those who are not homosexual.⁵ *Employment Division* also indicates explicitly that legislators can make concessions to religious practices.⁶ We now have the Federal Religious Freedom Restoration Act, the Religious Land Use and Institutionalized Persons Act, and many similar state provisions that do just that.⁷ A subtler point concerns circumstances in which the government must treat nonreligious claims the same way it treats similar religious ones. Even here, if the religious claims help to provoke the basis for what equal treatment is required, free exercise remains important.

Two further aspects of significance concern the relation between free exercise and nonestablishment. The most obvious is that both clauses are designed to promote government noninterference and freedom of religious belief and practice. Free exercise bears on how one should see the basic notion of nonestablishment. And sometimes the values of the two clauses do seem to come into conflict, as with prayers to begin legislative sessions. If this content is suitably neutral regarding the issues on which the legislative body must vote, those wanting the prayers may claim that allowing them is a free exercise right. Then the question is how far free exercise qualifies the coverage of nonestablishment, or is itself qualified by the conflict.⁸ In all five of these ways, free exercise remains a special liberty that has not become redundant.

When one considers how religions should be treated, one recognizes that given the diversity of populations, nonestablishment, at least in some form, is needed. In an important sense, the two basic concepts of nonestablishment and free exercise work together. If the government favors one religion over others, that will enhance the actual practices of that religion, while possibly interfering with what other religions do. Also important, favoritism is bound to encourage some people to get involved with that religion; this impairs the basic idea that people should choose freely whether to join a particular form of religion, without being pushed by the government. Some obvious examples are these. If the government promotes strong financial support for and endorses a particular religion, involvement in that religion may seem more attractive to someone not already dedicated to another faith. And if favoring includes teaching of a particular religion within public schools, that could incline students to believe that it is the true religion. Of course, teaching about a religion is not the same as teaching or implying its truth, but that distinction may not be simple for teachers or students. Nevertheless, omitting reference to religion in human history would convey a nonobjective, unrealistic account of all that has mattered.⁹

For the values underlying both free exercise and nonestablishment, the government should not favor some religion over others. This key to the basic idea of nonestablishment is strongly supported by the core value of free exercise, since people will feel more free about religion if they understand that the government will not favor or disfavor them based on their convictions or the groups to which they are joined.

A modest exception to the no-disfavoring occurs if a religious group, or a segment of that group, supports violence against others. An existing controversial example of this concerns Islam. So long as a significantly large proportion of Muslims support violence against non-Muslims or Muslims of different denominations, it may be appropriate to do a more careful screening of Muslims – at least Muslim adult males who are not elderly – who seek entry into the United States. This cautionary policy differs from objectionable “racial profiling” in deciding who to admit to our country.

Although free exercise and nonestablishment basically fit with one another, we do have, as mentioned, certain tensions between them. For some of these, it is not easy to say what are the right approaches within a liberal democracy. Perhaps the most obvious example is government engagement in religious practices and messages, at least if these do not promote some particular religious beliefs and groups over others. Is it appropriate for legislative sessions to begin with non-denominational prayers and for presidents to end formal addresses with an appreciation of God and a request for God’s help? Presidents, like ordinary citizens, are free to have their own religious convictions, but when they reference those convictions in an official speech, such as a yearly address to Congress, their comments amount to something beyond a simple personal expression. If most officials, as well as most citizens, have religious beliefs, free exercise can support their expressions for such occasions. For the most part, what the nonestablishment clause requires does not depend on the religious outlook of citizens and officials, but the extent to which free exercise concerns may qualify likely applications could depend on it. Of course, what is generally relevant is the content and context of the religious element in a public speech.

One way to view some of the apparent religious references is to see them as merely “ceremonial deism,” referring to the culture and history of the country. This was suggested by Justice Sandra Day O’Connor regarding the use of “under God” in the Pledge of Allegiance.¹⁰ Although this perception may be accurate as a representation of how a great many citizens regard the pledge, I am skeptical that these are the dominant understandings of either aliens who say the pledge before becoming citizens or students in public schools who are called upon to do so. I think many in these categories, as well as some others, will perceive the pledge as including an acknowledgment about the place of God, or at least references to an actual God, in the United States.

The military and prisons, coercive institutions in which citizens lose many of their rights, are two special government domains. For both of these, the government should in some form provide religious exercise for those whose overall freedom is constrained. For military members stationed abroad in combat zones or aboard navy ships, the government may need to provide clerics themselves. For prisoners, it may manage by bringing clerics from outside to enter and provide services. The free exercise clause should here be taken to require, or at least authorize, reasonable efforts by the government to provide actual opportunities for typical exercise for those not free to go where they can worship as they choose.

An interesting question connected to all this is whether nonreligious activities and convictions should be treated equally. A believer in absolute “neutrality” might think the right answer is “yes”; but I believe, as noted earlier, that this view is an oversimplification. If soldiers and prisoners are given time to pray or an opportunity to have their dietary needs satisfied, allowing others a time to reflect or satisfy their genuine convictions about acceptable food makes sense, but the provision of clerics is different. Despite some decline, religion remains very important in the lives of many Americans, and for most religions, the role of clerics is central to worship. One might imagine some nonreligious analogue, in which a leader is central to gatherings organized around basic values and experience, but actual examples are few or nonexistent. For something like actual military chaplains, we cannot expect a government accession to a nonreligious analogue. Here religion will appropriately be given special status. However, apart from special cases, government need not provide for clerics in all denominations in every military situation in which there is a need for a chaplain. In some cases, nondenominational chaplains might have the appropriate skills.

Prisons present harder questions still, such as whether religion should count about judgments concerning parole and, if so, what the role of clerics should be. Although this consideration could produce concern about dishonest affiliations, if it is true that religious involvement makes subsequent criminal acts less likely, parole boards should be able to take that involvement into account. They should, however, probably avoid making these determinations vary depending on precise statistics about particular denominations. An obvious exception to equal treatment concerns attachment to religions that themselves promote criminal acts. An interesting special example here concerns a religion that encourages polygamy. One might conclude that its members are more likely to commit what counts as a particular violation of law, but no more likely or even less likely to commit other crimes.

Determining the proper role of clerics in parole board decisions is itself not simple. If religious practices and convictions are to be taken into account, clerics need to be able to testify about individual applicants for parole, although this constitutes religious personnel seriously affecting a certain kind of official determination. An important distinction here is between clerics contributing to infor-

mation bearing on the problem of recidivism and their describing the specifically religious character of the prisoner, which might or might not have such a bearing.

In a number of states, clerics actually serve on parole boards. That may well be too great an involvement of clergy in government decisions, an involvement especially likely to encourage prisoners to get involved with the particular religions of those clerics. I believe this practice should be regarded as at odds with the values of nonestablishment and free exercise.

Public schools in democratic societies generate their own problems. As a matter of principle, schools should teach about the place of religion in human history, but not the truth or falsity of a particular faith. They should also not teach more general points, such as that a loving God genuinely exists, or that atheism is actually true. The distinction between teaching *about* religion and teaching a religious claim *as true* may be difficult for teachers to draw and for schoolchildren to perceive. This may lead some to conclude that it is desirable for those subjects simply to be omitted. But doing that would yield an incomplete account of what has mattered historically and would do so in a way that minimizes the actual place of religion. One could see this as a form of establishment of non-religion conceived as presupposing atheism or at least as minimizing the actual place of religious views and practices in human life. This would implicitly encourage a kind of minimization of the importance of religion in students' perspectives. Despite the complexities about distinguishing between an "objective" account of various beliefs and practices and an apparent implication of their likely truth and intrinsic value, to totally disregard the place of religion in human life and in our culture is much worse. Public schools properly include religious topics in what they cover, while teachers should at the same time try hard not to endorse any particular religious conviction.

When it comes to teaching subjects like evolution that are well established by science but conflict with the religious beliefs of those that take certain biblical passages about creation as literally true, should teachers delve into the competing version? I believe not, although teachers may tell students that some people have a strikingly conflicting religious view. If a topic is subject to rational analysis and does not depend on any particular religious outlook, it is appropriately taught for itself in public schools. This would be true of mathematics and science among others. Concerns that are raised by a subject, such as worries about climate change, are appropriately covered. When it comes to competing views that are based on entirely different premises about reality, such as a biblical account of when God created human beings, it is fine for a teacher to mention these, but not appropriate to explore them in analytical detail.¹¹

Matters are more complicated when it comes to moral issues. Some moral questions are answerable on rational grounds. For example, parents should pro-

vide care for their children, and no one should kill another due to slight irritation. But we do not have simple rational answers about when abortions are not a matter of moral concern and what laws and public policies should thereby be instituted. Similar concerns exist for whether adoption by intergender couples should be preferred over gay couples because it is desirable for a child to have parents of both genders. I am assuming here that gay couples should have the right to marry they were accorded by the Supreme Court in *Obergefell v. Hodges*, and that this includes a right to adopt children.¹² But it does not necessarily follow that parental genders are irrelevant to who might be favored for a specific adoption. When it comes to such issues, it may be best for teachers briefly to explain opposing views, including religious ones, but without getting into details. Something similar may be appropriate for some political issues, although Donald Trump's presidency has led many to believe those involve certain moral concerns that have correct answers, such as whether political leaders should be basically honest.

What of religious convictions in lawmaking? Should laws and policies in our liberal democracy, or any democracy, be based exclusively on grounds that are not religious or anti-religious? If so, both legislators and citizens with relevant religious convictions about an issue should make every effort to disregard them in their political stances. How persuasive or realistic this position is turns out to be quite complicated. We need to distinguish among kinds of issues, between legislators versus ordinary citizens, and between actual reliance versus articulated bases for a stance, as well as how much courts should be involved in all this in constitutional and statutory interpretation. One may think it is healthy for judges constitutionally to protect the exercise of religion from ordinary laws that impair it. But with a few exceptions, the Supreme Court decided, in *Employment Division v. Smith*, that no such right exists. That leaves it in principle up to legislators to decide about the range of special treatment for religion. Ironically, legislators may decide to adopt a flexible standard that reinstates the range of judgments left to judges. This is what Congress did with the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act.¹³

Political decisions that actually favor one religion over others are not of general concern: under a basic nonestablishment principle, such laws and executive practices should not be adopted and citizens should not support them. More deserving of our concentration are essentially nonreligious questions, about which religious teachings may take particular positions. An obvious example that has existed throughout time is how much aid the government should give to people who are poor and disadvantaged. A different illustration concerns a modern controversy in the United States: is it or is it not acceptable to separate children from their parents in immigration detention?

How simple is it for someone to distinguish the weight of nonreligious convictions from religious ones and to assess their degree of personal influence over time? Suppose that someone believes she should make a decision on nonreligious grounds: the government should give substantial aid to the poor and disadvantaged because it is the just thing to do. Yet she also believes that a loving God strongly wishes people to provide that kind of help to others. For most such people, it would be very hard or nearly impossible to discount completely their religious beliefs in arriving at an attempted religious-independent position.

Let us consider a more complicated example. Suppose someone was raised in a religion that takes a strong position on a particular issue, such as aid to the poor, abortion, or same-sex marriage. In his early years, he was a devoted follower and embraced these positions. As he grew older, his religious convictions disappeared, and he came to regard religious bases as irrelevant. But when our subject thinks about contentious issues in nonreligious terms, can he really discount the influence of his earlier views? In a straightforward way, his past perspective could lead him to believe that what he long accepted as sound positions on crucial social issues remain so. But we can also imagine a kind of reverse influence. If a person now believes the religion itself is foolish, he might conceivably discount the force of nonreligious reasons that support political positions the religious group has taken.

When we put all this together we can see how hard it could be for many people to genuinely rely only on nonreligious thinking.¹⁴ This counts strongly against telling citizens that they should rely only on nonreligious reasons. More directly, assuming many in the country do have religious convictions, when it comes to issues that do not directly concern religion, such as public aid for the poor, I do not think it should be seen as wrong, nor as a kind of establishment, for them to rely self-consciously on the religious truth in which they believe.

Given that legislators represent many kinds of citizens, the more powerful argument is that they should rely as far as possible on nonreligious reasons, reasons of a kind that can be shared by rational citizens independent of any religious convictions they may have.¹⁵ Legislators, however, like the rest of us, may have some difficulty figuring out how far religion has influenced their positions. Of course, one nonreligious factor for legislators is a need to satisfy the desires and convictions of those they represent. And that could well include giving a degree of weight to the religiously based positions of members of that group.

When we turn to public articulations defending positions, as in open legislative sessions, political platforms, and campaign speeches, we can expect legislators to rely on nonreligious bases that are widely accepted. And in a liberal democracy, it makes good sense for advocating citizens to act similarly. If this is right, then the public arguments for positions may be more nonreligious than the complete balance of influential bases.

Does religion merit special treatment in a liberal democracy? To approach this complicated and sometimes highly controversial question, I begin with three important generalizations. The first is that the appropriate answers may well not be the same for all types of liberal democracy. The beliefs and practices of most citizens will shift over time and will be quite different in different countries. The best answers for a given country depend partly on the cultures of the country at the time. Here I focus on the present-day United States. The second generalization is that even in the context of a single democratic country, we should not assume that there is one decisive answer to apply across the board. It may well be that religious convictions and practices will warrant special treatments in some parts of a country but not others. The third point is that, for this discourse, one should not rely directly on an individual religious conviction itself but rather reasons that have wide acceptance.

Among the issues of concern here are non-favoritism of some groups or individuals over others, concessions to beliefs and practices, and specific privileges for groups.

A core idea of nonestablishment that contributes to free exercise is that the government should not favor some particular religious bodies and organizations over others. Is this special for religion or does it have broader application? There is no simple answer. We can certainly understand that the Equal Protection Clause precludes favoring white groups or African-American groups, and the Free Speech Clause may similarly bar certain categorizations, but at least in our present culture, the constraint concerning treatment of religious groups is taken as more absolute. To this degree, the free exercise and nonestablishment clauses do exercise a greater constraint against differential treatment than do other constitutional provisions.

If the government does not favor a particular religious group over others, may it grant some privilege to religious groups that does not exist for nonreligious groups? Of course, concessions should not allow religious groups to directly harm others or to receive privileges that have nothing to do with their religious practices. But that leaves us with questions about religious practices that may be at odds with general legal requirements. Two notable examples here are hiring decisions and the consumption of substances.

Suppose a religion holds that God has instructed us that only men should be priests. Precluding women from the position is at odds with established law prohibiting gender discrimination. But to tell members of a religion that they must accept as clergy those they believe are ineligible would be a substantial restraint on their free exercise. Not surprisingly, the Supreme Court has accepted the practice by churches, including the Roman Catholic Church, of limiting clerics to men.¹⁶

When it comes to controlled substances, what is generally forbidden by law may be part of a core practice of a religion. Two examples here involve communion wine and peyote as an ingredient for a religious gathering. Since no state now

bans the sale and drinking of alcohol, the wine example is no longer a practical concern; but such bans did exist in the United States in the past. Some Christians believe God has instructed the ritual consumption of wine as a representation of the blood of Jesus, and many others think this use is at least symbolically valid. Given the small amount of wine taken by those participating in communion, which itself does not elicit typical concerns about the consumption of alcohol, an exception here was obviously favorable (even if a few consumers might have been encouraged by the experience to go home and drink more).

More difficult is the case of religious use of peyote, since the basic effects resulting from religious medicinal use are not so different from those generally regarded as harmful or dangerous enough to warrant a broad prohibition. Whether the use in a religious service is enough to warrant an exemption is a more nuanced question, with complicating factors of sovereignty and history, among many others.

Should individuals be excused from ordinary legal requirements, such as military conscription, because of religious convictions and, if so, when? Should nonreligious convictions get the same treatment? Obviously, if the legal requirement offers citizens protection from substantial harm, such as criminal laws prohibiting battery, no special exemption should go to religious individuals and groups. It may, however, be acceptable for religious groups to discipline and treat their own members in more subtly negative ways that could be subject to tort liability in other contexts.

What if the privilege does not cause direct harm to anyone? Shall a religious objector be excused from jury duty or a military draft? The draft situation has invoked a specific statutory exception, prompting the key question of whether nonreligious claims should be treated similarly. Very briefly, given that a genuine pacifist will not engage in military efforts, a broader exemption clearly makes sense, especially if some form of alternate service is required. Congress sought to limit the exemption to religious claimants, but the Supreme Court responded by reading “religion” in the statute so broadly that it included those whose pacifist convictions were not religious in an ordinary sense.¹⁷ (Justice Harlan voted with the plurality to make a majority, but his basis was that restricting the privilege to religious convictions in this context was unconstitutional.)

Readers may disagree with some or many of my actual positions on these complex and controversial issues. But my overarching point is that the right relations of democracy and religion can depend on cultural settings; and even within a particular setting, like the present liberal democracy of the United States, we have a number of less-than-simple questions about what is called for. These lack complete and indisputable answers. Like much of our lives, what is right is both complex and disputable.

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ENDNOTES

- ¹ What follows summarizes matters I have explained and positions I have taken in various writings. Among these are the following books, which can be a source for readers who want to explore some of the issues in more depth. Kent Greenawalt, *Religions and the Constitution: Free Exercise and Fairness* (Princeton, N.J.: Princeton University Press, 2006); *Religion and the Constitution: Establishment and Fairness* (Princeton, N.J.: Princeton University Press, 2008); *Does God Belong in Public Schools?* (Princeton, N.J.: Princeton University Press, 2005); *Statutory Interpretation: Twenty Questions* (New York: Foundation Press, 1999); *Conflicts of Law and Morality* (Oxford: Oxford University Press, 1987); *Exemptions: Necessary, Justified, or Misguided?* (Cambridge, Mass.: Harvard University Press, 2016); *From the Bottom Up* (Oxford: Oxford University Press, 2016); *When Free Exercise and Nonestablishment Conflict* (Cambridge, Mass.: Harvard University Press, 2017); and *Religious Convictions and Political Choice* (Oxford: Oxford University Press, 1988).
- ² See Robert Audi, *Democratic Authority and the Separation of Church and State* (Oxford: Oxford University Press, 2013).
- ³ *Employment Division v. Smith* 494 U.S. 872 (1990).
- ⁴ I am presently working on a book about the nonredundancy of free exercise (it has not yet been submitted for actual publication).
- ⁵ See *Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Commission* 132 S. Ct. 694 (2012).
- ⁶ *Employment Division v. Smith*.
- ⁷ 42 U.S.C. §2000bb-1 (1993); and 42 U.S.C. §2000cc-§2000cc-5 (2000).
- ⁸ Among my writings to address the subject is Greenawalt, *When Free Exercise and Nonestablishment Conflict*.
- ⁹ See Greenawalt, *Does God Belong in Public Schools?*

- ¹⁰ See her individual opinion (concurring in judgment) in *Elk Grove Unified School District v. Newdow* 542 U.S. 1, 36–37 (2004).
- ¹¹ Although I have explored much of this in earlier work, Robert Audi’s essay “Religion and Politics of Science: Can Evolutionary Biology Be Religious Neutral?” *Philosophy and Social Criticism* 35 (1–2) (2009): 23–50, provides a superbly detailed account of various considerations and the weight they should carry that far exceeds what my own work contains.
- ¹² *Obergefell v. Hodges* 576 U.S. ____ (2015).
- ¹³ See 42 U.S.C. §2000bb-1 (1993); and 42 U.S.C. §2000cc-2000cc-5 (2000).
- ¹⁴ See Greenawalt, *Religious Convictions and Political Choice*.
- ¹⁵ *Ibid.*
- ¹⁶ See generally *Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Commission* 132 S. Ct. 694 (2012).
- ¹⁷ *Welsh v. United States* 398 U.S. 333 (1970).

Democracy, Religion & Public Reason

Samuel Freeman

A convention of democracy is that government should promote the common good. Citizens' common good is based in their shared civil interests, including security of themselves and their possessions, equal basic liberties, diverse opportunities, and an adequate social minimum. Citizens' civil interests ground what John Rawls calls "the political values of justice and public reason." These political values determine the political legitimacy of laws and the political constitution, and provide the proper bases for voting, public discussion, and political justification. These political values similarly provide the terms to properly understand the separation of church and state, freedom of conscience, and free exercise of religion. It is not a proper role of government to promote religious doctrines or practices, or to enforce moral requirements of religion. For government to enforce or even endorse the imperatives or ends of religion violates individuals' freedom and equality: it encroaches upon their liberty of conscience and freedom to pursue their conceptions of the good; impairs their equal civic status; and undermines their equal political rights as free and equal citizens.

In American constitutional democracy, reasonable people generally agree on the fundamental importance of freedom of conscience and religion and a democratic society's duty of tolerance of diverse religious, philosophical, and moral views. Differences on these questions normally concern whether religious beliefs and practices warrant special protections compared with philosophical and nonreligious moral beliefs and practices. And if special protection for religious freedom is warranted, does it extend to providing political support and public endorsement of religious symbols and practices, such as prayer in public schools? The contention that religion has a legitimate place in public political life, and that religious reasons are legitimate grounds for political decisions, are often rationalized by appeals to majoritarian democratic sentiments. If members of a religiously homogenous community support prayer in public schools, then why should this not be permitted so long as children are not coerced to participate? Few who argue this position would accept the teaching of atheism in public schools if it had majority support, on grounds that it violated their freedom of religion. This suggests that political arguments for public religious symbols and practices are not motivated by political values, but rather by belief in the greater importance of religion over nonreligion. The position is in tension with the liber-

al justification for liberty of conscience and tolerance of diverse views and ways of living, which assumes that conscientious religious convictions and conduct are not exceptional or deserving of greater political protection and endorsement than are nonreligious philosophical and moral convictions and conduct.

Is majoritarian democratic support and legal enforcement of religious morality – such as religious opposition to rights of abortion and contraception, or laws declaring fertilized eggs legal persons from the moment of conception – compatible with the First Amendment nonestablishment clause and free exercise clause of the U.S. Constitution and freedom of individual conscience? Similar questions are raised by a government’s endorsement of religious beliefs and symbols of religion. State endorsement of Christianity or religion in general calls into question the political equality of those who reject it. Even if state endorsement of religion or religious symbols and practices does not involve coercive interference with individual conscience, it can jeopardize or diminish the equal civic standing of nonbelievers.¹ State endorsement of religion dilutes nonbelievers’ equal rights of political participation and their claims to a political justification of laws and public policies on terms they can accept as free and equal democratic citizens.

I contend that these and related questions regarding freedom of conscience and religion, political equality, separation of church and state, and special support and accommodation for religion turn on whether political measures can be justified in terms of what John Rawls calls “the political values of justice and public reason,” or sometimes simply “public reasons.”² To explain the idea of political justification by public reasons, I begin with some remarks on the subject of liberal neutrality between religion and the political values of a constitutional democracy. My aim is to clarify the idea of democratic public reason and explain its relevance to questions regarding the proper role of religion in political decisions and public life in a liberal constitutional democracy.

N*eutrality Between Religions and the Good.* Religious critics of liberalism contend that in protecting freedom of conscience and institutional separation of church and state, liberalism claims but inevitably fails to be “neutral” between religion and nonreligion, or with respect to the values individuals affirm, or among different religious, moral, and philosophical views. It is true that liberal institutions and laws cannot be neutral in a causal sense toward religion in their influence and effects on society and its members: the many freedoms and opportunities liberalism guarantees affect beliefs and practices. Indeed, they often draw people to question and abandon their religious views and violate religious imperatives and customary moral norms. Liberalism also influences religious doctrine itself, and eventually the mainstream religions in the West have either come to endorse most of the equal rights, liberties, and opportunities liberalism supports (such as equality for women), or risked marginalizing themselves.

But liberal freedoms and opportunities have the same unsettling effects on secular beliefs and institutions and individuals' adherence to nonreligious doctrines and conventions. So, it can at least be said that liberalism is neutral in its disruptive effects on traditional beliefs, practices, and institutions of all kinds.

In protecting freedom of conscience, thought, and individuals' tastes and pursuits, liberalism is sometimes said to aspire to be "neutral" or impartial with respect to "the Good": the values, commitments, ideals, and ways of living tolerated in liberal society. But liberal institutions, in addition to protecting individual rights and liberties, promote goods and public benefits of many kinds often opposed by traditional religions: the equality of women; publicly funded education to develop individuals' minds, capacities, and skills so they can be productive, self-supporting, and take advantage of diverse employment and cultural opportunities; individuals' health and well-being through public health measures and provision of health care; public goods such as infrastructure necessary for a modern society (highways, airports, public transportation, and so on); scientific and medical research; exploration of nature and outer space; publicly funded libraries and museums for the discovery and preservation of knowledge and culture; and protection of species and the environment. Modern liberals presuppose these are political values that are legitimate for government to protect and pursue, in addition to traditional political values of safety and security of persons and their property, economic prosperity, and individual liberty.

Here, too, it is noteworthy that the traditional justifications of liberalism are grounded in controversial philosophical positions. These include both religious doctrines of natural law originating in God's commands (John Locke), and also nonreligious doctrines that assume such intrinsic values as negative liberty and minimizing coercion (Friedrich Hayek), moral and rational autonomy (Immanuel Kant), social utility (Jeremy Bentham), individuality (J. S. Mill), and the plurality and free choice of values (Isaiah Berlin).³ Further, it is argued that in defining what constitutes the domain of right and justice, liberalism cannot avoid endorsing a particular philosophical view of value and the nature of right and justice that conflicts with religion, or controversial epistemic views about rationality, reasonableness, accessibility of reasons, and mutual acceptability.⁴

These examples suggest that the claim that liberalism purports to be "neutral between religion and the good" is unfortunate. Clearly this is not true of traditional philosophical justifications of liberalism. The philosophical liberalism of Kant, Mill, Rawls's *Theory of Justice*, Ronald Dworkin, Joseph Raz, and others who endorse individual autonomy, while tolerant of diverse religions, make little pretense about being "neutral" toward traditional religions with respect to individuals' good. They all presuppose (partially) comprehensive conceptions of right and value that directly conflict with most religious creeds. Moreover, few if any religions accept the utilitarian conceptions of value affirmed by Bentham, Mill, and

Henry Sidgwick that overall happiness (not communion with God) is the ultimate good in all activities. Fewer still endorse Kant's claims that reason (not God's will) is the source of morality and justice, that a human's rational will is the origin of value, and that moral autonomy – acting for the sake of right and justice – is the ultimate good and measure of a person's moral worth. Kant's and Mill's liberalism are extensions of their comprehensive moral views and address the optimal social and political conditions that enable individuals to fully exercise their capacities and realize moral and rational autonomy (Kant) or individuality (Mill). While both endorse the liberal idea that individuals are to be free to decide their own conceptions of a good life, they both subscribe to a kind of perfectionism of the self to guide individuals' decisions about which values and endeavors they ought to pursue (implicit in Kant's duties to oneself to perfect one's own capacities and Mill's distinction between higher and lower pleasures). Even Rawls's account of "the good" in *A Theory of Justice*, though only "partially comprehensive," is beholden to Kant's and Mill's accounts of rational and moral autonomy.

The intrinsic value that many philosophical liberals assign to individual autonomy means their liberalism is neutral neither in its effects, its aims, its values, nor its justification of liberal institutions. For the implication of these philosophical liberalism is that transcendent religious doctrines are false in crucial respects, regarding both the nature of morality and value, and also (given liberalism's alliance with the natural sciences) the origins of the universe, humankind, and many natural facts. One can understand then why there is so much religious opposition to liberalism among fundamentalists, evangelicals, and orthodox religions: for philosophical liberalism's fundamental ideas are incompatible with the doctrines of the traditional religions.⁵

There is no feasible way to make laws and public policies neutral in their effects on religion or on individuals' conceptions of the good. Liberals contend nonetheless that so long as laws and public policies are *neutral in their aim*, are not designed to discriminate or burden religion, and promote legitimate state purposes (about which liberalism and traditional religions often disagree), these measures should be politically legitimate.⁶ There might be some accommodation given to religions to mitigate burdensome effects, such as exempting Amish children from compulsory education requirements at age fourteen,⁷ or exempting religious employers from providing no-cost contraception in health care they are required to provide employees.⁸ But accommodations and exemptions from legal requirements for religious reasons raise questions of their own regarding neutrality and favoritism toward religion. Still, without any attempt at accommodation whatsoever, there can be problems of unfairness in the distribution of burdens on individuals' exercise of their freedoms of conscience and religion.⁹ To enforce dress codes at school, work, and the military that deny the wearing of any religious headgear seems to unfairly discriminate against members of minority religions when the

attire has great religious and moral significance. If neutrality in the effect of laws with purportedly neutral aims is not always possible, there still remains a question of the neutrality or fairness of treatment of those who experience exceptional burdens in spite of government's pursuit of neutral aims.¹⁰

One promising way to address the problem of political neutrality toward religion and conceptions of the good in a liberal constitutional democracy is with the idea of neutral or impartial justification: *public justification* in terms of *public reason* and the *political values of justice*. To clarify these complex ideas, consider Locke's claim in *A Letter Concerning Toleration* that the business of government is not the salvation and care of people's souls, but instead is restricted to the procurement of certain "civil interests" all have: "Life, Liberty, Health, and Indolency of the Body; and the Possession of outward things, such as Money, Land, Houses, Furniture, and the like."¹¹ The general idea is that government's primary if not exclusive role is to impartially promote the common good, which consists in protecting and procuring certain fundamental interests that are essential to the good of all citizens: their lives, liberties, property, and other political values. Going beyond Locke, so long as government does so impartially without intending to discriminate in favor or against religion, it acts legitimately ("neutrally"), even if laws have disparate effects on certain religious confessions or nonreligious conceptions of the good. There is disagreement about how "compelling" these civil interests must be to restrict religious ritual and conduct, and about whether general laws unfairly burden religion in certain circumstances or are "narrowly tailored" enough so as to avoid such burdens. But the general idea of the legitimate and compelling civil interests that government may impartially pursue is characteristic of the liberal tradition and provides a way into understanding the "neutral" or public justification of laws according to the political values of justice and public reason.

The *Structure of Democratic Public Reason*. The idea of political justification by public reason is a natural corollary to the main idea of social contract theories: that the fundamental terms of social cooperation should be generally acceptable to free and equal persons expected to comply with them. Acceptable on what grounds? Hobbesian contractarians contend that cooperative terms should be acceptable to each when justifiable on grounds of each individual's private interests and personal religious and moral convictions, and when terms of social cooperation are the outcome of a bargain among these conflicting interests and views.¹² The Hobbesian view provides a fitting characterization of the political compromises typical of a pluralist majoritarian democracy wherein citizens vote for candidates who represent their private interests and religious and moral concerns. By contrast, the liberal-democratic contract tradition says that terms of social cooperation should be impartially justified and acceptable to citizens generally on grounds of the shared civil interests they have in their capacity as free and

equal citizens. These civil interests provide the grounding for legitimate constitutional principles and laws that can be impartially justified to all citizens – justified, not as an unstable compromise among conflicting private interests and moral and religious convictions, but in terms of political values of public reason all can endorse in their capacity as free and equal citizens.

Democracy in the United States embodies tendencies of both the Hobbesian and the liberal-democratic social contract views.¹³ Here I focus on the liberal-democratic contract doctrine and its account of public reason as embodying the more appropriate conception of public political justification for a constitutional democracy.

What is public reason and the political values it incorporates? Turn again to Locke's liberal account of the civil interests of citizens and the political ideal of free and equal persons that informs these civil interests. The duties of government are to attend to the common civil interests of society's members: for Locke, their lives, liberties, health, external possessions, and leisure time. These civil interests are shared among persons with the capacities for reason since all are born free and equal (by virtue of God's creation, Locke says). The civil interests of free and equal persons with capacities for reason ground certain political values and fundamental principles (or "laws of nature" in Locke's terms) that are in each individual's interest when others respect and comply with them. As the political agent of the sovereign people, it is the duty and proper role of government through the laws to promote the common civil interests of free and equal persons by enforcing these principles and political values of justice, which constitute the "public good." Citizens are to exercise their rights of conscience or "private judgment" to decide if government has violated its trust by exceeding its legitimate powers. But there is no mention yet of *public reason* or the duty of government to justify its laws to citizens. Locke, though an early liberal, was not an advocate of democracy. Jean-Jacques Rousseau was the first to invoke the idea of public reason, which he distinguishes from the private reason of individuals grounded in their personal interests and pursuits. Public reason for Rousseau is the reason of the collective body of citizens as they impartially deliberate on measures that meet requirements of justice and promote the common good of all. Public reason is to guide the "general will," or citizens' deliberations and collective judgments on laws that effectively realize the civil interests and common good of all citizens.¹⁴

By the time Rawls inherits the idea of public reason, most of its background and structure are in place. The democratic ideal of public reason and of the public justification it supports presume:

1. An ideal of *free and equal persons* with the capacities for practical reasoning, which are the "moral powers" to be *reasonable* by complying with requirements of justice, and *rational* in forming and pursuing a conception of the good.

2. Free and equal persons' *fundamental civil interests* in developing and exercising their moral powers, since these enable citizens to engage in social and political cooperation as equal citizens and pursue their individual conceptions of the good.
3. *The political values of justice and public reason*, which are necessary to promote the fundamental civil interests of citizens, including for Rawls the "primary social goods": basic rights and liberties, diverse opportunities and powers and positions of office, income and wealth, and the social bases of self-respect.
4. *A political conception of justice* grounded in citizens' fundamental civil interests and their associated political values that enables citizens to assign priorities to political values and determine the balance of public reasons as they are applied to decide laws, public policies, and constitutional questions.

Public reason provides the bases for public political justification of laws to all citizens. Accordingly, it is crucial to the democratic idea of public justification that public reasons must be *shared* among free and equal citizens generally, not simply reasons that are intelligible or otherwise accessible to citizens as in Hobbesian accounts of public justification. Not all reasons shared by citizens are public reasons: we all have reasons for personal cleanliness and to clean our clothes and living quarters periodically, but these are neither political values nor public reasons. Public reasons are shared because they are grounded in the civil interests of free and equal citizens generally and express the political values that these civil interests support. Finally, public reason requires a political conception of justice whose principles and ideals provide determinate "content" to public reasoning, since it enables citizens and their political representatives to address the many disputes regarding the significance and relative weight or importance of political values.

Rawls has a more expansive conception of civil interests than does Locke, Kant, and nineteenth-century classical liberals. They were primarily concerned with establishing personal rights of conscience and belief, and economic rights and liberties for a nondemocratic private commercial society. In order to accommodate liberalism to the circumstances of a modern, diverse democracy, it is necessary to generalize the civil interests of free and equal persons. All reasonable citizens now regard themselves as free, socially equal, and legally independent regardless of race, nationality, or gender. They also regard themselves as responsible for their lives and conceptions of their good, and as having rights to participate as civic equals in democratic deliberation on social policies and decisions on laws required by justice and the common good. For these reasons, free and equal moral persons have, in their capacities as democratic citizens, fundamental civil interests in the "full and informed exercise" of the moral powers of practical reasoning that enable them to rationally decide and pursue their aims, and also to reason

about and responsibly comply with requirements of justice and the common good in their capacity as democratic citizens.

Citizens' civil interests in these capacities for practical reasoning are fundamental, not for perfectionist reasons or because many citizens accept the intrinsic good of rational and moral autonomy. Rather, the exercise of these capacities is necessary for all citizens – regardless of their conscientious convictions and final purposes – to take part in and benefit from social and political cooperation in a democratic society. Without the capacities to be rational and reasonable, individuals are unable to critically deliberate about and effectively pursue their purposes, understand and comply with laws required by justice, and more generally take responsibility for their actions and lives and effectively participate as equal citizens in social and political life. Rawls interprets the more familiar civil interests of Locke and classical liberals – the security of life, liberty, property, and so on – as among the primary social goods mentioned earlier, which are all essential to the exercise and development of the moral powers and the pursuit of most any permissible rational conception of the good in a modern democratic society. The fundamental civil interests of citizens in their moral powers and the primary social goods are the fundamental *political values* that are the main business of government to develop, protect, or procure for all citizens. They provide the foundation for other political values of justice that should ground public reasoning about laws, public policies, and requirements of the political constitution.

Regarding the “political values of justice and public reason,” Rawls says, “These values provide public reasons for all citizens.”¹⁵ Among the liberal political values Rawls specifically mentions are such values of justice as equal political and civil liberty, equality of opportunity, social equality and economic reciprocity, the common good, the social bases of self-respect, and the necessary institutional conditions for these values. There are also the political values of public reason that include guidelines for free and public inquiry, the appropriate use of concepts of judgment, inference and evidence, and such political virtues as reasonableness, fair-mindedness, and a readiness to honor the duty of civility, all of which make reasoned public discussion possible.¹⁶

Rawls later says that the values mentioned in the Preamble to the U.S. Constitution are examples of political values: a more perfect union, justice, domestic tranquility, the common defense, the general welfare, and the blessings of liberty for ourselves and our posterity, all of which include more specific values under them, such as the fair distribution of income and wealth. Effective and efficient use of economic resources are political values, which include promoting economic prosperity and preventing economic, environmental, and other kinds of social loss or waste.¹⁷ This includes the development of human as well as real capital, and thus adequate education of citizens to develop their capacities and skills so that they can be economically productive, self-supporting, and successful in their cho-

sen pursuits. Economic reciprocity is also a political value, which means both that citizens should have adequate means to develop and exercise their moral powers and pursue a wide range of conceptions of the good, and also that there be a fair distribution of income and wealth. Having diverse opportunities for productive employment is a political value, as are the physical health and mental well-being of citizens that are necessary for them to lead productive and successful lives.

Other political values Rawls mentions relating to human health and the environment are preserving the natural order to further the good of ourselves and future generations; promoting biological and medical knowledge by fostering species of animals and plants; and protecting the beauties of nature for purposes of public recreation and “the pleasures of a deeper understanding of the world.”¹⁸ From his brief discussions of the right to abortion, we learn that among the relevant political values are “appropriate respect for human life,” the reproduction of liberal society over time, full equality of women, and respecting the requirements of public reason itself in political discussion of controversial issues.¹⁹ Political values that relate to the family are the freedom and equality of women, the equality of children as future citizens, the freedom of religion, and the value of the family in securing the orderly production and reproduction of society and its culture from one generation to the next.²⁰

This is not an exhaustive list of the political values that should govern public reason, political decisions, and political justification in a constitutional democracy. In general, political values include the values, principles, and ideals that are significant if not essential to enable democratic citizens generally to adequately develop and fully exercise their moral powers, take advantage of diverse opportunities and pursue their freely determined conceptions of the good, and participate as socially and politically equal members of a democratic society on grounds of reciprocity and mutual respect. Given the many political values that are significantly instrumental to these ends, most if not all political questions that legitimately arise in a democratic society can and should be addressed by reasoning in terms of these shared political values. In this regard, public reason is, Rawls says, “complete.”²¹ This is especially the case when “constitutional essentials” and “matters of basic justice” are at stake: questions regarding individuals’ constitutional rights and liberties, equal opportunities and equal protection under law, the proper constitutional powers and procedures of government, the fulfillment of individuals’ basic needs so they can effectively exercise basic rights and liberties and take advantage of opportunities, and finally the achievement of economic reciprocity with the fair distribution of income and wealth.²²

But even regarding questions that are not constitutional essentials or matters of basic justice, the political values of public reason normally should guide political officials’ judgments. This seems reasonable if not required in the case of the adequate provision of many public goods that may not be required by basic justice,

such as where to construct highways and public transportation, public works, funding postsecondary education for all, the provision of certain public services (like legal aid), and funding cultural institutions (such as art museums, orchestras, and convention centers). In the absence of political values that guide decisions on these and other publicly funded measures, public funds will be misused for nonpublic purposes or prone to unfair distributions depending on people's wealth and political influence.

Rawls envisioned certain ostensibly perfectionist values governments can support when constitutional essentials and basic justice are not involved, such as art, historical, and other museums, or subsidies for orchestras, jazz concerts, and theaters. Public subsidies for parks, national holiday celebrations, convention centers and coliseums, perhaps even stadiums for athletic events, also seem to qualify. For given the wide range of political values of public reason Rawls mentions – including “public recreation and the pleasures of a deeper understanding of the world” – even many perfectionist, entertainment, and other leisure values would seem to be instrumentally justifiable in terms of the political values of education, health and mental well-being, and so on. As Rawls says in justifying laws that protect “the claims of animals and rest of nature”: “In each case we should start from the status of adult citizens and proceed subject to certain constraints to obtain a reasonable law.”²³ The constraints he mentions are that measures that promote perfectionist and other values not required by constitutional essentials and basic justice must sufficiently relate to and suitably advance citizens' fundamental civil interests in the “adequate development and full and informed exercise of the moral powers” and other political values of public reason.

It is because the political values of public reason can accommodate a wide range of subsidiary instrumental values that Rawls can claim that the political values of public reason are virtually “complete”: they are sufficient to address all or nearly all legitimate questions regarding political policies and laws regulating conduct and individuals' rights, liberties, opportunities, and other matters of legitimate public concern, at least so far as constitutional essentials and basic justice are concerned. Still, it is important that the values many consider perfectionist (scientific, mathematical, and literary knowledge, aesthetic creativity and appreciation, athletic prowess and dexterity) are not to be promoted for their own sake even though individuals may value them as such. They are rather to be promoted since they are conducive to realizing citizens' civil interests and the public good.

Political Legitimacy. The implication of the liberal-democratic claim – that the proper role of government is to promote only the civil interests of free and equal citizens and associated political values – is that laws and policies designed to promote nonpolitical values that cannot be justified in terms of civil

interests and political values of public reason exceed government's mandate and are not politically legitimate. If democratic government is to exercise its coercive powers to justifiably compel conduct or expend public funds, then it should do so only for reasons that citizens can accept as compatible with the civil interests and political values they share as citizens. Moreover, political legitimacy is important because it defines the limits on government officials' powers to exercise political authority, and also citizens' duties to obey laws that they might regard as contrary to their particular interests or conscientious beliefs, or even as unfair or unjust. Even if they regard laws as contrary to their conscientious beliefs or as unjust, citizens with few exceptions have a moral duty of political justice to comply with politically legitimate laws, those justifiable in terms of political values of public reason.

Rawls tells us that laws and "all questions arising in the legislature that concern or border on constitutional essentials or questions of basic justice should be settled, so far as possible, by principles and ideals that can be endorsed" by "common human reason" and supported by political values that "*can serve as a basis of public reason and justification.*"²⁴ This is a condition on laws' political legitimacy. The mere fact of majority will – that a majority of citizens support measures that promote their individual interests or comprehensive religious, philosophical, and moral views – is not sufficient to bestow political legitimacy on measures. Instead, political officials in their public acts and decisions have a "duty to honor public reason" in order to confer political legitimacy.²⁵ Moreover, citizens also have a moral "duty of civility, to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason."²⁶

These are three separate requirements of political legitimacy. The first imposes a political obligation on government officials: that they make decisions on laws and other matters on grounds of the political values of public reason and provide a public justification in these terms. The second is an analogous moral duty of civility on citizens: that they publicly advocate and vote only for candidates who support measures that are politically legitimate and supported by the political values of public reason. Third, citizens have a duty that applies especially when they advocate and vote for political policies or legal measures on the basis of their religious and other comprehensive views: to explain to other citizens how their votes also conform to the political values of public reason.²⁷

Many argue that it is unreasonable to expect religious citizens *not* to vote their religious views but vote political values instead, since it compromises their "religious integrity." For this reason, citizens' duty of civility allegedly cannot require that citizens vote or advocate public reasons if they are contrary to their religious beliefs. This is but one religious challenge to the implications of political legitimacy and public reason.

Religion and the Neutrality of Political Justification through Public Reason. The political values of public reason, as I've described them, potentially include development of human capacities that might seem to be perfectionist values, provided they are instrumental to realizing the fundamental civil interests of democratic citizens. But if that is so, then why shouldn't religious faith, such as belief in God and in the divine ordering of the universe, also be contemplated as instrumental to promoting political values and legitimate public grounds for laws and public policies? After all, for many people, religious knowledge and experience (knowledge of the Bible and theology, prayer and meditation), like knowledge of science, art, and literature taught in public schools, are conducive to their being well-rounded persons and law-abiding citizens. So why should certain religious beliefs, symbols, and practices, such as school prayer and religious instruction, not be incorporated into public reason and the political domain, so long as they promote good citizenship, public education, and other political values as well as many citizens' sense of justice?

The requirement that government impartially promote the common good, and that it do so without aiming to discriminate in favor or against religion, rules out relying on religious means to promote civic ends and the common good. Let us assume that public school prayer would in fact calm students at the beginning of the school day and help them focus on their classes and schoolwork. Even if the primary purpose of school prayer is not religious but to promote the education of children, still the means taken to promote this civic purpose does so in ways that discriminate in favor of religion. It is difficult to argue that promoting religion is not a secondary aim here since there are many legitimate alternative means other than compulsory school prayer to achieve the same civic purpose of providing optimal conditions to educate students (for instance, mindfulness or breathing exercises, or a moment of silence for reflection). Applying the constitutional test of strict scrutiny when fundamental rights are at stake (liberty of conscience and freedom of thought), prayer in public schools is not "narrowly tailored" to achieve legitimate civil aims or interests. Moreover, school prayer and religious symbols in civic places, even if for civil purposes, promote particular religions or religion generally; as Justice O'Connor said, this makes those who have different or no religious beliefs appear and feel as if they are outsiders and not fully members of the civic community.²⁸ Finally, these practices involve government entanglement with religion, and jeopardize the democratic value of "separation of church and state."

Some philosophers claim that for many people, religious beliefs and values ground their beliefs about justice, and it is difficult for them to understand political values of justice and their duty to obey valid laws apart from their religion.²⁹ Nor can they maintain their "integrity" as persons unless they can appeal to their religious faith in coming to a decision and justifying their position on all pub-

lic matters. For many religious persons, prayer in public school and political forums, religious displays and symbols in publicly owned places, and other public recognition of their religious faith reinforce their commitment to justice and being conscientious law-abiding citizens, and hence promote the virtues of justice and other political values of public reason. This raises a different question from whether religious citizens have a civic or moral duty at all to exercise their political rights only in accord with the political values of public reason (addressed below). Conceding that they do, the question here is whether religious reasons, symbols, and practices should be publicly acknowledged and endorsed by government as a source of legitimate public reasons when they are sufficiently conducive to citizens' compliance with justice and their accepting political values of public reason.

In general, the fact that political endorsement of religious reasons, symbols, and practices might be conducive to promoting the moral powers and related political values for many people does not mean that religious reasons themselves should be regarded as public reasons; nor that they should have a politically recognized role in official decisions regarding laws and policies; nor does it justify political endorsement of religious practices or symbols. For to be *public*, political values must be *shareable* among *all* reasonable citizens and relate to their civil interests *in their capacity as free and equal citizens*. Teaching the arts and sciences in public schools to develop human capacities for reasoning, scientific, mathematical, and historical knowledge, literary and aesthetic appreciation, and sports and physical prowess enables citizens to choose from and take advantage of diverse employment and cultural opportunities, cultivate habits of maintaining good health, and promote other political values. But advocating and encouraging particular religious beliefs and spiritual connection to the divine is to provide reasons and instill beliefs that are accepted by some citizens but rejected by others. They reject these religious reasons not simply as false or misguided on grounds of their own conscientious religious, philosophical, and moral convictions and conceptions of the good, but also reject them as politically unreasonable *in their capacity as democratic citizens based on their fundamental civil interests* because they are not conducive to the development and exercise of the moral powers of citizens generally or to realizing other public political values. The same is not true of general education in the sciences, math, and history, even the history of art, philosophy, and religion. For there is little or no reason to question the evidential standards of these intellectual inquiries, even if there may be grounds for questioning the aesthetic value of some art and music, or the truth of the philosophical, ethical, and religious doctrines surveyed in such courses. There is a clear difference between teaching the beliefs, practices, and histories of different religions, versus advocating, affirming, and enacting religious beliefs and practices, such as by affirming religious creeds in public schools, legislatures, or courts.

Chief among the political values of justice are social and civic equality and the priority of equal basic rights and liberties, including equal liberty of conscience and freedom of thought and association, over other social values. When the official grounds for laws and public policies are based in religious reasons that are not acceptable as either comprehensive or public political values by democratic citizens generally, then they conflict with rather than promote the exercise of many citizens' fundamental civil interests, as well as their conceptions of the good. Liberty of conscience protects not simply freedom of conscientious belief but also the freedom to act on one's moral convictions consistent with the civil interests and legitimate rights of citizens. When religious reasons are made to serve as political reasons for coercive laws (such as prohibitions or unreasonable restrictions on extramarital and gay sex, contraception, or abortions), then there are serious questions regarding infringement upon dissenters' liberty of conscience and freedom of thought and association: they are being legally required to comport themselves with others' religious morality without justification by the political values of public reason.

Moreover, even if conduct and beliefs are not legally coerced by political endorsement of religion and religious morality, still many citizens' civil interests are treated as irrelevant or overridden on the basis of other citizens' religious, philosophical, or moral beliefs. Nonconformists then are not being publicly treated or regarded as fully equal citizens, since they decline to recognize or participate in publicly sanctioned religion and its practices. Moreover, the exercise of democratic political power in which they share is being employed for reasons that they reject based not simply on their conception of the good, but even in their capacity as equal citizens.³⁰ The exercise of their equal rights of political participation is thereby impaired, and their claim to a public political justification in terms of public reasons they can accept is denied.³¹

The view here does not apply only to religion, so it does not discriminate against religion as such. For the same constraints should apply to laws that are justifiable purely on grounds of nonreligious philosophical and moral views acceptable to only a portion of democratic citizens. This includes utilitarian values of maximizing aggregate welfare, libertarian values of absolute property and self-ownership, Kantian values of moral autonomy, Millian individuality and other perfectionist doctrines to develop excellences, and virtues and ways of "flourishing" that cannot be justified in terms of political values of justice and public reason. Likewise, for government to publicly endorse or advocate in public schools atheism and scientific materialism (that the material universe is all there is) as in the former Soviet Union and other communist nations, or similar controversial metaphysical doctrines, also conflicts with public reason. Believing these philosophical doctrines is not necessary for the development and full and informed exercise of the moral powers, or educating citizens so that they can be productive, be self-

supporting, and fully take advantage of a liberal society's diverse opportunities, or fulfill their roles and duties as free and equal citizens. Here I assume that the empirical and mathematical sciences, including Darwinian evolution, can be taught in public schools without denying what many believe to be God's role in creating the universe, and without the implication of scientific materialism and atheism. There is no legitimate empirical science of either atheism or of God's necessary role in creation, nor are these metaphysical positions necessary assumptions for any of the empirical sciences, nor for a liberal political conception of justice.

Let us return now to the issue of liberal neutrality and what it could mean in the context of political liberalism and public reason. Political liberalism we have seen is not neutral with respect to the good if that is taken to mean that there can be no conception of individuals' good or fundamental interests that it is the role of a liberal society to secure and encourage. Public reason assumes there are certain fundamental civil interests of democratic citizens that it is the purpose of government to realize and promote, since they are essential for free and equal citizens to lead free, independent, and productive lives and fulfill the obligations of citizens. Chief among these are the primary social goods: rights and liberties; diverse educational, employment, and cultural opportunities; powers and positions of office and responsibility; income and wealth; and the social bases of self-respect. Other political values are assumed to be essential to realizing the fundamental civil interests of citizens and the primary social goods necessary for them (health and absence of disease, education and development of individuals' capacities, and social unity, among others). What political liberalism eschews is a conception of the final ends or ultimate good that is presumed to be essential to each individuals' good: whether that be maximum happiness, moral autonomy, individuality or rational autonomy, human flourishing or perfectibility, the beatific vision of God or experience of the Holy Spirit, and so on. The basic liberal rights and liberties guarantee each person the political freedom to decide, revise, and pursue their own conception of the ends and pursuits that give meaning to their lives. This does not mean that moral autonomy, individuality, or individual freedom are themselves intrinsic values within political liberalism. But it does mean that having the *political* freedom to decide and act on one's conception of the good and having ample diverse opportunities to pursue it – as guaranteed by the basic liberties and their priority and fair equal opportunity – as well as the *political* autonomy to participate as a social and political equal in civic and public life of a democratic society are political values of justice and public reason that are fundamental to liberal constitutional democracy.

Nor does political liberalism and the values of public reason pretend that laws must be neutral in their effects. As we saw above, there is no way to formulate laws or public policy so that they do not advantage or burden anyone or the pursuit of some values more than others. What can be required by public reason is *procedural*

impartiality in decisions and *substantive fairness* in the distribution of benefits and burdens, and also that government take appropriate means to reduce unnecessary burdens of its decisions and mitigate or compensate for the costs to individuals that laws and policies may cause.

Procedural impartiality in making and applying laws and government regulations suggests a way that liberalism *should* aspire to be neutral: *neutrality of aim* is basically an impartiality requirement of public reason. It requires that governments in their decision-making not aim to advantage or disadvantage particular persons or groups or permissible conceptions of the good or comprehensive doctrines unless justifiable by sufficient public reasons. This is part of formal justice: that laws be general in their content and application, and fairly apply to everyone or all within some relevant group aimed to be affected by the laws (such as the elderly, the disabled, owners of motor vehicles, convicted felons, and so on). Nor should the state aim to do anything intended to advantage or disadvantage one or more comprehensive religious, moral, or philosophical doctrines more than others, or give greater assistance to those who pursue it.

Finally, and perhaps most significant, the political values of public reason are *neutral with respect to the justification* of laws and public policies. That there be shared political reasons grounded in the civil interests and essential good of free and equal democratic citizens and the political values these interests support is the primary purpose of appeal to political values of public reason in deliberating on laws and public policies, and in citizens' justification to others of the political positions they advocate and politically support and vote for. Democratic citizens with different individual interests and who affirm diverse and conflicting religious, philosophical, and moral views cannot be expected to agree on all the laws that are legislated in their name as members of the body politic. But they should be able to accept and endorse the political *reasons* that underlie and are used to justify the laws. Otherwise, the political power they share is being imposed to promote individual interests and religious, philosophical, and moral views that they reject and that cannot be justified on any grounds reasonably acceptable to them. Then both their freedom as individuals and their equal status and political power as citizens are being curbed for reasons they can reasonably reject, and they are not fully free and equal citizens.

Political Legitimacy, the Duty of Civility, and the Scope of Public Reason. We have seen that political legitimacy imposes a political duty on government officials to make decisions on grounds of the political values of public reason, at least when constitutional essentials and basic justice are at stake. Second, an analogous moral duty of civility extends to citizens: they advocate and vote for candidates who support measures that are also politically legitimate and hence are supported by the political values of public reason. Third, citizens' duty of civil-

ity also requires that, when citizens advocate and vote for measures on the basis of their religious and other comprehensive views, they explain to other citizens how their votes also conform to the political values of public reason.³²

Some contend it is unreasonable to expect religious citizens to constrain their votes by political values of public reason. Such constraints limit their fundamental freedom of religion, deprive them of their religious identity, and compromise their integrity as religious persons.³³ This is supposedly why religious citizens cannot have *the duty of civility* to explain their votes in terms of political values of public reason, or even a duty to consistently vote political values when these conflict with their conscientious religious beliefs.³⁴

The duty of civility is a moral duty, not a legal duty backed by sanctions. Moreover, liberty of conscience means that citizens legally can vote and politically advocate as their religious convictions require, and they have the freedom to act on their religious convictions so long as they do not violate the rights, liberties, and equal opportunities of others or violate any legitimate laws. So religious believers who oppose, for example, contraception and all rights to abortion on grounds of religious doctrine have a political right to advocate and vote their religious beliefs, even though this conflicts with their duty of civility and the political values of public reason. Political rights of liberty of conscience override the *moral* duty of civility so that citizens cannot be legally required to vote only political values of public reason or to explain how their votes and political advocacy on religious grounds is (or is not) compatible with public reason. But citizens' basic rights and liberties legally entitle them to speak and act in ways that conflict with many moral duties that are not legally mandated. News sources and politicians who regularly misrepresent the truth to the public normally have a legal right to do so, even though they violate moral duties of veracity and political obligations as fiduciary agents of the public. Still, the fact remains that the policies and laws they advocate are not politically legitimate according to the principle of political legitimacy unless they comply with political values of public reason. So, if candidates vote to enact laws that express their political supporters' religious and moral objections to all contraception and abortion, or to gay marriage or LGBT military service, then these laws are not politically legitimate, however much majoritarian support they may have. The problem is that other free and equal citizens are being coerced into compliance with a majority's religious and moral convictions with no public political justification in terms of political values of public reason.

Finally, regarding the contention that it is *unreasonable* to expect religious persons to vote contrary to their religious convictions when they conflict with public reason: in what sense is it unreasonable? It may be unreasonable within the terms of their comprehensive religious or philosophical doctrine and its account of what is reasonable and unreasonable. But it is not *politically unreasonable* within the terms of the political values of justice and the requirements of public reason, nor

within a liberal political conception of justice. What is politically reasonable and unreasonable is not to be decided by the conception of reason set forth in one or another comprehensive doctrine. Instead, within political liberalism, the notion of reasonableness, like the notion of being rational, is constrained by public reason and the requirements of public political justification. Recall that among the political values of public reason are guidelines for free and public inquiry, the appropriate use of concepts of judgment, inference, and evidence, and such political virtues as reasonableness, fair-mindedness, and a readiness to honor the duty of civility, all of which make reasoned public discussion possible.³⁵ We cannot generate the requirements of public reason and a liberal political conception by starting “outside” political argument with one or another philosophical conception of reason and reasonableness. Reason and reasonableness themselves need to be given a moral-political interpretation in terms of what is appropriate to demand or expect of others in their capacity as democratic citizens. So, Rawls specifies the idea of free and equal moral persons implicit in democratic culture and their fundamental civil interests; then he constructs the account of political values, public reason, and political reasonableness on those bases. When is someone being *politically* unreasonable? That is largely a matter of working out whether someone is offering and insisting on using considerations in public political arguments that are unsuited to the setting of justification addressed to free and equal persons with shared civil interests but different reasonable comprehensive views. Citizens and politicians are politically reasonable when they seek to cooperate with and support laws that can be justified to other citizens on grounds of principles, reasons, and political values they can accept in their capacity as free and equal citizens motivated by their fundamental civil interests. It is politically unreasonable for legislators, judges, and lawyers engaged in political argument to rely exclusively on philosophical or religious doctrine regarding the requirements of reason (such as natural law doctrine) in deciding whether rights to gay marriage, contraception, or abortion are reasonable. And the same is true of other comprehensive metaphysical and moral doctrines. Comprehensive doctrines are not relevant to determining what is politically reasonable and politically justifiable in terms of public reason.³⁶

Political appeals to religion occupy an ambiguous place in U.S. history. Religious reasons argued by the abolitionists and later Martin Luther King Jr. played a significant role in the public rejection of slavery and racial segregation. Such religious arguments for the dignity and equality of humankind are politically legitimate and compatible with public reason. But appeals to religion also play a continuing role in the rejection of the civil rights of gay and transgender people, opposition to contraception and abortion, and support for nativist immigration policies.³⁷ These are politically illegitimate appeals to religious reasons.

It is not the role of a constitutional democracy to either intentionally promote or impede citizens' religious beliefs or doctrines. Religious reasons and motives are not legitimate grounds for advocating public policy and deciding laws unless consistent with democratic citizens' civil interests and political values of justice and public reason. These political values provide the legitimate bases for public political justifications of laws and public policies among free and equal citizens in a democratic society.

AUTHOR'S NOTE

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ENDNOTES

- ¹ See Justice O'Connor's concurring opinion in *Lynch v. Donnelly* 465 U.S. 668 (1984), in which she says that government's endorsement of religion "sends a message to nonadherents that they are outsiders, not full members of the political community." Christopher Eisgruber and Lawrence Sager, *Religious Freedom and the Constitution* (Cambridge, Mass.: Harvard University Press, 2007); and Cécile Laborde, *Liberalism's Religion* (Cambridge, Mass.: Harvard University Press, 2017), 84–92, provide thorough discussion of this and related issues.
- ² John Rawls, *Political Liberalism*, expanded ed. (New York: Columbia University Press, 2005), 139, 224.
- ³ See John Locke, *The Second Treatise of Government* (1690); Immanuel Kant, *Groundwork of the Metaphysics of Morals* (1785); Jeremy Bentham, *An Introduction to the Principles of Morals and*

Legislation (1823); John Stuart Mill, *On Liberty* (1859); Friedrich Hayek, *The Constitution of Liberty* (1960); and Isaiah Berlin, *Two Concepts of Liberty* (1958).

- ⁴ See Christopher Eberle, *Religious Convictions in Liberal Politics* (Cambridge: Cambridge University Press, 2002), 14–16, on controversial epistemic assumptions of justificatory liberalism; and Laborde, *Liberalism's Religion*, 162–163, on Rawlsian liberalism's controversial distinction between the domain of right and justice versus the good.
- ⁵ See Alisdair MacIntyre, *After Virtue* (Notre Dame, Ind.: University of Notre Dame Press, 1981); and Patrick Deneen, *Why Liberalism Failed* (New Haven, Conn.: Yale University Press, 2018).
- ⁶ In *Employment Division v. Smith* 494 U.S. 872 (1990), the Supreme Court argued that since drug laws are neutral in their aim and not designed to burden religious practices, this justifies the denial of unemployment benefits to Native Americans fired for using peyote in religious rituals. However, Justice Scalia, writing the majority opinion for the Court, failed to consider whether enforcement of drug laws against religious rituals served any compelling government purpose.
- ⁷ *Yoder v. Wisconsin* 406 U.S. 205 (1972).
- ⁸ *Burwell v. Hobby Lobby Stores* 573 U.S. 682 (2014).
- ⁹ Compare *Employment Division v. Smith* with *Sherbert v. Verner* 374 U.S. 398 (1963), which held that a Seventh-day Adventist who refused to work on Saturdays for religious reasons could not be denied unemployment benefits.
- ¹⁰ On the fairness justification and neutrality of treatment, see Alan Patten, "Liberal Neutrality: An Interpretation and Defense," *The Journal of Political Philosophy* 20 (3) (2012): 249–272; and Alan Patten, "Religious Exemptions and Fairness," in *Religion in Liberal Political Philosophy*, ed. Cécile Laborde and Aurélia Bardou (Oxford: Oxford University Press, 2017).
- ¹¹ See Locke, *A Letter Concerning Toleration* (1689), ed. James Tully (Indianapolis: Hackett, 1983), 26. By "indolency of the body" Locke seems to mean the absence of pain and exertion, which suggests that leisure or free time—the time not required to work to meet basic needs—is a civil interest. See Julie Rose, *Free Time* (Princeton, N.J.: Princeton University Press, 2016).
- ¹² See David Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 1986); and Gerald Gaus, *The Order of Public Reason* (Cambridge: Cambridge University Press, 2011), two of the most prominent contemporary Hobbesian contract views.
- ¹³ Currently we live in a degenerating democracy with a president who thrives on conflict, shuns compromise and impartiality, and makes no attempt at public political justification to all citizens, but instead promotes only the personal, moral, and religious interests of his supporters.
- ¹⁴ See Jean-Jacques Rousseau, *On the Social Contract* (1762) (Indianapolis: Hackett, 2019).
- ¹⁵ John Rawls, "The Idea of Public Reason Revisited," in *Collected Papers*, ed. Samuel Freeman (Cambridge, Mass.: Harvard University Press, 2001), 601.
- ¹⁶ Rawls, *Political Liberalism*, 139, 224.
- ¹⁷ Rawls, *Collected Papers*, 584.
- ¹⁸ Rawls, *Political Liberalism*, 245.

- ¹⁹ See also John Rawls, *Justice as Fairness: A Restatement* (Cambridge Mass.: Harvard University Press, 2001), 117; and Rawls, *Political Liberalism*, 243.
- ²⁰ Rawls, *Collected Papers*, 601.
- ²¹ Rawls, *Political Liberalism*, 225, 241.
- ²² *Constitutional essentials* for Rawls are 1) matters that concern or affect the exercise of basic rights and liberties and opportunities and their priority over other social values, as well as the basic social minimum providing for the basic needs of all citizens, all of which are covered by his first principle of justice; and 2) the structure of government, including constitutional offices and their legitimate powers and the procedures for legislating, applying, and enforcing laws. Rawls, *Political Liberalism*, 227–228; and Rawls, *Justice as Fairness*, 47–48. *Basic justice* concerns matters that determine or significantly affect the structure of the economy, the specification of economic property rights, and the fair or just distribution of income and wealth; and questions whether justice requires fair equal opportunities or some other conception of equal opportunities, which are covered by Rawls's second principle of justice. Rawls, *Political Liberalism*, 228–229; and Rawls, *Justice as Fairness*, 48–49. Most issues regarding the economy concern basic justice and should be settled by political values of public reason. Rawls, *Political Liberalism*, 229.
- ²³ Rawls, *Political Liberalism*, 245.
- ²⁴ *Ibid.*, 137, 215.
- ²⁵ *Ibid.*, 217.
- ²⁶ *Ibid.*
- ²⁷ Rawls calls this requirement “the proviso.” *Ibid.*, 453, 462–466.
- ²⁸ See Justice O'Connor in *Lynch v. Donnelly*.
- ²⁹ See, for example, Paul Weithman, *Religion and the Obligations of Citizenship* (Cambridge: Cambridge University Press, 2006). See also Eberle, *Religious Convictions in Liberal Politics*; and Nicholas Wolterstorff, “The Role of Religion in Decision and Discussion of Political Issues,” in Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (New York: Roman and Littlefield, 1997).
- ³⁰ See Joshua Cohen, “Establishment, Exclusion, and Democracy's Public Reason,” in *Reasons and Recognition: Essays in Honor of T. M. Scanlon*, ed. R. Jay Wallace, Rahul Kumar, and Samuel Freeman (New York: Oxford University Press, 2011), 256–275.
- ³¹ Robert Audi makes a similar point with respect to governmental preference for a religion, which he says tends to concentrate greater political power in the preferred religion and its members and impairs democracy, since other citizens do not have equal opportunities to exercise political power on a fair basis. Robert Audi, “The Separation of Church and State and the Obligations of Citizenship,” *Philosophy and Public Affairs* 18 (3) (1989): 259–296, 266.
- ³² Rawls, *Political Liberalism*, 462–466.
- ³³ See Kent Greenawalt, *Private Consciences and Public Reason* (Oxford: Oxford University Press, 1995), 67.
- ³⁴ In addition to *ibid.* and Eberle's *Religious Convictions in Liberal Politics*, see Wolterstorff, “The Role of Religion in Decision and Discussion of Political Issues”; Michael Perry, *Love and Power: The Role of Religion and Morality in American Politics* (Oxford: Oxford University Press, 1993); Jeremy Waldron, “Isolating Public Reasons,” in *Rawls's Political Liberalism*,

ed. Thom Brooks and Martha C. Nussbaum (New York: Columbia University Press, 1993); and Gerald Gaus and Kevin Vallier, "The Roles of Religious Conviction in a Publicly Justified Polity," *Philosophy and Social Criticism* 35 (1–2) (2009): 51–76.

³⁵ Rawls, *Political Liberalism*, 139, 224.

³⁶ This responds to Eberle's contention, in *Religious Convictions in Liberal Politics*, that political liberalism is not neutral with respect to epistemic considerations, such as notions of rationality, reasonableness, and other grounds for justification. Political liberalism is neutral, I contend, because its account of political reasonableness and public justification comes from within political liberalism itself, and is not grounded in comprehensive doctrines regarding the requirements of reason.

³⁷ See, for example, Paula White in Julia Duin, "She Led Trump to Christ: The Rise of the Televangelist Who Advises the White House," *Washington Post Magazine*, November 14, 2017.

Liberalism & Deferential Treatment

Paul Weithman

Legally preferential treatment of a religious organization is the legal conferral of a status that is more favorable than that accorded to other religious organizations. This essay introduces and analyzes the contrasting concept of deferential treatment. “Deferential treatment” refers to forms of favorable treatment that are cultural rather than legal. While the problems posed by legally preferential treatment of religion are well known, the problems posed by deferential treatment have received little attention. One problem is that when a religious organization receives deferential treatment, its authorities are not compelled to exercise their power in ways that track the interests of those over whom they exercise it. This leaves those subject to their power liable to abuse. Another is that deferential treatment encourages “benchmark traditionalism.” Benchmark traditionalism is problematic because it is politically unreasonable. These problems with deferential treatment give all citizens, including religiously committed citizens, reason to favor a culture of non-deference.

Let us say that societies are liberal to the extent that they give special priority to the equal protection of basic rights and liberties, including freedom of the press, conscience, and association, together with political liberties. This might seem a relatively undemanding condition of liberalism, but the satisfaction of other important conditions follows from the satisfaction of this one. For example, a society can protect citizens’ rights only if it honors the rule of law. A society that protects the freedom of association has a government that is limited, and therefore allows for a robust and diverse civil society. The condition of liberalism is therefore not as minimal as it might initially seem.

Societies that protect the basic liberties of all citizens create space for pluralism. That space is created and maintained, in part, by citizens’ sustaining a public culture. For keeping government within the limits needed for a vibrant civil society requires citizens’ willingness to repudiate public officials who would overstep them. Civil society flourishes only if citizens observe informal norms of toleration and respect. That liberal societies create space in these ways raises the question of how citizens of liberal societies are to regard their own participation in the ways their societies create such a space.

Though I cannot show it here, I believe John Rawls, who authored *A Theory of Justice*, thought the question I have identified arose with respect to all citizens of liberal societies, and that answering it uncovered an important source of civic friendship and crucial buttress of justice.¹ For the purposes of this essay, though, I focus on that subset of the citizenry whom I call “citizens of ecclesial faith.” These are adherents of religions which claim that the human good, or the highest human good, consists of a relationship with God that is mediated by a particular ecclesial structure.

The question arises with respect to them because, by definition, societies that make space for pluralism make a plurality of ways of life available. One of the longer-term effects of liberal, pluralistic societies seems to be the loosening of ties with ecclesial structures, so that citizens come to regard those ties as bonds that can be renegotiated or broken at will. Moreover, once spaces are opened for a plurality of ways of life, it becomes possible for those who adhere to an ecclesial faith to conceive and explore different ways of adhering to it. This leads to what philosopher Charles Taylor has called the “unbundling” of individual lives: practices sanctioned by a church and regulations promulgated by it are selectively observed, followed in some areas of life but not others.² A pluralistic society is also bound to make space for – indeed, it may seem to encourage – ways of life that some citizens of ecclesial faith will consider profoundly misguided. Since all of these effects of pluralism might be thought at least *prima facie* troubling to citizens of ecclesial faith, these citizens may regret the ways they help sustain a culture that has these consequences. Their regret and alienation may loosen their allegiance to their societies and their fellow citizens, with unwelcome consequences for the quality of civic life. If this is right, then the question I have identified as pressing is one that liberal political philosophy must confront.

One piece of evidence that the question is experienced as a pressing one is that some citizens of ecclesial faith have responded to the pressure. Much to my surprise, so-called Catholic integralism is enjoying something of a revival. Catholic integralists decry some of the characteristic features of modern life: the differentiations between the sacred and the secular, the natural and the supernatural, the church and the state.³ I think of integralism as implying a response to the question I have identified because I think the differentiation of modern life and the creation of space for pluralism go hand-in-hand. One of the ways in which liberal societies create space for pluralism is precisely by creating and maintaining the differentiations to which integralists object. So I take it integralists disapprove of the way those societies make room for pluralism. And I take it they regard our – perhaps unavoidable – implication in the practices and culture by which liberal societies do so as at best a lamentable inevitability.

I have little sympathy for the integralist movement as I understand it. Indeed, I think it is psychologically healthy for people to be able to escape the reach and

scrutiny of a church, to find spaces in which they can treat its normative authority as self-imposed, and even to find spaces for transgression and experimentation. And so I think the differentiation to which integralists object is probably a healthy thing for religious believers. But I shall not engage integralism here. I bring it up only because its presence on the intellectual landscape testifies to the pressing character of the question I have identified.

That question might, however, seem quite easy to answer. There are some familiar arguments that citizens of ecclesial faith should value the creation of space for the organizations of civil society. Moreover, though I said above that the condition of liberalism is not as minimalist in its implications as it might initially seem to be, it is still weak enough to count as liberal a society that accords religion and religious organizations preferential legal standing. It is also weak enough to count as liberal a society that accords them what I shall call “deferential treatment.” It might be thought that these two forms of treatment have the potential greatly to alleviate religious citizens’ misgivings about liberal culture. I shall concentrate on deferential rather than preferential treatment here. After distinguishing preferential from deferential treatment, I shall explore two reasons citizens of ecclesial faith should value their own participation in a society that accords religion and religious organizations *non-deferential* treatment.

Legally preferential treatment of a religious organization or a religion refers to the legal conferral of a status that is more favorable than that accorded to other organizations or systems of belief. One familiar form of legally preferential treatment is ecclesial establishment. Another form is found where the law accords favorable status to religion, just as such. This occurs when, for example, the law treats ultimate commitments that are religious differently than it treats those that are nonreligious, and takes the former to ground claims to exemptions that the latter does not. It also occurs when state power is used to foster religion and membership in religious organizations, even if no particular religion or religious organization is favored or established.

By the *deferential treatment* of a religious organization or a religion, I mean forms of favorable treatment that are cultural rather than legal, since they do not depend on that organization or religion enjoying a different legal status than any other. Deferential treatment has a number of ingredients. The ingredients are natural concomitants, and so it is natural for them to be found together, but they are logically independent.

One ingredient of the deferential treatment of a *religion* is that its teachings are accorded the status of social norms. The teachings may concern the existence and nature of a supreme being, appropriate forms of worship and devotional practice, and appropriate forms of personal – including sexual – conduct. The teachings enjoy the status of social norms when they are generally taken to express stan-

dards of belief and conduct that are culturally rather than legally enforced. The phrase “generally taken” is unfortunately misleading and vague: it suggests that deferential treatment of a religion requires that its teachings be internalized or genuinely accepted by a majority. But norms can still function as a society’s standards of judgment if they are employed by a minority with the power to shape opinion or to give wide effect to their disapprobation.

An ingredient of the deferential treatment of a *religious organization* is that those charged with elucidating and promulgating its teachings are accorded the status of moral authorities, by members of the organization and by some of those outside it. Another ingredient of the deferential treatment of a religious organization is the social trust accorded to its hierarchy and clergy: to those, that is, who are among the people accorded the status of moral authorities. I take the *trust* in the phrase “social trust” to refer to a working presumption that those who are the objects of the attitude follow their own authoritative moral pronouncements, act for the good of those in their spiritual care, and honor demanding norms of pastoral conduct. That the trust is *social* means that according such trust is normative or expected of church members, including those in official positions, but also by others in society, including members of cultural and political elites. Describing the trust as *a working presumption* signals the fact that not everyone who accords what I have called “social trust” believes that members of the hierarchy and clergy honor the norms to which they are supposed to adhere. Rather, it is generally understood that those who accord social trust will act *as if* they believed that.

Still another ingredient of deferential treatment is that officials and clergy are accorded considerable latitude to act without official or unofficial scrutiny, so that the propriety or legality of their actions is rarely called into question. Still another ingredient comes into play when their actions *are* called into question. When they are, church officials and clergy are accorded a strong presumption of innocence by civil authorities, the gravity of their offenses is minimized, and they are punished with lenience.

Deferential treatment comes in degrees. The presence of any one of the foregoing ingredients would suffice for us to say that a religion or religious organization is the beneficiary of some deferential treatment. Deferential treatment increases as more of the ingredients are present or as any one of the ingredients becomes more intensely or widely present. To the extent that a church receives deferential treatment, the church, its hierarchy, and its clergy enjoy positions of privilege. The privilege is, in the first instance, a cultural rather than a legal phenomenon, for its maintenance depends on the general recognition and observance of informal and often tacit norms. Where it prevails, the explanation of its prevalence – like that of other forms of privilege – can be complicated. Those who sustain it may act out of a variety of motives, from the reverent and the high-minded, to cold calculations

about how best to maintain the good will of ecclesiastical officials in positions of social and political power.

I noted at the outset that societies that are liberal in my sense, and hence pluralistic, allow for a robust civil society. According to one familiar argument, a robust civil society is to be valued because it consists of organizations that can check the power of the state and hold public officials accountable.⁴ That is something all citizens have good reason to value, including citizens of ecclesial faith. Citizens of faith therefore have reason to value and contribute to the pluralistic public culture that sustains civil society. Moreover, in some societies, churches are prominent among the organizations of civil society that serve as counterweights to government. Citizens of ecclesial faith who belong to such churches would seem to have reason to value and to take pride in their doing so.

Citizens of ecclesial faith may also seem to have *prima facie* reason to value their own participation in checking government power. But they may not have all-things-considered reason to value it, or even to participate in that activity. Pointing out the excesses of government and holding public officials accountable can be dangerous business. And so it may be that when all the reasons are toted up, citizens of ecclesial faith have the most reason to free-ride on the efforts of others to hold government accountable, and to suppress rather than to affirm any desire they find within themselves to take part. But I think the argument above points us in the right direction by highlighting the fact that liberal societies are societies with multiple centers of power that are capable of checking one another's excesses. According to the argument I want to explore next, citizens of ecclesial faith have reason to value a certain kind of liberal society, and their own participation in the culture that sustains it, because a liberal society of that kind checks the power of religious organizations over their members.

When I introduced the idea of deferential treatment, I indicated that if a church is accorded such treatment, then those who hold positions in its hierarchy or its clergy more easily avoid being held legally or socially accountable for their conduct than other citizens. And so they will not often be subject to legal penalties for offenses they commit and such offenses will not often be spoken of in ways that open them to shaming or ostracism.

Those holding official or clerical positions within a church are in positions to exercise power over those entrusted to their care: adult and minor clergy-in-training, minors who may be entrusted to their tutelage or supervision, and believers who approach them for pastoral care at vulnerable moments in their lives. If they can escape legal and social accountability for their conduct, then they are not compelled by the threat of legal and social penalties to exercise their power in ways that track the interests of those over whom they exercise it. They may in fact

exercise it in a way that tracks those interests, but there are not sufficiently strong legal and social incentives to do so.

That those in power are not forced to track the interests of those subject to them leaves the subjects vulnerable to the abuse. This vulnerability is therefore traceable to the deferential treatment accorded churches. If one thinks, as I do, that they should not be left vulnerable to the abuse of power even if that power is not in fact abused, then it follows that churches should not be accorded high degrees of deferential treatment. To see whether citizens of ecclesial faith should value their participation in a society that does not accord their church deferential treatment, we need to see what the opposite of deferential treatment would be.

Generalized suspicion of a church, its clergy, and its hierarchy would be a mistake, as would generalized readiness to believe the worst of anyone who professes a commitment to the forms of sexual discipline and abstinence that a church might ask of its clergy. What *is* necessary is that public officials and ordinary citizens sustain legal and cultural practices that provide ecclesiastical officials and clergy with the appropriate disincentives to act against the interests of those in their power.

The necessary legal practices are obvious enough. Statutes of limitations need to be sufficiently lengthy. Officials need to exercise their subpoena power to investigate first-order crimes and subsequent attempts to conceal them. They cannot be afraid to jail even highly visible ecclesiastical officials who are convicted of criminal behavior. But the necessary practices are not just legal, and it is not just public officials who are responsible for maintaining them. Investigative journalists, their editors, and their publishers must follow stories where they lead. Citizens have to be supportive of them. Everyone must learn to avoid euphemisms and to call the crimes what they are.

A culture of non-deference makes cognitive and emotional demands of citizens of ecclesial faith that they may find difficult to satisfy, though how difficult no doubt depends on the internal organization of the ecclesial organization to which they belong. Suppose that an organization invests its clergy and hierarchy with authority on theological and moral matters. And suppose we follow philosopher Joseph Raz in thinking that the exercise of authority consists, at least in part, in the provision of preemptive reasons.⁵ Then the recognition of clerical or hierarchical authority requires the reception of clerical and hierarchical pronouncements as reasons of that kind for belief and conduct. That is, it requires members of the church to treat those pronouncements as blocking the force of other reasons they have that bear on these matters. Getting them to treat pronouncements as preemptive – rather than as, say, advisory – is greatly facilitated by formation in a church culture, with its account of where ecclesial authority comes from. That formation can easily encourage habits of deference to authority that are too general in scope, so that reason, scrutiny, and judgment are short-circuited where they are warranted. And so citizens of ecclesial faith need to live with a challenging

dualism, treating ecclesial authority as genuine and preemptive while confining deference to its proper sphere.

A culture of non-deference makes demands of other citizens as well. Investigators and prosecutors can be overly zealous in the pursuit of a righteous cause. They need to do their work with judiciousness and restraint. A religiously pluralistic society may well be home to faiths and churches whose practices are strange or off-putting, and whose members seem alien. A culture of non-deference also has to be a culture of tolerance, so that minority faiths are not met with hostility or unwarranted suspicion. All of this is part of what it is to sustain a liberal society in which there are multiple centers of power that can be mutually checking. Citizens of ecclesial faith should value such a society, and their own participation in its creation and maintenance. For by doing their part to sustain such a society and its public culture, they participate in creating disincentives for those who would otherwise be in a position to harm vulnerable persons in their care.

One may object that the argument appeals to a false dichotomy, for it assumes that the only way to protect the vulnerable is by a culture of non-deferential treatment. Another possibility, which I did not consider even to rebut, is to leave deferential treatment in place while letting the organizations of civil society police themselves. Why might that not be an acceptable way to provide security and protection?

The claim that a culture of deferential treatment leads to unacceptable vulnerability is an empirical one. The question of whether organizations should police themselves is also empirical. The short answer is that the results of the empirical investigation are in, and we know all too well how self-policing has worked out. According to a more expansive version of that answer, things have worked out that way because societies in which deferential treatment is accorded are precisely the ones in which organizations of civil society are likely to be especially bad at policing themselves and should not be left free to do so. There are, I think, many reasons why, but I shall cite just one: the privilege it is accorded when a church is deferred to comes, over time, to be thought of, not just as the way things *should* be, but as the way they *must* be, as essential to the church's identity. Once a privileged status is seen as an essential component of institutional identity, it has to be protected at all costs. That means that much of what threatens to jeopardize the privilege is going to be suppressed, covered up, or silenced. If this empirical conjecture is right, it is one more reason to object to the deferential treatment of religion.

D eferential treatment of religion encourages a form of unreasonability that I call "benchmark traditionalism." To see what benchmark traditionalism is, recall the commonplace that society ought to be a scheme of mutual benefit. I refer to this requirement as a "commonplace" because it is commonly acknowledged. I suspect it is commonly acknowledged because it is undertheorized in many quarters of political philosophy. So long as it is not clear what

mutual benefit demands, agreeing to the requirement of mutuality is costless. But if the commonplace is undertheorized in many quarters, it is not in the school of moral and political philosophy called *contractualism*.⁶ One of the great insights of contractualist liberalism is that the demands of the mutual benefit requirement can be ascertained procedurally: a society is a scheme of mutual benefit if it complies with principles that can be justified to everyone via an appropriate procedure or, what is often taken to be the same thing, if it complies with principles about which no one has a valid complaint that is not outweighed by competing moral considerations.

My characterization of benchmark traditionalism takes the contractualist insight as its point of departure. But before getting to benchmark traditionalism, I need to elaborate the insight. Compliance is not stasis: the governance of societies is an ongoing undertaking, a matter of constant adjustment to continually altering circumstances. This raises the question of how to judge whether adjustments or changes are for mutual benefit. The contractualist insight supplies an answer: if the move from one state of affairs to another results in a state of affairs that complies with principles that can be justified to everyone by means that are justifiable, then the change is mutually beneficial.

This contractualist insight has the advantage of subsuming Pareto improvements as a special case. Those improvements are changes that are justifiable to all because they make no one worse off and at least one person better off. But not all changes, even all justifiable changes, are Pareto improvements, since some changes worsen the lot of some people in ways that give rise to valid complaints. What contractualism says about these cases is that the change is justified if – or perhaps if and only if – the burdens imposed on those who have valid complaints about the change are less weighty than the burdens that would have to be borne by the beneficiaries of the change were the change not made. Thus, in contractualists' hands, the requirement of mutual benefit ceases to be a costless commonplace. Contractualists recognize that changes sometimes impose costs that have to be balanced.

Of course, how the comparative weight of burdens is to be judged is itself a complicated question that can be answered in different ways. To answer it, contractualists need to identify fundamental interests and may have recourse to priority rules that need to be justified. I will not go into the identification of those interests or the content of the priority rules here. What matters for present purposes is this: In order to determine accurately whether demands of mutuality are satisfied, the right weights have to be attached to the burdens borne by those affected. Only if the weights are right can we determine how to balance a set of valid complaints. In order to determine whether someone has a valid complaint at all, we also have to choose the right state or states of affairs as the benchmark of comparison. If a legitimate move to a just distribution results in someone losing benefits to which he had no right in the first place, then he does not have a valid

complaint despite his loss. His sense that he does arise from his comparison of his holdings under a just distribution with his greater holdings under an unjust one. But the difference does not ground a valid complaint on his part, to be weighed against the valid complaints of others, because the comparison with an unjust state of affairs is the wrong one to draw.

It is possible, then, for citizens to go wrong in the weighting of valid complaints and for them to choose the wrong benchmark. But it is also possible to choose a benchmark or assign a weight for the wrong reasons. What makes someone a benchmark traditionalist is that he goes wrong in at least this way. What are the reasons on the basis of which the benchmark traditionalist goes wrong in this way?

Above, I discussed some of the privileges of which deferential treatment is composed. Privilege and deference can shape an institution's self-conception. Once an organization has become accustomed to them, it becomes very hard for it – read, “those who direct it” – to think of itself as lacking privilege. The privilege that it is accorded when it is deferred to comes, over time, to be thought of as the way things should or must be. Something similar is true for citizens of a faith that enjoy a dominant place in culture. Its adherents can come to think of its dominance as the way things should or must be. The customary gradually becomes normative, whether or not its status as normative is intellectually defensible. And so those who lead a church that has enjoyed deference, and those who adhere to its doctrine, can be led to take as a benchmark the state of affairs in which such deference is accorded and to seize on that feature as what makes the benchmark appropriate. They can then believe that they have well-founded complaints about moves away from that benchmark even if they do not. This is the first manifestation of benchmark traditionalism, and the one that gives it its name. And since those who are accustomed to privilege may think it should continue, its loss or modification may weigh heavily upon them just in virtue of the fact that they enjoyed it. They can then attach undue weights to their burdens even when their complaints are *prima facie* well-founded.⁷ This is the second manifestation of benchmark traditionalism.

It is characteristic of benchmark traditionalists to take uncritically as their benchmark a world in which traditional norms have the status of social norms. A culture of deference is part of a social or psychological explanation for why someone might assume the wrong benchmark, but it is not a philosophical explanation of what makes a benchmark wrong. For that, we need to look at the merits of the benchmark. The ideas of benchmark traditionalism and deference are of interest because such uncritical assumptions are common, and deference helps to explain why they happen. In putting them forward, I am taking up one important task of social philosophy: to bring an important but unnoticed and unnamed social phenomenon to the surface, and to use the analytic and conceptual tools of philosophy to illuminate it.

To see how benchmark traditionalism might work in practice, consider a somewhat speculative treatment of a Supreme Court case that has been penetratingly explored elsewhere in this issue of *Dædalus: Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.⁸

The story of *Masterpiece* begins with *Obergefell v. Hodges*, the case in which the U.S. Supreme Court found that same-sex couples have a constitutional right to marry.⁹ Some of those who find gay marriage morally objectionable have requested exemptions from generally applicable public accommodation laws that would require them to provide photographic, culinary, or confectionary services for same-sex weddings. One such request came before the Court in the 2017–2018 term. Jack Phillips, owner of the Masterpiece Cakeshop in Lakewood, Colorado, argued that he should not be legally compelled to create a cake with a message celebrating same-sex marriage. To compel him to do so would, he argued, “violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed and would violate his right to the free exercise of religion.”¹⁰

Let us consider why this might be an unreasonable objection. It may be thought – in the spirit of John Rawls’s treatment of what he called “public reason”¹¹ – that if the baker in *Masterpiece* is unreasonable, his unreasonability lies in his advocacy of a political position that can be defended only by appeal to religious teachings about the proper expression of human sexuality. But this thought is mistaken. Perhaps Phillips’s objection to same-sex marriage can be defended only by appeal to religious claims about the nature of marriage. But the Court was not asked to rule on the merits of that objection. The question before the Court was whether Phillips could be compelled to customize a cake celebrating same-sex marriage, given – as was granted all around – that he had a religious objection to doing so. His lawyers’ argument that he should not be compelled to do so turned on the values of religious freedom and the freedom of artistic expression.¹² They therefore turned on public political values.

Nor is Phillips unreasonable in virtue of asking government to use its coercive power to impose his view of marriage on others. Phillips was not asking the Court to do that: he was not asking the Court to reverse *Obergefell*, though he may have wished that it would. Rather, as Cathleen Kaveny emphasizes in her contribution to this issue, what Phillips wanted was for his own life to be unaffected or minimally affected by that decision, despite the fact that a decision in his favor would have imposed a burden on others. But that in itself does not make the plaintiff unreasonable. For something similar is true of others who have gone to the courts to seek religious accommodations. The defendants in *United States v. Seeger*, for example, sought exemptions from military service on grounds of conscience despite the fact that they did not claim to be conforming to the directives of a supreme being.¹³ They therefore wanted to live their lives as if the government had not decided to engage in military action, despite the fact that doing so would require others

to bear greater shares of the burden of combat duty. If Phillips is unreasonable for wanting to live as if *Obergefell* had not been decided, then Seeger was unreasonable for wanting to live as if the decision to pursue military action had not been made. This seems to be the wrong result. But then where, if anywhere, could the plaintiff's unreasonability lie?

We have seen that in determining whether court decisions and laws adjust a scheme of liberty in a way that benefits all, it is necessary to gauge the ongoing conferral of benefits and imposition of losses by the appropriate benchmark. Suppose that the plaintiff in *Masterpiece* took as his benchmark American society as it was before *Obergefell* was handed down. Only under that condition would he feel secure in the possession of his religious and expressive liberty.¹⁴ And suppose that what made American society at that time seem to him to be the appropriate benchmark is simply that it was a society in which his traditional view of marriage enjoyed a certain privileged status: it was legally normative. It was widely recognized by the law as the way marriage in the United States should be. If this were the plaintiff's reason for choosing his benchmark and for seeking a conscientious objection, then his conduct would exemplify benchmark traditionalism.

Masterpiece Cakeshop is not an uncomplicated case. Crucial to it was the fact that the plaintiff was being asked to create a cake specifically for a gay wedding celebration. To compel the baker to create the cake would, the baker argued, be to compel artistic expression. It may be thought that the prospect of compelled artistic expression can ground a valid complaint. But even if there is some validity to the complaint, it does not follow that that complaint is weighty enough to be accommodated since there are other, conflicting claims at stake as well. The baker's petition would exemplify benchmark traditionalism if he overestimated the weight of his complaint because of the privileged status his traditional view enjoyed.

Nothing in the record of which I am aware reveals the true motives of the plaintiff in *Masterpiece Cakeshop*. I have fictionalized them to illustrate what I mean by "benchmark traditionalism." Though I lack the social scientific evidence to prove it, I believe that benchmark traditionalism is a common phenomenon. Some defenders of traditional values are culture warriors, moved by intense dislike of those whose views they take to be abhorrent. But there are, I think, many traditionalists who do not conform, and do not believe they conform, to this stereotype. They believe themselves to be broad-minded because they are willing to accommodate themselves, perhaps grudgingly, to changes in religious and sexual behavior. Their willingness to accommodate is such that they genuinely feel no animus toward those whose ways of life they believe to be wrong. But their willingness to accommodate is conditional on the assumption that traditionalist views of religious belief or sexual behavior – and the organizations that are the primary bearers and teachers of those views – will be accorded a privileged status in their society's culture. In the case of the views themselves, that status is a

benchmark that other practices are to approximate. In the case of the organizations that bear and promulgate them, the status is that of moral authority.

And so the people I now have in view are willing to accommodate themselves to the increasingly prevalent signs of secularism in their society, or to the increasingly visible presence of gay couples and transgender persons, so long as they believe traditional religiosity and traditional marriage are generally recognized – even by those whose behavior departs from the traditional – as the way people should behave.¹⁵ They are willing to accommodate to cultural diversity, so long as they believe that traditional religious organizations and figures are generally recognized – even by those outside them – as moral authorities. That is, they are willing to accommodate so long as theirs is a society that accords deferential treatment to traditional ways of life.

Such benchmark traditionalists suffer from one or both of two shortcomings. Either they continue to inhabit a mental world of a bygone era, in which traditional mores and organizations enjoyed benchmark status. In that case, they fail to recognize the true extent of reasonable pluralism. Or they fail to see that traditionalist views need to be publicly justified if they are to be taken as benchmarks for assessing legal and cultural changes. In that case, they fail to acknowledge that it is unreasonable to take them as benchmarks, and to assess losses of liberty against them, unless a public justification for that status is forthcoming. Both of these shortcomings are species of unreasonability. Since they are forms of unreasonability encouraged by deferential treatment, citizens of ecclesial faith have reason to value a culture in which such deference is not practiced.

AUTHOR'S NOTE

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Faith (2016), *Why Political Liberalism? On John Rawls's Political Turn* (2010), and *Religion and the Obligations of Citizenship* (2002).

ENDNOTES

- ¹ John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, Mass.: Harvard University Press, 1999), sec. 79.
- ² Charles Taylor, "Afterword," in *Working with a Secular Age: Interdisciplinary Perspectives on Charles Taylor's Master Narrative*, ed. Florian Zemmin, Colin Jager, and Guido Vanheeswijck (Berlin: De Gruyter, 2017), 369–384.
- ³ For an accessible treatment, see Edmund Waldstein, "An Integralist Manifesto," *First Things* 276 (2017).
- ⁴ As political sociologist Larry Diamond has written: "The first and most basic role of civil society is to limit and control the power of the state"; Larry Diamond, "What Civil Society Can Do to Develop Democracy," https://web.stanford.edu/~ldiamond/iraq/Develop_Democracy021002.htm (accessed December 28, 2018).
- ⁵ Joseph Raz, "Authority and Justification," *Philosophy and Public Affairs* 14 (1) (1985): 3–29.
- ⁶ Two paradigms of contractualist moral and political theory are Rawls, *Theory of Justice*; and T. M. Scanlon, "Contractualism and Utilitarianism," in *Utilitarianism and Beyond*, ed. Amartya Sen and Bernard Williams (Cambridge: Cambridge University Press, 1982), 103–128.
- ⁷ Perhaps the assignment of undue weights to losses or potential losses is an instance of the endowment effect and the related phenomenon of status quo bias; see Daniel Kahneman, Jack L. Knetsch, and Richard Thaler, "Loss Aversion, Status Quo Bias and the Endowment Effect," *Journal of Economic Perspectives* 5 (1) (1991): 193–206.
- ⁸ 584 U.S. ____ 2018.
- ⁹ 576 U.S. ____ 2015.
- ¹⁰ Opinion of the Court, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. ____ (2018), 1. The opinion can be found at https://www.supremecourt.gov/opinions/17pdf/16-111_new2_22p3.pdf (accessed April 8, 2019).
- ¹¹ See John Rawls, "Idea of Public Reason Revisited," *University of Chicago Law Review* 64 (3) (1997): 765–807.
- ¹² See David Cortman, Rory T. Gray, and Jeremy D. Tedesco, "Reply in Support of Petition for a Writ of Certiorari," SCOTUSblog, <https://www.scotusblog.com/wp-content/uploads/2016/12/16-111-pet-cert-reply.pdf> (accessed April 9, 2019).
- ¹³ 380 U.S. 163 (1965). On third-party harms in *Seeger*, see Micah Schwartzman, Nelson Tebbe, and Richard Schragger, "The Costs of Conscience," *Kentucky Law Journal* 106 (2018): 881–912, 803–804.
- ¹⁴ See Jack Phillips, "I'm the Masterpiece Cakeshop Baker. Will the Supreme Court Uphold My Freedom?" *The Washington Post*, April 26, 2018.
- ¹⁵ They believe, in T. M. Scanlon's phrase, that their way of living is "uniquely the way for our society"; see T. M. Scanlon, "The Difficulty of Tolerance," in *The Difficulty of Tolerance: Essays in Moral and Political Philosophy* (Cambridge: Cambridge University Press, 2003), 187–201, 192.

The Ironies of the New Religious Liberty Litigation

Cathleen Kaveny

The plaintiffs in recent religious liberty litigation are very different from plaintiffs in earlier cases. They are not marginalized or politically powerless. They seek to return the country to its conservative roots, rather than to escape the dominant liberal mindset. But their success has come at a cost to their own deep commitments. This essay will proceed as follows. First, I describe key elements of recent religious liberty cases, highlighting the ways in which they go beyond the older case law that ostensibly served as precedent. Second, I argue that these decisions ironically fall prey to the communitarian critiques of modern liberal democracy that have been prominent in conservative religious circles for thirty years or more. Finally, I sketch a new way forward, drawing on the notion of civic friendship and the Golden Rule, and suggest the question religious believers should be asking now is not “What are our legal rights?” but “What do we owe morally to fellow citizens who believe differently than we do?”

Objecting to practices such as abortion, contraception, and same-sex marriages, some religious believers have claimed that the First Amendment’s guarantee of religious liberty should insulate them not only from direct involvement in such activities, but also from more remote connection. And their claims have been quite successful. In *Burwell v. Hobby Lobby Stores* (2014), the Supreme Court upheld the right of the defendant, a closely held corporation owned by evangelical Protestants, to be relieved from the obligation to provide certain contraceptives, which the owners believed to be abortifacient, in the employee health insurance plan.¹ In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018), the Court decided (albeit on narrow grounds) in favor of a Christian baker who refused to bake a wedding cake to celebrate the union of a same-sex couple.²

Some people believe that these cases are victories for religious believers in the United States. If they are victories, in my view, they are Pyrrhic ones. They will not help move American society toward a more stable and mutually respectful pluralism. Moreover, they will neither protect nor advance the Christian worldview to which the religious litigants are most committed. In their quest for legal victory, the lawyers for the plaintiffs have advanced a way of viewing human beings

and human society that has been heavily (and persuasively) critiqued by Christian philosophers and theologians over the past thirty years.

Using the image of “civic friendship” and the ideal of the Golden Rule, I ponder what might happen if religious communities began to ask themselves not “What are *our* rights?” but “What do we *owe* our friends, neighbors, customers, and employees who believe differently than we do?” and “What is the virtuous way of dealing with conflicting moral beliefs, given our particular roles and role-related obligations?”

Before the culture wars, religious liberty cases were comparatively rare, and most successful ones followed the same pattern. The plaintiffs were members of small, marginalized, or isolated religious groups. They sought personal relief from a law of general applicability; they did not seek to change the law for everyone else. Generally, such plaintiffs wanted to be left alone. Moreover, the exemptions they sought generally did not impose a burden on persons outside their community. In short, the exemptions they sought were narrow and contained.³

For example, the Amish plaintiffs in *Wisconsin v. Yoder* (1972) wanted the freedom to educate their children at home.⁴ They did not question the need to educate their children, but instead argued that Amish teenagers would benefit from the home-based vocational training that would better equip them for the life most would eventually lead. They did not attack the state’s authority to mandate secondary education for the majority of children. Similarly, the Native American plaintiffs in *Employment Division v. Smith* (1990) sought relief from narcotics laws that impeded them from smoking peyote as required in their religious rituals.⁵ They did not argue that their right to religious liberty gave them a license to consume other illegal drugs, or even to ingest sacramental drugs outside of the ritual setting.

In *Sherbert v. Verner* (1963), the plaintiff, a Seventh-day Adventist, challenged a South Carolina decision that rendered her ineligible to receive unemployment compensation because she refused to work on Saturday, which was her Sabbath. South Carolina law already accommodated those who refused to work on Sunday, in accordance with the religious views of the majority of the population. Adell Sherbert did not want to take the Sunday exemption away from anyone else. She simply wanted to claim an analogous benefit for herself. Extending the same consideration to Seventh-day Adventists, who constitute less than 1 percent of the population, would not harm the majority or even significantly burden the public purse.⁶

The new religious liberty plaintiffs do not fit that pattern in three respects. First, they are not politically powerless minorities. It is true that many religious conservatives see themselves as marginalized and derided, particularly in elite universities. At the same time, however, they wield significant political and cul-

tural power, as the election of Donald Trump demonstrates. The shifting composition of the Supreme Court, and the dominance of the Federalist Society in the selection of lower-court judges, testifies to the ability of conservatives, and particularly religious conservatives, to marshal political forces in a more or less evenly divided public square. Not only do they have an agenda for society, they also have a realistic chance of accomplishing it.

Second, the plaintiffs in recent religious liberty cases are not isolated from the broader society. Some plaintiffs are not individuals, but rather corporations that are integrated into the life of communities across the nation and whose decisions have an impact on many others. Hobby Lobby is not a small business tucked away in the hillside. Its eight hundred stores grace malls and shopping plazas across the country.⁷ Furthermore, by their own admission, the owners of Hobby Lobby see their wealth as a gift from God, and as a means of evangelizing the culture.⁸ They have provided substantial support to the Museum of the Bible in Washington, D.C., which proffers a particular (and contestable) view of biblical history to thousands of visitors each year.⁹ By contrast, the owner of Masterpiece Cakeshop, who refused on religious grounds to serve same-sex wedding customers, was a small businessman. Yet his was a public business, which attracted customers not only through storefront sales, but also by Internet advertising.¹⁰

Third, the new religious liberty plaintiffs are not morally and politically quiescent. The Little Sisters of the Poor believe that abortion and artificial contraception are morally wrong for *everyone*, not simply for Roman Catholics.¹¹ Evangelical Protestants such as the owners of Masterpiece Cakeshop believe that the extension of the institution of marriage to include same-sex couples is premised on a faulty understanding of the nature and purpose of sexual union – for everyone. They do not seek merely to be left alone. Instead, they wish to convince the country that their moral views describe the correct way to live, not only for Christians, but for everyone. They do not avoid political engagement; they actively pursue it. I do not mean to suggest, of course, that the plaintiffs are acting alone. In many of these high-profile cases, they are cooperating with the legal and moral program of their attorneys and advisors, who often select them as the “face” of their cause for strategic reasons.

The status of the new religious liberty plaintiffs shapes the litigation of their claims. It alters the appropriate description of the relief they seek from the courts. It also distorts the application of the four-pronged test applied to religious liberty claims under the Religious Freedom Restoration Act (RFRA).¹² That test asks the plaintiff to show that it has a) a *sincere* religious belief on which the law impinges; and b) that the impingement counts as a *substantial burden* upon that belief. Correlatively, it asks the government to show that c) the objectionable law is justified by a *compelling state interest*, which d) the government has pursued with the *least restrictive means*.

Exemptions and “As Ifs.” Religious liberty plaintiffs commonly say they are seeking an “exemption” from prevailing law. The word “exemption” comes from the Latin word *exemire*, which means *to remove, take out, or take away*. But the goal of many contemporary religious liberty plaintiffs is not removal; it is reform. Within their moral worldview, the positive law mandating contraceptive coverage, permitting abortion, and enabling same-sex marriage is not legitimate, because it is an unjust law. They want to be able to act *as if* that positive law has not been enacted, because they do not believe it is fully binding as law.

What are the differences between an exemption and an “as if”? The concept of exemption centrally applies in three cases: First, it applies in cases involving activities that are physically and temporally set apart from day-to-day life, such as religious rituals. Participants in the ritual claim only that the laws they challenge (such as laws against using narcotics) should not apply in this context. They are perfectly willing to follow it in other times and places. Second, the term exemption applies when a community (such as the Amish) sets itself entirely apart from broader societal norms in whole or in part. Third, it makes sense to talk of an exemption when religious communities seek to displace the secular law so that they can follow their own norms on particular well-defined topics, such as divorce and remarriage.

But the exemption concept does not work as well in cases in which the claimant is making a general judgment about the injustice of the law as it applies to everyone. Martin Luther King Jr., for example, would not have been satisfied with a mere exemption to the Jim Crow regime. As his “Letter from Birmingham Jail” testifies, he believed the laws mandating segregation were unjust laws in the eyes of God. He acted *as if* they were not binding, because in his view, they were not. And acting as if the positive law was not binding was part of a step to changing that positive law to better conform to the moral law.

The same can be said about the plaintiffs in the new religious liberty cases. The legal relief they seek is not best understood as an exemption. They do not want to be exempted from modern society: they do not want to be carved out from it, or set apart from it, in whole or in part. They want, instead, to transform it. They want to live *as if* the unjust law has not been enacted in order to invite others to live that way as well, and eventually, to overturn the law that they believe to be unjust. In these religious liberty cases, the goals of exemption are transmuted into the goals of civil disobedience, but without the personal costs.

What difference does it make that plaintiffs in the new religious liberty cases are asking for an “as if” form of relief rather than an exemption? First, and more generally, the cases are conceived and litigated as part of a broader culture war. Consequently, they implicate both the stability and the pedagogical value of the law in ways that the older cases did not. Second, the stakes of granting an exemption become higher for their opponents, because they cannot avoid the recogni-

tion that they will not receive similar treatment when they become the minority asking for accommodation for their beliefs.

Sincerity and Burdens. RFRA requires the plaintiff to show both that they have a sincere religious belief and that the law they challenge imposes a substantial burden on their ability to act on that belief. In practice, however, the courts limit their inquiry to whether the plaintiff's objections to the law are sincere. Quite understandably, the courts do not want to put themselves in the position of weighing burdens on religious belief. Doing so would require judges to put themselves in the religious framework of the plaintiffs, and thereby risk excessive entanglement between church and state. Yet reducing "substantial burden" to "sincerity" also has its dangers, which are exacerbated in the new religious liberty wars.

What, exactly, is a sincere objection to a burden? Does it need to be tied narrowly to the legally required act itself, or can it relate to the broader consequences of the act? Consider, again, the Little Sisters of the Poor, who objected to signing a form saying that they refused to provide contraceptive coverage on religious grounds. That act, viewed in isolation, was surely not burdensome. The burden was being conscripted, no matter how tenuously, into a regulatory scheme that could result in the provision of contraception to their employees.

What about objections that are sincerely strategic? The University of Notre Dame joined the U.S. Catholic bishops and the Little Sisters of the Poor in vociferously objecting to the contraceptive mandate. After they won the case, however, Notre Dame voluntarily decided to cover contraceptives (but not abortifacients) in its employee health plan. The University could not have sincerely objected to the act required of them by the law, since they did so voluntarily. What they did object to was the fact that it was required of them. Notre Dame sincerely feared that if the government could impose a contraceptive mandate today, it might require them to cover abortions tomorrow. Theirs was a strategic, slippery-slope sincerity.

Finally, my sincere objection may be keyed to my moral assessment of the law. I may honestly experience each of its burdens as onerous, no matter how minimal they may be in themselves, simply because I believe them all to be unjust. The subjective weight of a burden, after all, is correlated to our sense of its meaning and purpose. Is being sincerely upset at being slightly impinged upon by what I believe to be an immoral law enough to qualify as substantially burdened? Or does the demand of action or inaction need be onerous in itself?

Compelling State Interests and Competing Moral Perspectives. Once the plaintiff has met its obligation to show a sincere religious belief that is substantially burdened by the law in question, it is time to consider the government's response. The government must show that the law furthers a compelling state interest, which is pursued with the least restrictive means.

But this raises a question: whose perspective on the merits of the law should the courts adopt? This question was not pressing in many older religious liberty

cases because the plaintiffs were not interested in challenging the law's general applicability or undermining the legitimacy of the interests that it furthers. But it does matter a great deal in the new cases, since competing views on the merits of the law correspond to broader divisions in society, and even within the judicial branch itself.

So how should judges decide whether the government interest is *compelling*? That term involves a value judgment. To many people, of course, birth control is morally unproblematic. But others think differently: they hold that no governmental interest furthered by the provision of cost-free birth control can be compelling because no ends can justify morally objectionable means. I suspect that judges in recent cases have sidestepped this issue by avoiding direct consideration of the moral values animating a piece of legislation, particularly if it embodies moral values to which they are hostile. Instead, they bring their values to bear indirectly, by second-guessing the legislators in considering whether the law could have been designed in a less restrictive way.

Consider Justice Samuel Alito's majority opinion in *Hobby Lobby*. He assumed, quickly and grudgingly, that the government had a compelling interest in providing contraception. Moreover, he reduced the governmental objective to its narrowest possible mechanical description: "guaranteeing cost-free access to the four challenged contraceptive methods." But that is rather like saying that the aim of the civil rights acts was limited to ensuring that African Americans could sit anywhere they wanted on the bus. Just as the interest served by the civil rights acts was racial equality, the interest served by the U.S. Department of Health and Human Services regulations was to provide seamless, integrated preventive health care for women.

The skepticism Alito signaled about the weight of the government's interest did not dissipate when he assumed without deciding that the interest was compelling. Instead, it was channeled into his stringent application of the fourth prong of the test, which asks whether the government could have used less restrictive means to achieve that interest. He toyed with the argument raised by the plaintiffs that the government might have provided free contraception by expanding another program, such as Title X. In the end, Alito simply decided that the government could have expanded the exemption already in place for nonprofit objectors to accommodate for-profit closely held companies like Hobby Lobby. He paid no attention to their pragmatic and strategic reasons for not doing so, including the difficulty of defining a "closely held" for-profit company.

The four-pronged test for considering religious liberty claims has been reduced to one functional prong. Courts assume that religious believers sincerely experience a significant burden, and that the government interest furthered by the burdensome law is compelling. They consider only whether the

law is as narrowly tailored as possible. Judges then become the equivalent of Monday-morning quarterbacks, considering whether the state hypothetically could have structured the requirement differently. For the new religious liberty plaintiffs, this contraction of the test is doubly ironic. First, and most important, it further removes straightforward political and moral discourse from judicial reasoning. Second, it reduces the judicial task to second-guessing legislative strategy, although many of the plaintiffs adopt a judicial philosophy that rejects “legislating from the bench.”

There are other ironies in the new religious liberty litigation. The new religious liberty plaintiffs tend to be religiously and socially conservative, lamenting the changes that have occurred in American society over the past half-century. Yet in order to achieve victory in the courts, religious plaintiffs have reinforced aspects of American life that they find deeply objectionable. Many of these features were identified in philosopher Alasdair MacIntyre’s *After Virtue*, whose diagnosis of the problems of contemporary liberalism has captured the imagination of many religious conservatives.¹³

MacIntyre contends that many denizens of contemporary liberal democracies treat moral discourse in an *emotivist* manner: that is, they hold the expression of a moral judgment to be nothing more than an individual’s expression of a strong feeling of attraction or aversion to a particular action.¹⁴ He maintains that the appeal of emotivism is correlated with the continuing failure to make progress on controversial moral issues such as abortion after the breakdown of a unified account of human flourishing and moral reasoning indebted to medieval Christendom. Most religious conservatives believe that their moral judgments are supported by reason; they strive to refurbish the broader Christian view of flourishing that would make those judgments intelligible. But their litigation strategy undercuts their ultimate aims. Precisely because “sincerity” has been the standard applied to plaintiffs, they have an incentive to highlight the emotional component of their moral objection, rather than explicate its inner logic.

For example, the decision of the Beckett Fund to have the Little Sisters of the Poor serve as lead plaintiffs made sense strategically. They are not only nuns; they are *little sisters*: their name invokes resonances of pious childhood innocence. *Of course* they would be viscerally repulsed by contraception, and only a moral monster would make them have anything to do with it. In this context, belaboring the hard-headed analysis of Catholic moral theology would only muddy the waters. While Catholic teaching prohibits abortion, its views on complicity are far more complicated.¹⁵ It is highly doubtful that the Little Sisters would have violated Catholic teaching on “cooperation with evil” if they had signed a government form declaring their conscientious objection to providing contraception. This is not to say, of course, that the plaintiffs could not have tried to make such a case. But given the applicable legal framework’s emphasis on “sincerity,” and the ten-

gency of American culture to equate sincerity with honest and emotionally fueled reaction, it would have been counterproductive for them to do so.

Many conservative Christians have also endorsed MacIntyre's judgment that liberal society encourages a corrosive and morally *solipsistic individualism*. They have lambasted the dominance of the language of individual rights in secular liberal culture and lamented the concomitant occlusion of the language of duty and obligation.¹⁶ Yet the legal strategy adopted by the plaintiffs in the new religious liberty cases has entrenched the individualistic, self-centered orientation of rights language so often complained about by religious and social conservatives. This charge may seem misplaced. After all, organizations such as the Little Sisters of the Poor, Catholic Charities, and the University of Notre Dame have rightly claimed that their religious mission requires them to serve others. They ask only to serve in a manner that is consistent with their own normative vision. Doesn't this make them altruistic, not morally self-centered?

They are altruistic, but on their own moral terms. And that is the key. We may helpfully distinguish between the *ground* and the *object* of their activities. While the object is other-regarding, the ground is entirely self-regarding. In framing their cases for legal consumption, the new religious liberty plaintiffs focused exclusively on their own rights, understood in a narrow sense: their rights to follow their own moral code in employing and providing services to others. Furthermore, they claim the right to act as if they had no duties to others who in good conscience did not view matters such as same-sex marriage, contraception, or abortion in the same manner.

For deeply and devoutly Roman Catholic plaintiffs, this constricted and decontextualized understanding of rights language is ironic, for three reasons. First, the Roman Catholic tradition has not understood rights in a way that is abstracted from a more holistic understanding of the good of the entire community. Second, in the Catholic moral tradition, rights are not to be defined separately and set off against duties. Third, since the Second Vatican Council, official Catholic teaching has acknowledged the need for all people in pluralistic societies to recognize the dignity of those who do not understand moral claims in the same way they do. In fact, granting recognition is a moral duty of a Catholic institution. Recognizing the dignity of others with different moral views requires developing a set of habits, including imaginative empathy, compassion, and a lively sense of fairness. It may be within my legal rights to take a particular action, but is it morally right to do so? Will it build up admirable qualities of character, enabling me to more fully flourish as a member of the community? Asking these questions, of course, is not good litigation strategy. The exclusive focus on protecting and defending our rights consumes all the moral air in the room.

In MacIntyre's view, moral obligations are deeply tied to one's social role.¹⁷ Roles not only empower the individuals who inhabit them, they also create legiti-

mate expectations (and to that extent moral obligations) on the part of those who interact with the role-holder. Unfortunately, recent religious liberty litigation has not encouraged plaintiffs to reflect critically on their variegated social and institutional roles, the practices associated with those roles, or the legitimate expectations that can be associated with those roles on the part of third parties.

Recent religious liberty plaintiffs tend to highlight two roles, both of which pertain to the divine-human relationship. First, they present themselves as children of God, who are obliged to follow the moral rules that God has imparted to His children. Second, they present themselves as a prophetic witness to God's word, to provide the secular world with a clear model of upright behavior. But divine child and prophetic witness are not the only roles that these plaintiffs occupy. They also occupy roles that deeply embed them within society, roles which (as MacIntyre pointed out) generate a rich set of obligations, some of which are reciprocal.

The Little Sisters of the Poor are an employer, and some of their employees are not conservative Roman Catholics. Masterpiece Cakeshop holds itself out not only as a specialty bakery, but also as a participant in the stream of commerce, which is open to all comers. Hobby Lobby may be a closely held corporation – the number of people who own it is small – but it is also a very large enterprise, employing thirty-eight thousand people. What shape does the moral obligation to respect the conscience of others take for those who inhabit these roles? Someone might object that the stylized combat of constitutional litigation is not the appropriate place for such self-reflection on the part of religious plaintiffs. That is true enough. Yet it is also true that litigation should not supplant or distort such reflection within religious communities themselves.

The plaintiffs in the new religious liberty cases have been largely victorious. They have likely won the legal right to refuse to include contraception, gender transition measures, and abortion in their health care packages. They may have won, at least under certain conditions, the legal right to refuse service to same-sex couples. But under what conditions should they exercise these legal rights? The question is important because it is not always morally justified to exercise a legal right.

We might find the necessary insight to address these questions by exploring the convergences of two concepts: civic friendship, drawn on by Western philosophers from Aristotle to Rawls, and the Golden Rule, which many religious traditions view as incorporating their core moral insights. Both concepts ask the plaintiffs to reflect on their obligations, not only their rights, as members of a broader, pluralistic community. They ask the plaintiffs to view themselves in a complex web of relationships, in which they are not only vulnerable, but also powerful. Moreover, they invite the plaintiffs to see these relationships not as comprising a

series of fleeting transactions, but as extending over time, and partially constitutive of their own character. They encourage the plaintiffs to see their moral flourishing, therefore, as connected to acting with integrity in the society in which they live: a pluralistic liberal democracy. Some think that these concepts are too general and even vacuous to provide much guidance. I am not quite so skeptical about their usefulness. While they may not provide a fully developed moral charter of rights and obligations, they do channel our attention in a fruitful direction, asking us to look away from our own interest and to step into the shoes of other people in the community.

Civic Friendship and Reciprocity. The ideal of civic friendship is an old one. It is difficult to apply to our geographically dispersed and pluralistic society. Consequently, it is beyond the scope of this essay to work out fully the implications of civic friendship for our current controversies over religious liberty; I can only point to key issues. Briefly, I think civic friendship requires a) equal political standing; b) prima facie regard for the determinations of one another's conscience; and c) a certain reciprocity with respect to d) the common project of maintaining our liberal representative democracy. Working out what each term means with respect to the task of religious liberty is a complicated undertaking. I can only begin it here by focusing on the criterion of *reciprocity*. The challenges it poses for religious liberty exemptions help explain the social tensions we face over the granting of them.

At its basic level, reciprocity means that over time, I hold myself ready to extend to you considerations analogous to the ones that I expect from you. In the context of private friendship, it requires each friend to cultivate the dispositions to give and to receive. Civic friendship also requires reciprocity. Contemporary political and legal theorists have argued that reciprocity is at the basis of the rule of law: each of us promises to give up our freedom to advance our own self-interest in the way we view best in exchange for the promise of everyone else to do the same thing. Breaking the law, on this view, is a violation of reciprocity because one takes for oneself a liberty that has not been accorded to everyone else.

How might the claim of reciprocity operate in the case of religious liberty claims in our constitutional democracy? We might begin with a simple observation: generally, in the United States, the majority gets to make the laws. At first glance, reciprocity could mean that I promise that if I am in the majority, I will make an exception (as best I can) to my generally applicable laws in order to accommodate your deeply held religious/moral beliefs. You promise to do the same if you are in the majority. Working out what this promise and expectation of reciprocity means in concrete cases is very challenging. We run into problems of both form and substance.

Let's look first at prohibitions. Say that the law *prohibits* action X, and I want an exemption so that I can perform action X for religiously infused moral reasons.

Let us suppose, as well, that the prohibition is controversial. In deciding whether to grant an exemption, the defenders of the prohibition are doubtless considering their own status if the prohibition is repealed. But what would reciprocity look like if this were to transpire?

If the prohibition is lifted, of course, those opposed to the act are not obliged to engage it. In some cases, that may be enough to protect their sphere of moral action, if the prohibition relates to a ritual requirement they understand as binding only on members of a particular social group. So, if the Utah legislature repealed a law banning restaurants from serving coffee, Latter Day Saints would arguably be fine. But prohibitions and restrictions that encode widely applicable judgments about common morality and the common good raise different questions.

For example, religious conservatives opposed repealing laws stringently restricting divorce. They reacted with frustration to remarks like: “If you don’t like divorce, just don’t get one.” They think the law against divorce is an important piece of the common morality. It is not dissimilar to the reaction of post-repeal Prohibitionists to the retort, “If you don’t approve of drinking alcohol, just don’t drink.” The problem, in their view, was not the actual act of taking a sip of alcohol. The problem was the moral climate created when many people drink many sips of alcohol. When Prohibition was repealed, the idea of an exemption for its proponents was nonsensical, for two reasons. First, an exemption from a permission is logically impossible. Second, and more important, the real problem was that the religiously infused moral and political worldview of the Prohibitionists was defeated. From that sort of defeat, there is no exemption. And there is no reciprocity.

What about the potential for reciprocity in the case of exemptions from legal *requirements*? In these situations, the law requires me to perform act Y, and I do not want to perform act Y. Again, assume I think the requirement is based on the imposition of false and alien morality. For example, consider the situation of a religiously based social service agency that refuses to place children for adoption with same-sex couples. It would be possible to grant the agency an exemption, allowing it to place children only with opposite-sex couples. In many cases, however, the exemption is only a second-best option. Some such agencies are run by religious traditions that do not believe any agency should place children with same-sex couples. In their ideal world, such placements would be prohibited, because they are bad for the children and bad for the community. So those who consider whether to grant or deny the exemption will recognize that reciprocity is not likely to be forthcoming if same-sex marriage is someday abolished.

In addition to prohibitions and requiring certain actions, the law also comprises *enablements*, which empower patterns of activities and relationships. Enablements are not requirements and prohibitions. Yet to be effective, an enablement often needs to be buttressed by both. Consider the new institution of same-sex marriage. A baker who refuses to make a cake for a same-sex wedding does not

“disobey” the enablement, but he does thwart it. Should he be granted an exemption? In considering this question, the proponents of same-sex marriage must be mindful of the fact that claims for religious liberty are not isolated pleas for accommodation, but instead function as loci of political-moral contestation. Those who object to same-sex marriage would eradicate it for everyone. Consequently, the challenge of the requirement of reciprocity bleeds into the challenge of the “as if” that I discussed earlier. It is one thing to give an exemption to a discrete religious or moral group that a) does not think the norm they follow applies to those who do not belong to their group; and/or b) is not engaged in a viable struggle to legally (re)establish that norm in the broader community. But it is another thing entirely to grant an exemption to a group that sees the exemption not as an article of peace with the dominant culture, but as a staging area to wage a culture war. In the latter type of situation, an exemption may be politically wise; it may function as a political-moral “escape valve.” But given the concerns about reciprocity, it is difficult to justify in principle.

The Golden Rule and Role Relations. “Do unto others as you would have them do unto you.” As many philosophers have noted, the Golden Rule is a formal requirement. It is not hard to imagine a ruthlessly consistent Nazi saying, “If I were a Jew, I should be killed too.” At the same time, the Golden Rule is not without substantive ethical import. First, it has epistemological implications; it encourages agents to gather more information about the impact of their actions through an imaginative exercise. Second, it has arêtic implications. It encourages agents to exercise the virtue of empathy with those who will be most affected by their actions.

The most significant impact of the Golden Rule, I think, will be encouraging religious liberty plaintiffs to consider the obligations incumbent upon them by virtue of their role relationships. In the *Hobby Lobby* case, the majority held that closely held for-profit corporations are eligible to make religious liberty claims. The Golden Rule invites employers to ask themselves how they would respond to the imposition of an alien morality as a condition of their own employment. How would they feel if the shoe were on the other foot? Answering this question in a noncircular way requires thinking more systematically about the role relationship between employers and employees. The new religious liberty plaintiffs need to address the question: what are the characteristics of a virtuous employer?

An employer is not a parent, nor an overlord, nor a teacher. In my view, it is best to see employers as engaged in a limited common project with their employees, which limits what can justly be expected of the employees. *Hobby Lobby*’s owners may be evangelical Christians, but its purposes as set forth in its articles of incorporation in effect at the time of the lawsuit are thoroughly secular. Within limits, an employer is entitled to control an employee’s behavior on the job. Yet restrictions that extend to their personal lives require a heavy justification. For example, a counselor at an addiction treatment center can legitimately be prohib-

ited from using drugs or alcohol, and the spokesperson for a vegan diet/lifestyle brand can legitimately be contractually prohibited from eating meat. In these situations, the objectives of the enterprise legitimately extend into the employees' personal lives.

A heavy burden falls on employers that want to constrict what employees can do with their compensation. It would be possible for Hobby Lobby to enter into a contract with its employees which prohibited them from purchasing pornography, contraceptives, and abortions with their wages. But to do so would be to step far beyond the rightful bounds of its role as an employer. I believe the same can be said of health care benefits, which are part of an employee's compensation package. The federal government has developed a basic benefits package that was designed to maintain the health of the covered individual and the whole population. Employers who consider psychiatry or contraception morally illegitimate can certainly make their views known to their employees. They can petition the government to revise the standard benefits package. Yet they ought not overstep the boundaries of their role, to rewrite the benefits package according to their own medical-moral lights.

Recent religious liberty litigation may have provided a successful tactic for social conservatives fighting the culture war. In using that tactic, however, social conservatives may have blunted their own most powerful critique of Western liberal society: its atomistic individualism, its reduction of morality to feelings, and its inability to think in terms of the common good rather than the contestation of interest. If the litigation sorts out largely in their favor, perhaps religious entities will move beyond the categories of First Amendment cases and retrieve their own moral commitments. They may ask themselves two questions: what do we owe others as a matter of civic friendship in a pluralistic society, and how should we exercise the power we have, given our own role-related obligations and the Golden Rule? The answers they develop may put us all on a more stable path for living together peacefully and with mutual regard.

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ENDNOTES

- ¹ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).
- ² *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. ___, 138 S. Ct. 1719 (2018).
- ³ In *United States v. Seeger*, 380 U.S. 163 (1965), the Supreme Court held that the religion-based exemption in the Universal Military Training and Service Act of 1948 must be extended to “sincere and meaningful belief which occupies in the life of its possessor a place parallel” to the place occupied by God in the lives of those who generally seek the exemption. But the Court upheld the requirement that successful applicants for the exemption object to all war, not merely to a particular war in *Gillette v. United States*, 401 U.S. 437 (1971). It is true that successful conscientious objectors oppose war for everyone, not merely themselves. But there is little chance that they will succeed in convincing the nation to lay down its arms in all cases.
- ⁴ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
- ⁵ *Employment Division v. Smith*, 494 U.S. 872 (1990).
- ⁶ *Sherbert v. Verner*, 374 U.S. 398 (1963), was essentially overruled by *Employment Division v. Smith* as a matter of constitutional interpretation. Its force was partially restored (at least with respect to federal regulation) by the Religious Freedom Restoration Act of 1993 (RFRA).
- ⁷ Hobby Lobby, “Our Story,” <https://www.hobbylobby.com/about-us/our-story>.
- ⁸ David Solomon, “Meet David Green: Hobby Lobby’s Biblical Millionaire,” *Forbes*, October 8, 2012, <https://www.forbes.com/sites/briansolomon/2012/09/18/david-green-the-biblical-billionaire-backing-the-evangelical-movement/#2757a8e35807>.
- ⁹ Elizabeth Dias, “The Family Behind a \$500 Million Bible Museum Hopes to Change Washington,” *Time*, November 17, 2017, <http://time.com/5029473/bible-museum-steve-green-hobby-lobby/>.

- ¹⁰ Julie Compton, “Meet the Couple Behind the Masterpiece Cakeshop Case,” NBC News, December 6, 2017, <https://www.nbcnews.com/feature/nbc-out/meet-couple-behind-masterpiece-cakeshop-supreme-court-case-n826976>.
- ¹¹ In fact, the United States Conference of Catholic Bishops strongly urged that the mandate be repealed in its entirety. “Only rescission will eliminate all of the serious moral problems the mandate creates; only rescission will correct HHS’s legally flawed interpretation of the term ‘preventive services.’” Office of the General Counsel, United States Conference of Catholic Bishops, Letter to Centers for Medicare & Medicaid Services, Department of Health and Human Services, August 31, 2011, <http://www.usccb.org/issues-and-action/religious-liberty/hhs-mandate/upload/Interim-Final-Rules-on-Preventive-Services.pdf>.
- ¹² The Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4. RFRA represented widespread rejection of Justice Scalia’s majority opinion in *Employment Division v. Smith*, which relaxed the protections given to free exercise. RFRA re-established the more stringent test to evaluate governmental actions that interfered with free exercise that was articulated in *Sherbert v. Verner*. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that RFRA was unconstitutional as applied to the states. Because the issue in *Hobby Lobby* revolved around federal regulation, RFRA applied in that case.
- ¹³ Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 3rd ed. (Notre Dame, Ind.: University of Notre Dame Press, 2007).
- ¹⁴ *Ibid.*, chap. 1.
- ¹⁵ Traditional manuals of moral theology have not condemned nurses who handed a doctor the instrument with which to perform an abortion. The rationale is that they are performing their routine work, albeit in a morally illicit procedure. See, for example, Gerald Kelly, *Medico-Moral Problems* (St. Louis, Mo.: Catholic Health Association, 1958), 332–333.
- ¹⁶ See, for example, Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1993).
- ¹⁷ MacIntyre connects virtues to character, and character to social role and role-related obligations. See chapter 3 of *After Virtue*. The argument is clearest in Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, Ind.: University of Notre Dame Press, 1988).

The Perils of Politicized Religion

David E. Campbell

In the United States, religion and partisan politics have become increasingly intertwined. The rising level of religious disaffiliation is a backlash to the religious right: many Americans are abandoning religion because they see it as an extension of politics with which they disagree. Politics is also shaping many Americans' religious views. There has been a stunning change in the percentage of religious believers who, prior to Donald Trump's presidential candidacy, overwhelmingly objected to immoral private behavior by politicians but now dismiss it as irrelevant to their ability to act ethically in their public role. The politicization of religion not only contributes to greater political polarization, it diminishes the ability of religious leaders to speak prophetically on important public issues.

In the contemporary United States, religion has increasingly become mired in partisan politics. Politicians routinely appear alongside religious leaders while campaigning and invoke their own religious bona fides as they appeal to voters. The connection between religion and partisan politics has become so pervasive in American politics that it is easy for Americans to forget that, in comparison with other liberal democracies, the United States stands apart. I was reminded of this myself when, a few years ago, I gave a lecture in Berlin on religion's role in American presidential elections, a subject on which I lecture frequently to American audiences. The Germans in the audience were aghast as I explained how U.S. presidential candidates, Republicans in particular, regularly speak in very personal terms about their religious beliefs.

At the same time that religion and partisan politics have become intertwined, the United States has also been undergoing a "secular turn," with more and more Americans identifying as not having a religious affiliation, and a smaller but still growing number adopting an affirmatively secular worldview. In their exhaustive analysis of the existing data on religious trends, social scientists David Voas and Mark Chaves conclude that "the evidence for a decades-long decline in American religiosity is now incontrovertible. Like the evidence for global warming, it comes from multiple sources, shows up in several dimensions, and paints a consistent factual picture."¹

This essay describes how these two trends are related, and why we should care. One consequence of the overlap of religion and partisanship has been a secular backlash: increasingly, Americans – especially young people – are abandoning religion because they see it as an extension of politics, specifically politics with which they disagree. As an empirical matter, the politicization of religion (and the religionization of politics) as well as the attendant backlash have been fascinating developments, as they contribute to our understanding of how religion and politics interact. However, the partisan inflection of American religion is not just an interesting empirical trend; it has troubling normative implications as well. Some may lament the growth of secularization; others may celebrate it. I take no position either way. Rather, my concern is with the social consequences of the politicized form of religion that has triggered the secular backlash.

One need not be an advocate for religion, or even a religious believer, to see the dangers of politicized religion. There are at least two reasons: First, the growing secularist-religionist cleavage is yet one more way that Americans are polarized. Given the deep-seated nature of a religious or secular worldview, such a cleavage has the potential to be especially dangerous. History shows that religious conflict – including, and especially, disagreement between the religious and the secular – can bring societies to a boiling point, even more so when those religious-secular divisions reinforce a political cleavage. Second, the more religion is wrapped up in partisan politics, the more it loses its prophetic potential. Religious voices are not always on the right side of history (sometimes they are on both sides or take no side), but nonetheless have a unique ability to raise a moral voice and to mobilize social action. For many Americans, Martin Luther King Jr. is the exemplar of a prophetic voice in our politics, but he stands among many religious leaders who, over the course of American history, have risen above the partisan fray to express a moral voice. Given the current state of our body politic, prophetic voices are needed now more than ever. Many religious traditions can speak to the troubles of our time, including economic inequality, racial prejudice, and callousness toward immigrants and refugees – inspiring Americans to find solutions to seemingly intractable problems. Even people with a secular belief system should appreciate that religion can serve to inspire and motivate people to bring about significant social change.

This essay answers a series of questions. In the contemporary United States, to what extent is religion perceived as partisan? What is the empirical research to support the argument that the partisan tinge to religion has led to a secular backlash? Why is the political fracture along religious-secular lines a threat to religious tolerance? How does the partisan perception of religion hinder its prophetic voice? What, if anything, can be done to change the status quo, so that religion transcends the partisan fray – perhaps serving as a force for lessening rather than exacerbating political polarization?

For a younger generation of Americans, it may seem obvious that religion and partisanship go hand in hand, since that is the only world they know. My undergraduate students, for example, have come of political age during a time in which the religious right is often described as the base of the Republican Party. To them, the partisan connection between religion and the GOP is an article of faith. Election commentary often features discussion of the “God gap,” or the fact that, in general, Americans who attend religious services regularly are more likely to vote Republican. Nor are these merely the mistaken notions of the chattering class: social science research confirms that religious commitment (measured in various ways) is indeed a strong predictor of identifying as a Republican.² The connection between religion and the Republican Party has not formed by accident, but is instead the result of deliberate choices by strategic politicians, who saw an opportunity to wean many white religious voters away from the Democratic Party by emphasizing socially conservative issues like opposition to abortion and LGBT rights.

Many voters are like my undergraduate students, who have internalized the religious divide between the parties. In national surveys of Americans, far more say that “religious people” are more likely to be Republicans than Democrats; even more say that “evangelicals” are Republicans. In fact, when asked which groups are likely to be Republicans, Americans put evangelicals next to business people, traditionally the heart and soul of the GOP. Conversely, Americans also associate secularists with the Democratic Party, although not to the same extent that they link religionists with the Republicans.³ Notably, these partisan group associations are shared by Republicans and Democrats alike: that is, people on both sides of the aisle perceive the religious-secular divide between the parties.⁴ At a time when Republicans and Democrats agree on very little, this is a rare example of bipartisan consensus. Yet it is also important to note that a sizeable share of the American population does *not* perceive a religious-secular cleavage between the parties. Thirty-six percent say that evangelicals are “an even mix” of both Republicans and Democrats. More, 54 percent, say the same about religious people generally. Likewise, 55 percent perceive “people who are not religious” as split between the two parties. In other words, while there is undoubtedly a partisan division along religious-secular lines, there is still a significant portion of the electorate who do not see politics through a religious lens, suggesting that American politics is not locked into an intractable division between religious and secular Americans.

Furthering the point that the religious-secular divide is not a permanent feature of the American political system, it is also important to note that there are exceptions to the religion-Republican connection, most notably among African Americans. Black people are, on average, highly religious, and yet lean heavily toward the Democratic Party. The same is generally true of Latinos, although they

are, on average, less religious than African Americans, and less likely to identify with the Democratic Party. While a much smaller share of the electorate, Muslim Americans are another group with a high level of religiosity who are also heavily Democratic. Thus, the talk of a God gap is largely a divide among white voters: a reminder that there is no iron law that links religion to only one party or political perspective. Readers of a certain age will also recall that the current religion-Republican connection is, in historical context, a relatively new development. As late as the 1970s, there was essentially no connection between voters' degree of religiosity and their partisan leanings.⁵

These important exceptions notwithstanding, the fact remains that many voters associate religion with one of our two political parties. The public perception is significant for understanding voting patterns, voter mobilization strategies, and the policies that the parties are likely to support when in office. Yet the religion-Republican connection goes further than just the tendency for religious voters (especially those who are white) to identify as Republicans. To say that members of any religious tradition are likely to have a particular political view implies that it is the religion that leads to the political view; religion comes first. In other words, it suggests that voters' religiosity pulls them toward the party that has spent a generation branding itself as the party favorable to religious interests.

There is also increasing evidence, both anecdotal and systematic, that politics shapes religious views. Instead of religion preceding politics, politics takes priority over religion, thus flipping the typical assumption of how religion and politics come together. As I explain below, the fact that many Americans prioritize politics over religion – whether consciously or unconsciously – is what drives the secular backlash to the rise of the religious right.

What is the evidence for the claim that politics often precedes religion? Consider two notable examples. One is Roy Moore, a Republican senatorial candidate in Alabama in 2017. Prior to running for the Senate, Moore had made a career out of being a *cause célèbre* within religious right circles. As the elected chief justice of the Alabama Supreme Court, he installed a two-ton granite monument of the Ten Commandments in the state judicial building. A federal court determined that it was a violation of the Constitution's nonestablishment clause and ordered it removed. When Moore refused, the court expelled him from the bench. Moore then took the monument on a national tour, speaking to sympathetic audiences about how the United States is a Christian nation whose values are under attack by those espousing a secular view of the world.⁶ He again ran for the Alabama Supreme Court and won, but was again removed from the bench for defying the Supreme Court decision legalizing same-sex marriage.⁷

With this background, Moore ran for the Senate as the candidate of the religious right, an enviable distinction in Alabama, a highly religious state in which

white evangelicals are a large constituency. However, instead of rolling easily to victory, he was soon embroiled in controversy. Multiple women came forward accusing Moore of having sexually harassed them as teenagers when he was an assistant district attorney in his thirties.

In light of these charges, many Republicans dropped their support of Moore. But not all. Among his most vocal supporters were various pastors, including Franklin Graham, son of Billy Graham. A group of over fifty pastors released a letter endorsing Moore, despite the evidence that he was a serial sexual predator.⁸ While Moore lost the election, exit polls revealed that he received 80 percent of the vote among white evangelicals.⁹

The second example of politics taking precedence over principle is a similar tale about Donald Trump's campaign for the presidency. Many highly religious voters were slow to warm to Trump, and it was not hard to see why. He owns casinos, had long bragged about his extramarital sexual dalliances, and is often profane. While on the campaign trail, he demonstrated an obvious unfamiliarity with the Bible and the core tenets of Christianity. Eventually, though, religious Republicans – including but not limited to evangelicals – came to be among Trump's strongest supporters. And they stuck with him even after the release of the Access Hollywood tape, in which Trump is heard bragging about how being a celebrity enabled him to kiss women without their consent and to grab them by their genitals. On election day, 81 percent of white evangelicals voted for Trump. To put that level of support in context, Trump received a higher percentage of evangelical support than George W. Bush in 2004 (78 percent), who is himself an evangelical.

Given the extraordinarily high level of white evangelical support for Trump, one might ask whether this story is really only about the politicization of evangelicalism specifically, and not religion more broadly. There can be no doubt that evangelicals are a “leading indicator” of how religion has become politicized. Not only are evangelical leaders the most vocal religious leaders in Trump's camp but, as noted above, Americans are more likely to associate evangelicals with the Republican Party than simply “religious people.” Notably, though, this is not just an evangelical, or even Protestant, phenomenon. For example, among white Catholics, Trump received 60 percent of the vote, obviously lower than among evangelicals but still higher than white Catholics' support of Mitt Romney in 2012, John McCain in 2008, or George W. Bush in 2004.

Both the Moore and Trump examples suggest that religious views can be subordinated to partisanship. Still, the vote is a blunt indicator, making it difficult to decipher people's underlying opinions. No doubt many religious voters were casting a vote against Hillary Clinton rather than for Donald Trump. Fortunately, though, we need not rely on the broad brushstrokes of election returns to see how politics can shape the views held by religious Americans. Public opinion data provide finer-grained evidence. Back in 2011, a poll conducted by the Public Religion

Research Institute and Religion News Service asked a nationally representative sample of Americans whether “a public official who commits an immoral act in their personal life” can still “behave ethically and fulfill their duties in their public and professional life.” This was just over a decade following the impeachment of Bill Clinton, when the nation was riven over the question of the connection between private and public morality. At that time, 60 percent of white evangelicals said that immoral acts in private meant that a public official could not be trusted to behave ethically in a professional capacity. This is to be expected, given the number of religious – especially, evangelical – leaders who argued for President Clinton’s removal from office owing to his adultery and his dishonesty when denying his affair under oath. Consider these words from Franklin Graham in a 1998 *Wall Street Journal* op-ed, which succinctly reflect the prevailing view of Clinton’s indiscretions among evangelical leaders at the time: “If [Clinton] will lie to or mislead his wife and daughter, those with whom he is most intimate, what will prevent him from doing the same to the American public?”¹⁰

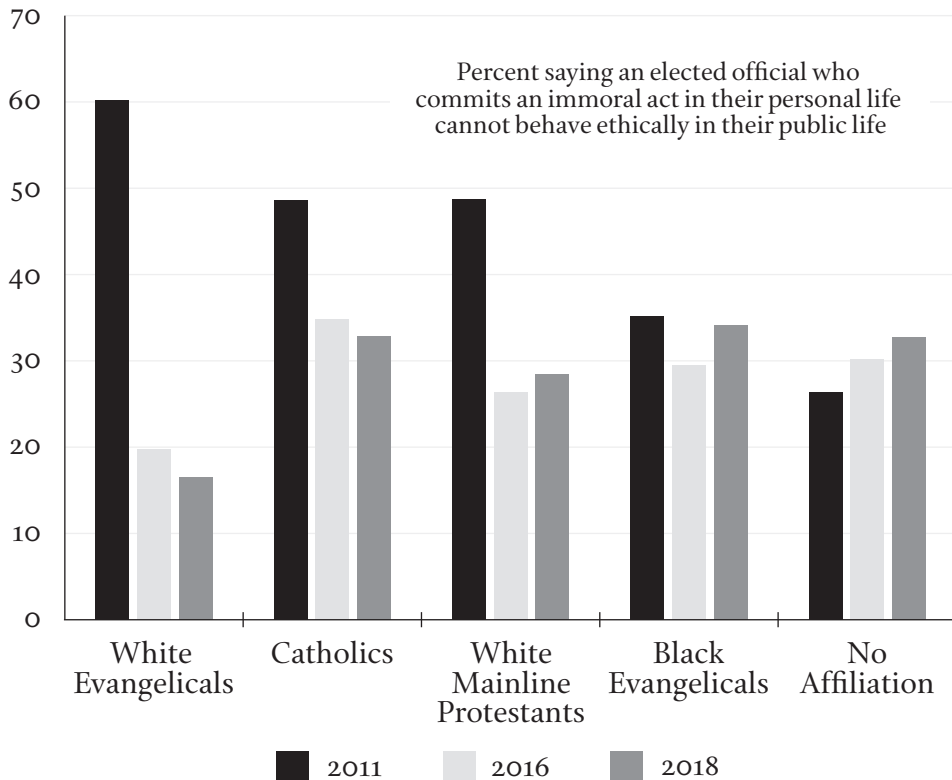
This same question about private and public morality was posed in another national survey done in October of 2016, following the release of the Access Hollywood tape. Now, only 20 percent of evangelicals – Trump’s strongest supporters – said that private immorality meant a public official could not behave ethically in their professional responsibilities, a precipitous forty-point drop.¹¹ White evangelicals were not the only ones whose opinions changed. Among mainline Protestants, there was a twenty-two-point decline in those who said that immorality in private meant unethical behavior in public. Catholics fell fourteen points, while black Protestants only dropped five points. In contrast, people without a religious affiliation became five points more likely to agree with the statement that immorality behind closed doors precludes ethical behavior professionally.

While these changes in attitude are revealing, are they long-lasting? Or did they simply reflect the heat of the 2016 presidential campaign, only to fade away after election day? To find out, my colleague Geoffrey Layman and I posed the same question on the 2018 Cooperative Congressional Election Study, a very large survey of the American electorate. As shown in Figure 1, we found that the results held steady. In fact, after two years of the Trump presidency, white evangelicals were slightly less likely to see a connection between private immorality and publicly unethical behavior: 16.5 percent, compared with 20 percent back in 2016. The views of mainline Protestants, Catholics, black Protestants, and people without a religious affiliation were virtually unchanged.

The point in highlighting the changing attitudes toward private immorality and public ethics is, of course, to suggest that the change is due to politics trumping (if you will) an opinion that is closely tied to one’s religious beliefs. To dig deeper into the connection between partisanship and views of public officials’ morality, we asked two other versions of the same question that prime respon-

Figure 1

Evangelicals, Catholics, and Mainline Protestants Have Become Less Concerned about a Politician's Private Morality

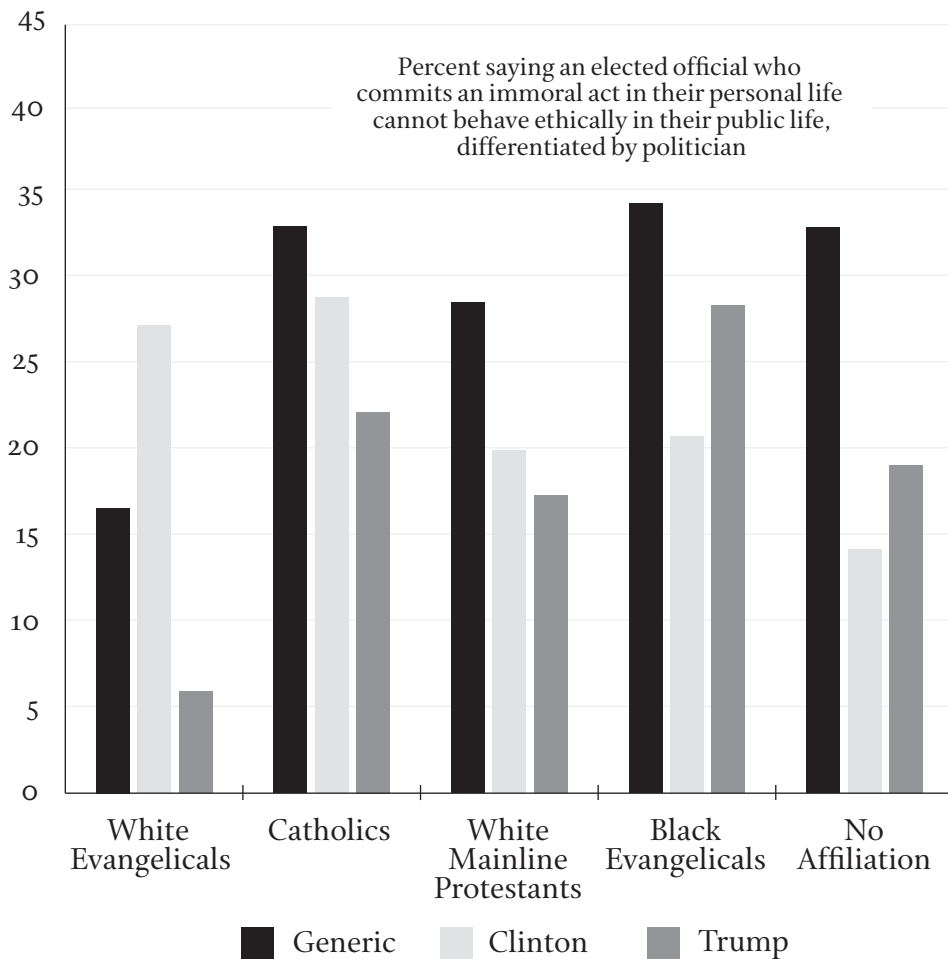


Source: Geoffrey Layman and David E. Campbell, Cooperative Congressional Election Study, 2018.

dents to think of either Trump or Clinton when answering the question. One begins with the statement, “Many supporters of Donald Trump have argued,” followed by the statement that a public official can act immorally in private but ethically in public. The other references the affair and impeachment of Bill Clinton by adding the prefatory statement, “When he was president, many supporters of Bill Clinton argued. . . .” Respondents were randomly assigned to receive only one of the three variations: the generic, Trump, or Clinton version.

As shown in Figure 2, when asked about Trump specifically, only 6 percent of white evangelicals said that there was a connection between private immorality and public ethics. In contrast, when primed to think about Clinton, 27 percent saw

Figure 2
Concern about a Politician's Private Morality Depends on the Politician



Source: Geoffrey Layman and David E. Campbell, Cooperative Congressional Election Study, 2018.

a connection: a difference of twenty-one points. Other religious groups also differ when asked about Trump or Clinton, but not to the same extent as evangelicals. Catholics were five points more likely to link private morality and public ethics when asked about Clinton; mainline Protestants were three points more likely. Lest one think that it is only Republican-leaning groups that shift their views depending on the politician in question, both black Protestants and people without

a religious affiliation were modestly less likely to connect privately questionable behavior with public ethics when asked about Clinton – by eight and five percentage points respectively.

It does not take a political scientist to figure out what is going on here. Many people respond to this question according to their party affiliation, not out of principle. To underscore that point, we can compare Republicans to independents and Democrats. Both evangelicals and Catholics who identify as Republicans are far more likely to question the public ethics of a privately immoral official when asked about Clinton versus Trump. Among evangelical Republicans, the percentage who express concern about the professional behavior of someone who misbehaves in private rises thirty-four points when asked about Clinton compared with Trump. Among Catholic Republicans, the gap is even greater: forty points. The inverse is also true. Both evangelicals and Catholics who identify as Democrats or independents are more concerned about a private-public connection when asked about Trump instead of Clinton, although the differences are not as large as for their Republican counterparts: eight points for evangelicals and twenty-nine points for Catholics.¹²

In sum, we have strong evidence that many religious believers place party over principle when evaluating the public implications of behavior they find immoral. They put politics first.

Some readers may ask whether the influence of politics over religion is anything new. After all, religion has long been intertwined with American politics. Clearly, this is the case, but this should be cause for concern rather than complacency. It is precisely because of this history that we should be alarmed about stark political divisions along religious lines. In the past, there was political conflict between members of pietistic and liturgical faiths, not to mention the tensions between Protestants and Catholics.¹³ At times, these conflicts even led to violence. Such a legacy of religion-fueled discord should give us pause, as they are a reminder that differences rooted in religion can be explosive.

Still, the parallels with the past are imperfect. What is new about today's political environment is that the partisan differences are not between religious camps, but rather between religion and secularity. One party has wrapped itself in religion, thus making religion, broadly construed, a source of partisan identity. The other has more quietly – and almost by default – come to be associated with secularity. While a few Democratic politicians have described themselves in secular terms, they remain few and far between. There is a “freethought” caucus within Congress, but it has all of four members, fewer than the Friends of Kazakhstan (which has ten). Most famously, during his 2016 presidential run, Bernie Sanders described himself as “not particularly religious,” a highly unusual admission in contemporary American politics. Yet he protested vigorously when leaked emails found some Democratic officials describing him as an atheist.

Republicans' identification with religion qua religion, and the Democrats' secular mirror image, has had far-reaching implications for both the religious and political landscape of the country. Perhaps the most significant consequence of the perception that religion has become an extension of politics has been its contribution to the nation's recent "secular turn." Over roughly the last twenty-five years, there has been a rapid rise in the percentage of Americans who report not having a religious affiliation. Until the early 1990s, the percentage of Americans who do not identify with a religion hovered between 5 and 7 percent – small enough that few observers paid much attention to them. Then, beginning in the early 1990s, that percentage began to rise. By 2000, it was 14 percent; in 2010, it reached 18 percent; and in 2018, it had grown to 23 percent.¹⁴ This sudden growth is puzzling, as most theories of secularization posit a process of generational replacement, whereby a population secularizes gradually as older, more-religious members die off and are replaced by younger, more-secular cohorts. This has been the pattern in most other advanced industrial democracies. What explains the anomalous American case?

In a prescient article published in 2002, sociologists Michael Hout and Claude Fischer proposed an explanation for the rise of the religious Nones, as those without an affiliation are often called: a backlash to the religious right.¹⁵ They suggested that the mixture of religion and partisan politics had led an increasing number of Americans to disclaim a religious affiliation. Specifically, moderates and liberals were turned off by religion because of its association with conservative politics. As they put it, "Organized religion linked itself to a conservative social agenda in the 1990s, and that led some political moderates and liberals who had previously identified with the religion of their youth or their spouse's religion to declare that they have no religion."

At the time, Hout and Fischer's explanation was based more on the process of elimination than affirmative evidence in favor of their hypothesis. Like an Agatha Christie novel, they figured out "who done it" by ruling out all the other suspects. In the years since, their foresight has become more and more apparent, as increasing evidence has accumulated in support of the secular backlash hypothesis.

For example, a recent article has found that, across states, the percentage of religious Nones has risen most where there has been the most activity by political organizations associated with the religious right. Other analyses based on repeated interviews with the same people have shown that, over time, Democrats are more likely to become religious Nones. Conversely, Nones are not likely to start identifying as Democrats. Put another way, it is the partisan identity that shapes one's religious identity or, more precisely, the lack thereof. Furthermore, that effect is only found among people who see a connection between Republicans and religion – further evidence that this is a backlash to the partisan connotations of religion.¹⁶

While these analyses of voters in their natural habitat are suggestive, there could still be alternative explanations for the apparent secular backlash to politicized religion. The most convincing evidence for a causal relationship comes from experiments in which the researcher has complete control over the conditions of the study, thus ruling out alternative explanations. To that end, my colleagues and I have conducted a series of experiments in which we expose people to examples of politicians who employ religious rhetoric, thus testing how they react. The design of the experiment is straightforward. First, we collect baseline data on individuals' religious preferences. Then, roughly a week later, we have them read a news story that describes the Republican and Democratic candidates in a nearby congressional race. In some versions of the story, the Republican uses a lot of religious rhetoric, in others, it is the Democrat who does so, and in other versions, both do. There is also a control condition in which neither candidate mentions religion. Subjects in the experiment are randomly assigned to one version of the story, after which they are asked the same questions as in the baseline survey. With this elegant design, we can see whether individuals change their religious preference based solely on their exposure to the news story. Randomization ensures that we can be confident that any rise in religious nonaffiliation is due only to the experimental "treatment": that is, being primed to think about the intertwining of religion with partisan politics.

Our results are completely consistent with the secular backlash hypothesis. We find that exposure to a Republican candidate who employs "God talk" leads to an increase in Democrats who report no religious affiliation.¹⁷ Lest it seem implausible that reading a single news story could cause people to abandon their religion, this sort of fluidity in their declared religious identity is consistent with other evidence showing that many Nones have an ambivalent religious identity, and move back and forth between identifying with or disclaiming a religious affiliation.¹⁸

In other words, multiple streams of evidence have converged toward the same conclusion. It is not just that the United States is becoming a more secular nation. It is that Americans' secularization is, at least in part, a backlash to the employment of religion for partisan ends. The widely held perception that religion is partisan has contributed to the turn away from religious affiliation. As is always the case with social scientific research, one can question the findings or methodology of a given study, but it is hard to argue when different studies using different methodologies, covering different time periods, all point to the same conclusion.

The decline in religious affiliation, however, is only the tip of the secular iceberg. While an important social trend, disaffiliation from religion is a very thin measure of secularization, especially as many Nones are what Hout and Fischer have called "unchurched believers." That is, they retain some traditional religious beliefs, particularly a belief in God, even if they are unwilling to identify with an organized religion. In order to better understand the depth of secularism within

the American population, my colleagues and I have developed a set of measures to gauge the degree to which individuals adopt a secular identity (such as atheist, agnostic, humanist, secular), receive guidance from nonreligious sources, and endorse a set of secular beliefs.¹⁹ Together, they form a scale of personal secularism.²⁰ While we have a much shorter time trend for these measures than for religious nonaffiliation, from 2011 to 2017, we observed a rise in this more robust form of secularism compared with the growth in the Nones. Furthermore, we also find a two-way relationship between secularism and political attitudes. Over time, being on the political left leads to more secularism, just as it leads to religious nonaffiliation. However, unlike nonaffiliation, this sharper-edged secularism also affects political views. In other words, the evidence points to a mutually reinforcing relationship between secularism and politics: more of one leads to more of the other.

For empirically oriented scholars, the secular backlash to the religious right is an interesting phenomenon – an explanation for one of the most significant social trends in the last thirty years. Within the literatures in political science and sociology (including my own work), these findings are typically framed in positivist terms. Here, though, I wish to make a normative argument. My concern is not the rise of secularism per se, as I will leave others to debate the merits of secularity versus religiosity. Instead, I worry about the politicization of religion and the attendant secular backlash because this state of affairs does not bode well for the state of religious tolerance in contemporary America; it also diminishes the ability of religious leaders to speak prophetically about issues of public policy.

In our 2010 book *American Grace: How Religion Divides and Unites Us*, Robert Putnam and I showed that religious tolerance in the United States was relatively high, despite the fact that the United States combines high levels of both religious diversity and devotion. The explanation for this puzzling combination of devotion, diversity, and tolerance, we argued, was the near-ubiquity of social “bridging” among Americans of different religious perspectives, including between believers and nonbelievers. Interfaith neighborhoods, friendships, extended families, and even marriages have become the norm. As people of different religious backgrounds (including no religion) form close friendships and familial bonds, they become more accepting of those who have a different worldview.

Today, I fear that the conditions for religious tolerance that Putnam and I described are disappearing. If a religious-secular divide is combined with a deep partisan cleavage, the result could be a deterioration in Americans’ degree of religious tolerance. There are at least two reasons to think that this might be the case. First, while Putnam and I found that people of different religious backgrounds often comingle, other evidence on the partisan cocooning of Americans suggests that this sort of interaction is becoming less common. If religiosity and secularity

are closely aligned to Americans' partisan identity, we would expect Americans with religious and secular worldviews to have less contact with one another, given that people with differing political views increasingly inhabit different social spheres.²¹ Second, even if there is interaction between religious and secular Americans, injecting politics into the mix makes for a combustible combination, given the mutual antipathy Republicans and Democrats have toward one another. In other words, compared with a decade or so ago, I suspect that religious and secular Americans are less likely to associate with one another and, when they do, are less likely to have the sort of interaction that fosters comity over contention. I readily concede that, at this point, this conclusion remains conjecture, to be confirmed with empirical evidence. But it seems more likely than not.

As a hint that religious-secular discord is increasingly shaped by political views, consider that since at least 2006, there has been a growing connection between Americans' partisan identity and their attitudes toward atheists. In the mid-2000s, there was little to no connection between partisanship and how people viewed atheists. By 2017, there was a sharp division: Republicans held a far more negative view of atheists than Democrats. Nor is this polarization in attitudes limited to atheists – admittedly, a relatively small share of the U.S. population – as Republicans and Democrats have also come to differ in their perceptions of nonreligious people, a more benign way of describing someone who is secular that applies to a far larger share of the population.²²

A skeptic might ask whether this partisan-inflected antipathy is all that worrisome, or at least if it warrants any more concern than the many other ways that political polarization has divided Americans. I suggest that it should not be dismissed as just one more source of division: the religious divides in our politics now stand in sharp contrast to the past high level of interreligious acceptance among Americans in their personal lives. Now, however, it appears that politics has come to infuse the relations between religious and secular Americans. It is one thing to have a political disagreement with your family, neighbors, and friends: those political differences are couched in personal relationships that subsume politics. In our current state of polarization, fewer and fewer Americans have such crosscutting social relationships. Americans' party preferences align with where they live, where they shop, and the media they consume. Add to this an alignment with one's religious or secular worldview and those divisions burrow even deeper.

There is another reason why the politicization of religion should cause alarm for religionists and secularists alike: the weakening of religion's prophetic voice on matters of public policy, both in the sense of looking ahead and commenting critically on the present day. Historically, religious leaders have often spoken to the better angels of our nature, independent of any association with a political party. Admittedly, this has not always been the case, as we should not romanticize the role of religion in American politics. Sometimes religious leaders have stayed si-

lent in the face of crisis or stood on the wrong side of history. Yet in their finest moments – including the abolition and civil rights movements – religious voices have nudged the nation toward a more perfect union. Even secularists who may not endorse its religious motivations should appreciate such advocacy. Politics, after all, makes strange bedfellows. However, religious leaders can only speak prophetically if religion is not seen as merely an extension of partisanship. Religious leaders must be willing to transcend partisan divisions as they speak to the problems of our day.

In today's politics, where might religious leaders be able to contribute to public discourse? While this list is hardly exhaustive, religious texts have a lot to say about economic inequality, stewardship of the earth, racial harmony, and immigration, not to mention war and poverty.

I concede that a superficial reading of my argument could be construed as a call for a stronger religious left. That inference, though, is wrong. While religion today is perceived – correctly or not – as aligned with the political right, it would be equally problematic if religion were so tightly intertwined with the political left. It is just as much a problem if people on either side of the political spectrum put their party over principle. The key to religion's prophetic potential is to not be perceived as being on one side or the other. Indeed, given the multiplicity of religious voices in the United States, I would expect religious leaders to take a wide variety of political positions: left, right, and center.

There will no doubt be readers who object to the characterization of religion as being concentrated on the right, as there are numerous examples of religious Americans who are forceful advocates for the left. And there are still others whose politics do not align with the left-right, Democratic-Republican American political spectrum. Some could even be called prophetic. While all of this is true, recall that the public *perception* of religion is partisan, and primarily on the right. The examples that cut against the general trend that I have described here have, for the most part, not seeped into the public consciousness. The reason for this is probably a matter of proportion. The sheer volume of conservative religious rhetoric – amplified by media such as Fox News, right-wing talk radio, and social media influencers – simply drowns out the voices on the left, in the middle, and those above the fray altogether. One might say that religion has been weaponized by the right.

What then, if anything, can be done about the politicization of religion? The answer lies in what appears to be driving the secular backlash. It is less what the religious leaders are doing and more the behavior of *politicians*.

Recall the experiments my colleagues and I conducted that showed that religious disaffiliation can be triggered by the mixture of religion and partisan politics, specifically in the Republican Party. There is an important nuance in our findings: while we observe a secular backlash when subjects read about politicians

who employ religious rhetoric, we do not see a comparable effect when clergy speak out politically. In other words, voters are not as bothered by religious leaders who cross over into politics than by politicians who co-opt religion. While admittedly tentative, this evidence suggests that the end of politicized religion will only come if or when politicians change their behavior, specifically by no longer deploying religion to court voters.

There is an irony here. The prophetic voice of religious leaders has been compromised by the actions of politicians. But this irony also points to a solution. What if religious leaders refuse to allow themselves to be co-opted by politicians, and speak out against the mixture of God and Caesar? This would mean no clergy appearances at campaign events; no invitations for politicians to speak in their houses of worship; no supportive speeches, articles, posts, or tweets. It would also mean that politicians risk criticism from local clergy – voters' own priests, pastors, and rabbis – for trying to mix religion with their politics.

While a rebuff from clergy would be an important start, however, it is not enough. Change will only come when politicians no longer see the status quo as helping their prospects for reelection, when their old ways cause them to lose more votes than they gain. At first blush, this may seem like a quixotic suggestion. Over the last generation, religion has become deeply embedded in our politics, especially among conservatives. Why would we think that politicians would change what is working for them? After all, politicians are notoriously loath to do anything to disrupt the status quo under which they were elected.

The most persuasive approach would be if voters in the center and on the right – especially those who are religious – snubbed politicians who deploy religion. If voters refuse to vote for, contribute money to, or campaign on behalf of politicians who exploit religious faith, those politicians will quickly change their tune. Such a negative reaction from voters would be the most powerful incentive of all. No politician can afford to alienate their base.

Is it realistic to think that such change is feasible? I remain optimistic that there is indeed hope. After all, weaponization of religion on the right is a relatively recent development in American politics. And recall that it is not found in most other liberal democracies. Nor is it even a completely accurate inference for voters to draw in the United States, as there are many examples of religious voices on the left, both in the present and the past, which is undoubtedly why many Americans do not perceive religion to be the province of one party over the other. The very fact that a sizeable share of Americans does not associate religion with one party over another means that the perception of politicized religion is far from universal. However, the end of politicized religion, and the religionization of politics, will require some consciousness-raising. Religionists and secularists alike need to recognize that the mixture of religion and partisan politics both threatens the state of religious tolerance in America and muffles religion's potential to be a prophetic voice.

AUTHOR'S NOTE

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ENDNOTES

- ¹ David Voas and Mark Chaves, "Is the United States a Counterexample to the Secularization Thesis?" *American Journal of Sociology* 121 (5) (2016): 1524.
- ² Robert D. Putnam and David E. Campbell, *American Grace: How Religion Divides and Unites Us* (New York: Simon & Schuster, 2010).
- ³ Specifically, in a 2017 national survey that I conducted with Geoffrey Layman and John Green, 37 percent of Americans said that religious people were "mainly Republicans," compared with 9 percent who said that they are "mainly Democrats." (The remainder chose "an even mix of both.") Fifty-five percent said that evangelical Christians are mainly Republicans, while only 9 percent described them as Democrats. Thirty-seven percent of Americans said that "nonreligious people" are mainly Democrats, while only 7 percent put them in the Republican camp. A slightly higher percentage, 42, linked atheists with the Democratic Party; 10 percent put them with the Republicans. David E. Campbell, Geoffrey C. Layman, and John C. Green, *Secular Surge: A New Fault Line in American Politics* (New York: Cambridge University Press, forthcoming).
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- ⁸ Leada Gore, “Kayla Moore Posts Support from 50 Pastors ; 4 Ask for Their Names to Be Removed,” AL.com, November 13, 2017, https://www.al.com/news/index.ssf/2017/11/53_pastors_sign_letter_of_supp.html.
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- ¹⁰ Franklin Graham, “Clinton’s Sins Aren’t Private,” *The Wall Street Journal*, August 27, 1998, <https://www.wsj.com/articles/SB904162265981632000>.
- ¹¹ Interestingly, recall that roughly 20 percent of white evangelicals did not vote for Trump: about the same number that see a link between private immorality and public ethics.
- ¹² Unfortunately, the other religious traditions are too small to allow for an analysis that combines party and religion in this way, although given these findings, we have every reason to expect comparable results.
- ¹³ Richard J. Jensen, *The Winning of the Midwest: Social and Political Conflict, 1888–1896* (Chicago: University of Chicago Press, 1971); Paul Kleppner, *Continuity and Change in Electoral Politics, 1893–1928* (New York: Greenwood Press, 1987); and Robert P. Swierenga, “Ethno-religious Political Behavior in the Mid-Nineteenth Century: Voting, Values, and Culture,” in *Religion and American Politics: From the Colonial Period to the 1980s*, ed. Mark A. Noll (New York: Oxford University Press, 1990).
- ¹⁴ These figures are from the General Social Survey, but other data sources show precisely the same trend. See NORC at the University of Chicago, *The General Social Survey*, various years.
- ¹⁵ Michael Hout and Claude S. Fischer, “Why More Americans Have No Religious Preference: Politics and Generations,” *American Sociological Review* 67 (2) (2002): 165–190.
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- ¹⁷ Campbell et al., “Putting Politics First.”
- ¹⁸ Chaeyoon Lim, Carol Ann MacGregor, and Robert D. Putnam, “Secular and Liminal: Discovering Heterogeneity among Religious Nones,” *Journal for the Scientific Study of Religion* 49 (4) (2010): 596–618.
- ¹⁹ David E. Campbell and Geoffrey C. Layman, “The Politics of Secularism in the United States,” in *Emerging Trends in the Social and Behavioral Sciences*, ed. Robert Scott and Marlis Buchmann (Hoboken, N.J.: John Wiley & Sons, 2017).
- ²⁰ Specifically, the scale includes three types of items. First is a set of eight secular beliefs, to which respondents indicate whether they agree or disagree. Five of the statements are worded to affirm secular perspectives:

- “Factual evidence from the natural world is the source of true beliefs.”
- “The great works of philosophy and science are the best source of truth, wisdom, and ethics.”
- “To understand the world, we must free our minds from old traditions and beliefs.”
- “When I make important decisions in my life, I rely mostly on reason and evidence.”
- “All of the greatest advances for humanity have come from science and technology.”

The other three statements represent the rejection of secular values:

- “It is hard to live a good life based on reason and facts alone.”
- “What we believe is right and wrong cannot be based only on human knowledge.”
- “The world would be a better place if we relied less on science and technology to solve our problems.”

The second part of the scale consists of a question that asks respondents whether they receive guidance from nonreligious sources, modeled on an oft-used question about religious guidance.

Third, the scale includes a measure of secular identity. Respondents were presented with a list of descriptive terms and asked which (if any) describes them. Those who selected atheist, agnostic, secular, or humanist were coded as having a secular identity.

²¹ Bill Bishop and Robert G. Cushing, *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart*, 1st ed. (Boston: Mariner Books, 2009); Shanto Iyengar and Sean J. Westwood, “Fear and Loathing across Party Lines: New Evidence on Group Polarization,” *American Journal of Political Science* 59 (3) (2015): 690–707; and Lilliana Mason, *Uncivil Agreement: How Politics Became Our Identity* (Chicago: University of Chicago Press, 2018).

²² Specifically, attitudes toward atheists and nonreligious people are measured with a type of survey question known as a feeling thermometer. This is a one-hundred-point scale, in which higher scores indicate that a respondent is more positive toward members of that group. Between 2006 and 2017, Republicans’ attitude toward nonreligious people fell into negative territory (going from an average score of fifty-three to forty-eight), while Democrats became more positive toward the nonreligious (fifty-four to fifty-eight). Consequently, back in 2006, there was a miniscule one-point difference in the scores given to nonreligious people by Republicans and Democrats. By 2017, that gap had grown to ten points. We have a shorter time frame for the assessment of atheists—2011 to 2017—but we observe the same growth in a partisan gap. In 2011, Democrats gave atheists an average score six points higher than Republicans. That gap grew to nineteen points by 2017.

Are Organizations' Religious Exemptions Democratically Defensible?

Stephanie Collins

Theorists of democratic multiculturalism have long defended individuals' religious exemptions from generally applicable laws. Examples include Sikhs being exempt from motorcycle helmet laws, or Jews and Muslims being exempt from humane animal slaughter laws. This essay investigates religious exemptions for organizations. Should organizations ever be granted exemptions from generally applicable laws in democratic societies, where those exemptions are justified by the organization's religion? This essay considers four arguments for such exemptions, which respectively rely on the "transferring up" to organizations of individuals' claims to autonomy or recognition; organizations' own claims to autonomy or recognition; organizations' status in the accountability community; and organizations' procedural constraints. The essay concludes that only the last argument holds up – and then, only with caveats.

Many democratic societies are pluralistic: people from different cultural, ethnic, and religious backgrounds live together, with different plans and values, and they disagree strongly about the permissibility of particular practices. Yet coordination and cooperation require that all citizens are united under one set of laws. Sometimes, this tension between pluralism and unity produces a *religiously grounded exemption*: there is a generally applicable law, but some are granted an exemption from that law because of religious conviction.

Thus, the United Kingdom's Highway Code requires that "On all journeys, the rider and pillion passenger on a motorcycle, scooter or moped **MUST** wear a protective helmet." Yet, "This does not apply to a follower of the Sikh religion while wearing a turban."¹ In other cases, the exemption is granted for religious reasons, but the exempt party is not an adherent of the religion: in the Australian state of Victoria, local councils have successfully applied for exemptions from antidiscrimination legislation so they can run women-only swimming classes targeted at Muslim women.² Here, the exempt parties are the councils, yet the exemption is justified with reference to the religion of individuals (swimming pool users).

In the 1990s, there was heated philosophical debate over such exemptions. Some viewed them as the proper response to individuals' autonomy or need for recognition.³ Others argued that exemptions are unnecessary if we have robust

freedom of association or that the values underlying the general laws are sufficient to reject exemptions (and if the values are not sufficient for this, then the general law should be scrapped altogether, rather than exempting some from it).⁴

All this concerns *individuals'* religious claims. But recently, organizations' religions have loomed large in pluralistic democracies. In 2014, Ashers Bakery in Northern Ireland refused to bake a cake with the slogan "Support Gay Marriage" because the slogan was "inconsistent" with the company's religious beliefs. The customer sued the company for discriminating against his sexual orientation and political beliefs. In October 2018, the Supreme Court ruled in favor of the bakery, stating that service providers may refuse to endorse messages they profoundly disagree with.⁵

A legislative example comes from Australia, where the Sex Discrimination Act allows an "educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed" to "discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy" if that person is a potential staff member, contract worker, or student.⁶ Thus, religious educational institutions may refuse to accept gay or trans people as staff or students, though such refusal would be unlawfully discriminatory if enacted by a non-religious educational institution. Thus, religious educational institutions are exempt from generally applicable antidiscrimination laws.

This essay examines justifications for exemptions that protect the religious convictions of organizations, including schools, hospitals, businesses, charities, churches, and others. My aim is not to justify or reject particular exemptions, such as those described above. My aim is more fundamental. I ask whether organizations' religious convictions can give rise to claims *at all*, even before those claims have been weighed against individuals' competing claims. I argue that exemptions should almost always be judged with reference to the religious convictions of individuals, not organizations. I reach this conclusion by examining four arguments for organizations' religious exemptions, only one of which succeeds, and then only rarely.

To start, what are organizations? They are a type of collective agent. A collective agent is constituted by agents that are united under a group-level, rationally operated, distinct decision-making procedure. In general, a collective agent might be large or small, formal or informal, short-lived or long-lasting, and so on, including families, sports teams, reading groups, and many more. Organizations, though, are specific: they have "(a) criteria to establish their boundaries and to distinguish their members from non-members, (b) principles of sovereignty concerning who is in charge and (c) chains of command delineating responsibilities within the organization."⁷

Collective agents – including organizations – can form irreducibly group-level religious convictions. To see this, consider that a “decision-making procedure” takes in reasons, beliefs, and preferences, and processes them to produce decisions. Organizations’ procedures include voting, committees, meetings, and so on, but their procedures are often informal and tacit, with the organization’s true beliefs and preferences revealed by the on-the-ground behavior of members (when acting within and because of their role), rather than by the “official party line.” Whether formal or informal, an organization’s procedure is “distinct” in that 1) the reasons it takes in tend to differ in kind from the reasons any of its members take in when deciding for themselves (consider: votes, proposals, and so on); and 2) its method for processing those reasons is different from the method of any one member when deciding for herself. For example, an organization might take the meeting contributions of members and process these using conversation-based consensus, thereby using a distinctive set of inputs and procedures to arrive at organizational beliefs. Members are unlikely to use these inputs, processed in this way, when settling the beliefs they hold themselves. If a procedure is “rationally operated,” it is operated with the aim of ensuring that current decisions follow from current beliefs and preferences, and that current beliefs and preferences are consistent with past beliefs, preferences, and decisions, plus any new evidence that has arisen since those were formed.⁸

The rational operation of a distinct procedure can mean a collective’s current beliefs are determined by its past beliefs, rather than by members’ current beliefs. For example, if a school has a long-standing practice of focusing on Christianity when teaching religion, then it might be rational for the school to continue this practice (maintain this preference), even if some, many, most, or even all current teachers and managers would prefer the school teach all religions equally. This possibility of departure is crucial, since – as I will explain – it allows a collective to have a religious conviction that no member has.

With this characterization of organizations in hand, how might we justify their religious exemptions? A first strategy emphasizes that organizations are intimately related to members. That intimacy inheres in at least two strands. First, organizations largely *supervene* on members: many ways of changing organizations require changing the members. For example, one natural way to alter an organization’s convictions is for enough members to alter their inputs in the decision-making procedure. Second, organizations’ actions are largely *constituted* by members’ actions: an organization usually cannot implement a policy, sign a contract, and so on, without members’ actions.

Given this intimate connection, perhaps organizations’ religious exemptions are justified via the religious convictions of members. That would be convenient, since we have well-established theories justifying religious exemptions for indi-

viduals. Perhaps the religious convictions of bakery owners generate a claim of the bakery itself. Perhaps the religious convictions of schools' managers justify a claim of the school itself.

To assess this, we must justify individuals' religious exemptions, returning to the 1990s debate. Philosopher Will Kymlicka has focused on "societal cultures" rather than religions, but his points can be extended to religions. For Kymlicka, a societal culture is "a culture which provides its members with meaningful ways of life across the full range of human activities including social, educational, religious, recreational, and economic life, encompassing both public and private spheres."⁹ Kymlicka's crucial premise is that "freedom involves making choices among various options, and our societal culture not only provides these options, but also makes them meaningful to us."¹⁰ Kymlicka insists people do not need "freedom to go beyond one's language and identity, but rather the freedom to move around within one's societal culture."¹¹ Plausibly, this role – of providing options, making options meaningful, and allowing us to choose among them – extends to religious tenets, practices, and communities, rather than being restricted to societal cultures.

Kymlicka argues that we need exemptions in order to preserve societal cultures, which in turn are needed because of their value for individual autonomy, understood as the capacity to make choices from among meaningful options. By "meaningful" options, I take Kymlicka to mean options for which there are self-identity connotations to choosing one way or another; an option is meaningful if it reflects some core feature of a person's identity. Kymlicka's argument resonates with philosopher Joseph Raz's autonomy-based conception of well-being, according to which "a person's well-being depends to a large extent on success in socially defined and determined pursuits and activities. . . . [People's] comprehensive goals are inevitably based on socially existing forms."¹² That is, our well-being depends upon our ability to select from among options that are already well-established within our society or, more important for present purposes, our religion.

A different argument for individuals' exemptions draws on philosopher Michael Sandel's idea that humans' constitutive ends define our personal identity, such that we are "thick with particular traits."¹³ These ends and traits are not chosen, as the autonomy argument asserts. Rather, one's religion (and culture more broadly) is "an attachment they discover, not merely an attribute but a constituent of their identity."¹⁴ Similarly, philosopher Robert Audi endorses "a *protection of identity principle*: The deeper a set of commitments is in a person, and the closer it comes to determining that person's sense of identity, the stronger the case for protecting the expression of those commitments."¹⁵ Audi points out that "as a matter of historical fact and perhaps of human psychology as well, religious commitments tend to be important for people in both ways: in depth and in determining their sense of identity."¹⁶ Thus we have the identity-based argument for

claims to religious exemptions: our religion is constitutive and/or determining of our (sense of) identity; our (sense of) identity should be respected and protected; therefore, our religion should be respected and protected, which will sometimes require that we are exempt from generally applicable laws.

How might humans' autonomy-based or identity-based claims transfer to organizations? The idea is this: When Ashers Bakery endorses a message, this implies that (some of) its members endorse that message. But the option *not* to endorse that message is crucial for members' autonomy or identity. So, for members' autonomy or identity to be respected, the bakery must be granted a claim to resist endorsing the message. The action transfers down (from organization to member); so the claim not to perform that action transfers up (from member to organization).

The problem is that the action does not transfer down. So there is no reason for the claim to transfer up. Ashers Bakery endorsing a message does not imply that any individual member endorses the message. Even if it is true that – to respect and protect individuals' autonomy or identity – individuals should be free not to endorse messages they disagree with, this individual freedom is not infringed upon when an organization of which they are a member endorses a message. The transferring-up strategy commits the fallacy of assuming that when a whole has some property, some constituent part of the whole also has that property. If a wall is eight feet tall, that does not imply that any brick constituting the wall is eight feet tall. Likewise, when a bakery endorses a message, this does not imply that any member endorses the message.

Nonetheless, sometimes some, most, or even all organization members will feel (or be interpreted as) tainted by the behaviors of their organization. A school's hiring a gay teacher does not imply that any member hires the gay teacher. But the school's hiring might cause individuals on the hiring committee to do things inconsistent with their autonomy or identity. If so, do members' claims transfer up to the organization, despite the action not transferring down?

No. Members claims might be real, in such cases. But members' claims do not generate a claim of the organization itself. To be clear: members' claims need to be balanced against the claim of the potential new hire, before an all-things-considered judgment is made. If the former claims outweigh the latter, then members are permitted not to be involved in the organization's action. If there is no other way for the organization to perform the action, then the organization is permitted not to perform the action. But this does not mean that the organization has a claim. Instead, it is akin to the Australian city councils being granted exemptions to run women-only swimming classes. There, it was not that Muslim women's rights were transferred up to the city council, such that we were respecting the council's claim and right to have its religious convictions respected. Instead, granting the council an exemption was a means of respecting the women's rights.

Similarly, sometimes an organization's action would have detrimental effects on members' autonomy or identity. The members may have a claim not to be involved in that action. But these are *members'* claims, not *the organization's* claims. This is important for two reasons: 1) such member claims will likely change as the composition of the organization changes – present members' autonomy and identity do not say anything about future members' autonomy and identity, so the organization's exemption should not be projected into the future; and 2) if we view the organization's exemption as grounded in a claim *of the organization* rather than *of the member(s)*, then we may be misled into thinking the claim is unduly weighty (because organizations are large, powerful, and subsume many members). When we view the claim as held by the relevant member(s), it will be easier to give it proper weight balanced against the competing claims of other individuals (such as potential new staff of the school).

Additionally, there are practical upshots to viewing the claim as held by members rather than by the organization. If members make a claim based on being tainted by the organization's action, then the first response should be to find other members who do not mind such "taint." The first response should not be to grant the organization (as a whole) the permission not to perform the action. Furthermore, members' claims must be treated on a case-by-case basis: in an instance in which *all* members refuse to be involved in the organization's action, this might (pending consideration of competing claims) justify allowing the organization not to perform that action *in that instance*. But it would not justify a general and ongoing exemption from the organization performing actions of that type.

In sum, we must not confuse an organization's claims with its members' claims. The latter do not give rise to the former, even if the latter can justify organizational noncompliance with laws in some instances. To believe otherwise is to neglect the ontological distinctness of the organization and its members.

A second argument suggests organizations have their own claims to autonomy and/or identity-protection. Take a university with a religious character. The interests of the university are not merely a product of the interests of its members; its interests may run counter to their interests. So perhaps it has its own right to autonomy or identity-protection.

Take autonomy first. The idea is that one's religion provides one with options, and choosing from among those options is highly valuable: "the sort of freedom ... they [that is, people] most value, and can make most use of, is freedom ... within their own societal culture."¹⁷ This argument is grounded in the liberal conception of the self: the self is a fundamentally free being. In philosopher John Rawls's words, "the self is prior to the ends which are affirmed by it," such that individuals "do not think of themselves as inevitably bound to, or as identical with, the pursuit of any particular complex of fundamental interests that they may have at any

given time.”¹⁸ Instead, they *choose* from among the options their societal culture gives them.

This conception of the self is not applicable to organizations. Organizations cannot “step back” from their goals like individuals can. To see this, imagine what it would take for a university to reflect upon whether to pursue the goals of teaching and research. Its decision-making procedure is set up such that these goals are built in. The university qua university cannot consider neglecting these goals. A university can decide among some options: it might decide to invest in humanities rather than sciences, for example. But it does so against the background of fundamental preexisting commitments, not from the position of being “prior to” the ends it affirms. The autonomy-based argument is inapplicable.

The identity-based argument was grounded in the proposition that our sense of self and our life’s meaning would be lost if we could not act in ways that express the central aspects of that identity. However, organizations do not have a sense of self or life’s meaning, as individuals do. Such senses require phenomenal consciousness: a subjective experience, an inner world, a creature with the sense. Organizations lack phenomenal consciousness.¹⁹ So it is false that the organization’s sense of self and its life’s meaning would be lost, were it not permitted certain practices. I have argued that organizations have beliefs, including beliefs that are so unshakeable they amount to convictions. But a sense of self or sense of meaning is a qualitatively different thing from beliefs, however unshakeable.

In this way, organizations do not fit within either the autonomy-based or identity-based defenses of religious exemptions. Organizations are mainly constituted by persons, but they must not be equated with persons. Not all agents are persons.

A third argument observes that we engage with organizations through what philosopher Daniel Dennett has called “the intentional stance”: we take a stance toward organizations that imputes to them beliefs, preferences, intentions, and actions.²⁰ One of the main reasons we do this is that organizations “perform in a certain way”: specifically, they give explanations of their actions.²¹ Political theorists Christian List and Philip Pettit wrote: “Let the agent be a Martian, or a robot, or a chimp that has been trained or engineered to a higher level of performance. If it proves capable of engaging us on the basis of commonly recognized obligations . . . we have every reason to incorporate it in the community of persons.”²² Organizations can offer accounts of their actions, in which those accounts acknowledge their obligations to others. They are therefore part of our accountability-community.

Philosopher Leonie Smith has used this reasoning to argue for organizations’ rights.²³ Crucially, Smith’s argument does not rely on substantive normative commitments. In pluralistic democracies, citizens disagree about such commitments. Thus, a justification of organizations’ rights that relied on such commitments

would enjoy scant support in pluralistic democracies. Instead, Smith has argued for granting organizations only those rights that are reasonable preconditions for them to offer accounts of their actions. If some rights are reasonable preconditions for such account-giving, and if we have good reasons to bolster organizations' account-giving abilities, then we have good reasons to grant organizations some rights.

Indeed, we do have good reason to bolster organizations' account-giving abilities: such abilities allow us to demand explanations of their failures, to blame them when they do wrong, and to bestow obligations on them. These are valuable social-political practices. The question becomes: which rights must organizations enjoy if they are to perform in this way? Smith suggests that they need "the right to free speech, to free association, and to be able to enter into legal contracts, among others."²⁴ Yet she suggests that, for example, "the right to a family private life" might not be necessary for organizations, even if this is needed "in order to be human."²⁵ And closer to our purposes, she asserts that a profit-driven organization "may not have a right to religious belief as it does not need this to perform . . . in the particular social sphere within which it is capable of participating, and in which it is structured to participate."²⁶

Smith is tentative in her endorsement of some rights and her rejection of others. To build more certainty, we should consider what it takes to give an account of one's actions. In a pluralistic democratic society, I suggest, an organization's public explanations of its actions should refer only to public reasons, where a public reason is, roughly, a reason that all sensible and informed citizens recognize as a reason.²⁷ For example, if an organization refuses to do business with a gay person "because our holy book says homosexuality is wrong," then it has given a non-public reason for its action. By contrast, if it refuses to do business with someone "because that person broke a contract with us in the past," then this reason is public: it is a reason all sensible and informed people would take to be a reason.

Of course, the line between a public and a nonpublic reason is vague and contestable. But reasons that refer to substantive religious doctrines are clearly non-public. If an organization owes society-at-large an account of its actions, then it is not helpful if the organization appeals to a religious doctrine that other members of the society do not endorse. Such an explanation is not intelligible to all reasonable and informed members of society, so it is not the kind of explanation that we should use organizations' rights to facilitate. Religiously grounded exemptions to generally applicable laws protect actions that are, in this way, not publicly justifiable. By contrast, generally applicable laws are publicly justifiable. So claims to such exemptions from generally applicable laws cannot be justified with reference to organizations' need to perform as accountable members of the moral community: such exemptions do not bolster their ability to give *public* justifications of their actions.

There is a fourth and final strategy. It starts from the fact that organizations are set up for a particular purpose, to be pursued in a particular way. We saw this when discussing the second strategy. There, I noted that the autonomy-based defense of religious exemptions is inapplicable to organizations, because organizations lack the relevant autonomy. A university, for example, cannot consider giving up the goals of teaching and research. Those goals are fundamental to its decision-making. More generally, an organization cannot decide to perform an action if its decision-making procedures, and fundamental goals, render it unable to decide to perform that action.

Building on this, I suggest we conceive of religiously grounded exemptions as liberty-rights, rather than claim-rights: religiously grounded exemptions amount to the *lifting of a legal duty* to perform some action (the action of abiding by the generally applicable law), rather than amounting to the *presence of a legal duty* (held by an entity other than the right-bearer) to respect the content of the right.²⁸ Most members of society have a duty to abide by the generally applicable law. Any entity that has an exemption lacks that duty. When exemptions are thus framed as absences of duties, it is easy to see how they might be justified. Simply, a duty to perform an action implies that the duty-bearing entity has the ability to perform that action: “ought” implies “can.” By contraposition, if an entity lacks the ability, then it lacks the duty. Thus, if an organization’s fundamental goals or decision-making procedures render it *unable* to abide by a generally applicable law, then it cannot have a duty to abide by that law. Thus, it must be granted a liberty-right (an absence of a duty) regarding that law: an exemption from the duty to abide by it.

The question is under what conditions an organization’s procedures and goals render it constitutionally unable to abide by a law. When assessing this, we should not simply take organizations at their word. After all, a school with a religious character might suddenly find itself able to abide by antidiscrimination laws if its funding becomes conditional on its doing so.²⁹ In this way, organizations might misunderstand their own constitutional inabilities.

This suggests a test for organizational abilities: would the organization abide by the general law if it were given an incentive for doing so? If yes, then we should reject any assertion that it is constitutionally incapable of abiding. This follows political theorist Zofia Stemplowska’s account of feasibility, according to which “motivational failure is an instance of mere unwillingness when there exists a conceivable incentive that would bring the agent’s motivational state in line with what is needed to perform the action in question.”³⁰ By contrast, if there is no incentive that could induce an organization to abide by the generally applicable law, then we should take seriously its claim to be unable to abide.

Morally speaking, it is important that the incentives are not threats.³¹ To ensure this, the offered incentive must not infringe upon the organization’s rights

(here referring to rights other than the right to religious exemptions). I assume these other rights are antecedently given, for example, via Smith's strategy discussed earlier. Thus, I assume organizations do have some rights, including claim-rights and liberty-rights. My argument takes no stand on how these nonreligious rights are justified or what their content is. The argument so far has concerned rights to religious exemptions only. When deciding whether an organization has the specific liberty-right to a religious exemption, we should offer the organization an incentive that does not infringe its rights that are not religious exemptions.

This introduces a temporal dimension to organizations' religious exemptions. After all, an organization may be unable *now* to abide by some law, while being able now to take steps to make itself able at a later time. That is, it might have the "diachronic ability" to abide by the law, while lacking the "synchronic ability."³² Regarding antidiscrimination laws, for example, one might think of Christian churches' shifting perceptions of women and LGBT+ people: while it might be plausible now for an educational institution with a religious character to claim that it is constitutionally incapable of making the decision to employ a trans person, any such claim will become less plausible as more churches slowly liberalize their attitudes toward homosexuality. What's more, such changes often happen in an unofficial way: not through decrees of leaders, but through changing practices and norms among the foot soldiers of the organization, as I mentioned when characterizing organizations' agency. If an organization can render itself able to abide by some law, then its exemption might legitimately be temporally constrained. Such organizations might be required to review their approach to the generally applicable law, with the exemption in turn being reviewed every five or ten years. This prevents "perverse incentives" whereby organizations are given license to avoid the law by constituting themselves unable to abide by the law.

Another constraint on this strategy derives from individuals' moral duties. As emphasized above, an organization's procedures and fundamental goals are conceptually – and often substantively – different from members' procedures and goals. If a collective's duty is ruled out due to its constitutional constraints, then members may have moral obligations to act upon the collective from the outside with the aim of revising the constitution. By *from the outside* I mean acting beyond what is mandated by their role within the organization. Of course, members might also have moral obligations to act *within* their role to change the constitution. But such internal actions are best construed as constituting actions of the organization itself, and therefore conceived of as the exercise of the organization's diachronic ability to abide by the law. By contrast, actions from the outside may become morally necessary when the organization is both synchronically and diachronically unable to abide by the law. Neither the internal nor the external actions of members are likely to be strictly enforceable by law, due to their demand-iness and potential infringement of individuals' basic liberties. But, notably,

the nonenforceability of such obligations does not derive from *the organization's* claim to have its religious convictions respected. And if members face moral-political pressure to fulfill such obligations, then the organization may well find itself able to abide by the law after all, thus dissolving its liberty-right not to abide.

This fourth strategy might appear overly permissive, insofar as its rationale extends beyond religious organizations. For example, can a white supremacist organization assert its inability to abide by antiracism laws because its constitution is racist? I make two points in response. First, I have sought to find a plausible justification for existing laws that provide religiously grounded exemptions to organizations. If that justification extends beyond religious organizations to other (more sinister) organizations, this does not show that the law should be changed to allow exemptions to the latter organizations. Second and more important, even if the fourth strategy does apply beyond religious organizations, some procedures and fundamental goals are beyond the democratic pale. Plausibly, religiously grounded exemptions apply only to those that are within the pale. The pale might be set in various ways, such as with reference to a harm principle or to basic liberal rights. But it will rule out certain organizations as impermissible, even before those organizations' exemptions can arise as a political question.

Where does this leave us? Consider again the Australian law: religious educational institutions may discriminate against potential staff members, contract workers, or students on the basis of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy. This is not justified by an organization having a claim of its own that is transferred up from the claims of members (the first strategy). Nor should we view the exemption as protecting the autonomy or identity of the organization itself (the second strategy). Neither is the exemption necessary for the accountability of the organization (the third strategy). Perhaps members have claims not to be involved in the hiring or teaching of people, because of those people's sex, sexual orientation, gender identity, marital or relationship status, or pregnancy. This essay has not sought to assess that idea. By looking directly to that possibility, we avoid giving members' claims more weight than they deserve, by imbuing them with the size, power, and longevity of the organizational entity. When members' claims are balanced against those of potential staff members, contract workers, or students, the latter may well win. But this is a matter of balancing *individuals'* claims: it is not a matter of a claim held by the organization itself.

That said, there may be some cases in which religiously grounded exemptions are justified with reference to the organization itself. These cases fall under the fourth strategy, in which an organization's procedures or foundational goals prevent it from being able to abide by the generally applicable law, thus preventing it from having a duty to so abide. To test whether this strategy can legitimately

be taken by Australia's religious educational institutions, I proposed an incentive test: would sticks and/or carrots suffice to induce compliance with nondiscrimination laws? Even when the answer is no, such that the fourth strategy can be taken, that strategy is unlikely to last: organizations will often have the long-term (if not short-term) ability to abide by the general law, and members will often have a moral duty to bring such an ability into existence if it does not yet exist. The result is that religious exemptions for organizations should be few and far between.

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ENDNOTES

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- ²⁴ *Ibid.*, 17.
- ²⁵ *Ibid.*, 24.
- ²⁶ *Ibid.*, 26.
- ²⁷ This term was made most famous by Rawls, though he claims the duty to give justifications in terms of public reasons applies only in the public political forum of courts and

legislatures, not in the “background culture” of a society. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), esp. 220.

²⁸ That distinction was conceptualized in Wesley Hohfeld, *Fundamental Legal Conceptions* (New Haven, Conn.: Yale University Press, 1919).

²⁹ I thank Jeanette Kennett for this point.

³⁰ Zofia Stemplowska, “Feasibility: Individual and Collective,” *Social Philosophy and Policy* 33 (1–2) (2016): 273–291, 280.

³¹ I thank Robert Audi, Colleen Murphy, and Paul Weithman for pressing this.

³² This terminology comes from Mark Jensen, “The Limits of Practical Possibility,” *Journal of Political Philosophy* 17 (2) (2009): 168–184.

Secular Reasons for Confessional Religious Education in Public Schools

Winfried Löffler

The cultural importance of religion and its ambiguous potential effects on the stability of liberal democracy and the rule of law recommend including information about religions in public school curricula. In certain contexts, there are even good secular reasons to have this done by teachers approved by the religious communities for their respective groups of pupils, as is being practiced in various European states (with a possibility of opting out, with ethics as a substitute subject in some schools). Is this practice compatible with the religious neutrality of states? An illustrative analysis shows how suitable criteria for the admission of religious groups to offering religious education can block the objection of undue preference. Like any solution in this field, it is not immune to theoretical and practical problems.

Democracies should not risk the dangers of religious illiteracy, given the ongoing cultural importance of religion and its ambiguous potential effects on the stability of liberal democracy and the rule of law. This essay analyzes a widespread European practice of securing basic religious competence: religious education in public schools taught by teachers approved by the respective confessional groups. In the light of the First and Fourteenth Amendments to the U.S. Constitution and the decisions of the U.S. Supreme Court,¹ it might seem exotic and a clear case of an inappropriate preference of one or a few lifestyles or social groups over others. However, this model (although it is not transferable into every cultural context) has a lot to recommend it, even within the normative framework of a religion-neutral constitution and the priority of the secular rationale for political arrangements.

There is widespread consensus that secularization theses, a former intellectual commonplace, have lost a lot of their plausibility in both of their two usual readings. According to the first reading, religions would lose their importance, shrink, or even die out in the course of modernization. The second reading postulated that the plausible and worthy components of the traditional religious ethos would live on in secular transformations, such as in the shape of the human rights ethos or various cultures of sensitivity (the environmental, emancipation, and gender equality movements or the general social trend to nonvio-

lent education styles might provide examples). Both processes were taken to be irreversible.

Today, however, both readings of the secularization theses seem doubtful, if not wrong.² Religion appears surprisingly resistant, at least as an ongoing topic of political discussion, if not a living, organized, and widespread practice. There is hardly any major crisis without religious aspects or, at least, to which such aspects would not be attributed. Moreover, sociologists of religion point to differentiated results that suggest that “individualization” and “pluralization” of religion are better diagnoses than “secularization”: organized, institutional religiosity might indeed be shrinking (at least in the West; for Eastern Europe, South America, or Southeast Asia, this is less clear). But individual patchwork religiosities prevail and “religion” in a looser sense of the word keeps its importance. The second reading – claiming a transformation from religious to secular ethos – is challenged by counterexamples, which are doubly puzzling: in various European countries and in Russia, but also in the United States and recently Brazil, irritating styles of policy find their support among those who explicitly plead for a revision or discarding of human rights, gender equality, the general culture of nonviolence, solidarity, and respect for the less privileged, and that display a general contempt of democratic processes and their players. Even more, these policies often sail under a “Christian” flag, although they are in precise opposition to the vast majority of theologians and religious ethicists, and conflicts between governments and church leaders and Christian charity organizations increase. The purported transformation from a religious to a secular ethos seems to be neither content-preserving nor irreversible.

Hence, a certain amount of religious competence and literacy among citizens is a desideratum in democracies: not only to better understand religious backgrounds of political behavior and to detect inappropriate utilizations, misgivings, and misunderstandings of religion, but also to cultivate an awareness of the positive contributions that many religious traditions can offer for democratic processes. Democracy and the rule of law stand under what has been labeled the Böckenförde paradox, after a famous dictum by the former German constitutional judge Ernst-Wolfgang Böckenförde:

The liberal, secularized state lives by prerequisites which it cannot guarantee itself. This is the great adventure it has undertaken for freedom’s sake. As a liberal state it can only endure if the freedom it bestows on its citizens takes some regulation from the interior, both from a moral substance of the individuals and a certain homogeneity of society at large. On the other hand, it cannot by itself procure these interior forces of regulation, that is, not with its own means such as legal compulsion and authoritative decree. Doing so, it would surrender its liberal character and fall back, in a secular manner, into the claim of totality it once led the way out of, back then in the confessional civil wars.³

Philosopher Jürgen Habermas (being a declared irreligious – “religiously unmusical” – thinker and as such an unsuspecting witness) has repeatedly pointed out over the last decades that religions might positively contribute to secure these prerequisites, including the willingness to obey rules, to respect democratic decisions and the legitimacy of deviant standpoints of others, and generally to prefer nonviolent solutions to conflicts.⁴ In some of their more problematic, deteriorated forms, however, religious mindsets can be destructive, antagonistic powers running afoul of the values standing behind democracy and the civic virtues characterizing the democratic citizen. Uninformed religiosity, or the combination of devoted religiosity and illiteracy, appears especially susceptible to such tendencies.

Therefore, even from a secular standpoint, much underpins the need of serious and authentic information about religions for broader segments of the population of democratic states: on the one hand, avoiding misunderstandings and disinformation about the religions (in their ambiguity, comprising beneficial as well as dangerous aspects); on the other hand, remaining aware of, defending, and perhaps regaining certain value positions that have some of their strongest defenders among religious groups. Hence, a certain level of religious literacy and competence seems not only politically useful, but also necessary for our self-understanding. The probably most effective and most viable way for democratic states to provide such literacy is integrating religion (somehow) into school curricula, including public schools.

In many European states, religious education is either a mandatory, chosen, or optional subject at public schools. In Austria (the case that will be examined for the following considerations), for example, it is a regular, obligatory subject in the curricula of most public schools serving students aged six to nineteen years (however, with the possibility of opting out or, where available, switching to ethics).⁵ The classes in religious education are publicly financed, but the shaping of their curricula is more or less autonomously left to those religious groups that are officially recognized by the state (there are currently sixteen) and that want to offer such religious education;⁶ teachers must be approved by the religious groups and obey the state’s various regulations about school teaching. Where corresponding academic theological education is available (such as at some German and Austrian state universities that currently offer academic programs in Islamic theology, in addition to the various Christian theologies), most religious groups require a degree at the master’s level or other suitable certificates for their teachers. Religious education is usually not given or perceived as indoctrination; the curricula comprise a lot of de facto secular ethics, religious studies, personality formation, social sensitivity training, discussions of ethically relevant actualities, and so on; and the possibility of opting out is taken less than one might expect: participation in religious education is markedly higher than the percentage

of churchgoers. Many pupils perceive the religion classes as forums in which not only their cognitive abilities but also their whole personalities are being taken seriously. Conversely, more-conservative believers sometimes lament the (in their eyes) lukewarm, unsubstantial content of the religion classes with overly ecumenical tendencies.

The dangers of ideological indoctrination – which many opponents see behind religious school education – are modest: with the possible exception of (rare) extremely charismatic figures, one or two weekly hours of religion class would hardly provide a basis for ideological brainwashing activities in a rather secular society. Moreover, religion teachers as persons and religious instruction as a subject are embedded in the whole social fabric of a modern school: the staff of teachers, parent-teacher conferences, parents' councils, and the like can be seen as public spaces of giving and taking reasons, and disturbing cases of indoctrination would soon face opposition from other teachers, parents, and pupils.

Historically, the present Austrian situation of religious education in public schools, combined with a “religion-friendly neutralism of the state,” can be understood as the result of an upgrade of other religions into the favorable position that Catholicism as the dominating religion enjoyed for centuries. The Austrian Constitution of 1920 is neutral in respect to religions and other worldviews, but it does not endorse secularism, which would itself constitute a sort of worldview. The practice of a noncompulsory religious education at schools is hence compatible with the Austrian Constitution (and all other relevant legal documents about human rights based in domestic and international law).

The question of the most suitable way of spreading religious literacy in a democratic state has probably no context-free or *more geometrico*–style answers. Any proposal will gain its plausibility from a certain context: that is, certain philosophical, legal, pedagogical, sociological, and historical premises, some of which are more descriptive, others more normative in nature. Hence, the European practice of religious education in public schools may have a lot to recommend it, but it is not easily transferable to different frameworks.

One such contextual condition is the fact that Europe – unlike, say, the United States – was historically dominated by only a few big religious groups (coarsely sketched: Catholicism in the South and Center, mainstream Protestantism in the North; and Orthodox national churches in the East). This deserves mentioning since all three groups have a long-going, basically positive approach to modern sciences and humanities (the Vatican has run an astronomical observatory since 1578, for example, but the intellectual and institutional affinities between theology and sciences go back at least to medieval scholastics; exceptions like the Galileo case are, seen on the whole and over centuries, marginal), and they have developed a robust positive relation to democracy.⁷ The European practice would thus

not be viable in states with a strong religious fragmentation: organizing religious education in public schools for too many different groups might simply find its practical, logistical limits. And where religious groups have a conflictive relation to democracy, the sciences, and the humanities, their involvement in the school system might not be desirable for either part. On this latter point, there is a significant difference between the United States and Europe: the notoriously controversial issue of handling spillover effects from other subjects like biology or physics to the religious beliefs of the pupils is almost unknown in most European states.⁸

Second, state-run schools dominate the education landscape in many European countries. Private schools are rather an exception, and there are various mixed private-public forms of organization and financing. This situation is on the whole favorable for large-scale religious education to work, since schools are governed by a more or less uniform legal regime.⁹

Third, there is a tradition of friendly cooperation between state and religious groups in many European countries, interestingly under very different general legal frameworks and before very different backgrounds in the sociology of religion.¹⁰ Furthermore, legal frameworks and sociological situations show no clear correspondences: there are (or were until recently) state churches in highly secularized societies (as in Britain or Scandinavia) as well as theoretically radical church-state separation systems combined with high political influence of the churches (as in Italy; religion is a subject of choice at schools there). Forms of friendly cooperation, such as in hospital or military chaplaincy or school matters, can hence function before various legal and social backgrounds. Some sort of global friendly cooperation relation, however, seems a prerequisite for religious education at public schools.

The issue of religious education and its possible relevance for democracy raises two conceptual questions. First, and in contrast to “thin” conceptions of democracy as a mere technical, value-neutral voting device to settle collective decision problems, I will here presuppose a more demanding, “thicker” conception of democracy that includes certain civic virtues or democratic habits and sees the democratic process in a bigger scale.¹¹ A democratic process finds its ends only in some suitable technical balloting procedure, but it should be embedded in an ongoing culture of giving and taking reasons in a public space, trying to understand the backgrounds of deviant standpoints, looking for possible common grounds for action, granting minimal respect to political opponents, and so on. Such a conception reflects an egalitarian account of the human being, sees a certain minimal legal position of the individual as irrevocable (even by balloting majorities), and trusts in the benefits of reason and public discussion. Obviously, modern democratic constitutions have some built-in devices that reflect such normative presuppositions: such as attempts to an intuitively plausible

proportional representation of the whole votership,¹² certain transparency guarantees and rights of the parliamentary minority, requests for qualified majorities in certain important decision matters, and fundamental rights that cannot be restricted even by high majorities.

Recent attempts to attack or shrink democracy in this thicker sense, even in states of the Western world (by modifying electoral laws in all-too-striking favor of the governing majority, threatening journalists, creating obstacles for free universities, watering down the independence of judges and the competences of supreme courts, global discrediting of entire segments of the population, and so on), remind us that thick forms of democracy do not come as a sort of natural gift of history, but need cultivation and protection. And religions, from their best to their deteriorated forms, bear a high and ambiguous potential for the protection as well as the destruction of democracy, in both its thin and thick understandings.

A second question concerns the conception of “education” that is presupposed and that a school system is – openly or tacitly – expected to foster. Interestingly, the legal cultures differ markedly in this respect: in some states, this question gets a distinctive answer in the constitution or in high-rank laws, whereas other legal orders are silent on it and/or leave it to the actual practice. Section 2 (1) of the Austrian Federal Law of School Organization (*Schulorganisationsgesetz*, SchOG) of 1962 exemplifies an elaborate account of the tasks of education with analogs in various other European school laws.¹³ Its somewhat solemn tone bestows on the text the character of a preamble, which has not been significantly changed since 1962:¹⁴

§ 2. *The Aim of the Austrian School* (1) The Austrian school aims to contribute – through instruction according to each stage of development and educational career – to advanced competence in young people according to cultural, religious, and social values and to the values of the true, the good and the beautiful. It shall equip young people with both the necessary knowledge and capability for life and future career paths and train them towards independent acquisition of education.

Young people shall be taught to become members of society and citizens of the democratic and federal Republic of Austria who are healthy and health-aware, able to work, dutiful and responsible. They shall be guided to independent judgment, social competence, and a sporty-active lifestyle, open to the political and world-view thought of others, able to participate in the economic and cultural life of Austria, Europe, and the world at large, and to cooperate in the common goals of humankind in love of freedom and the pursuit of peace.

The text obviously involves some strong normative, extrareligious valuations: Education is being conceived as more than merely getting equipped with necessary knowledge and useful individual competences for employability and professional careers. Beyond competences of cultural orientation and the ability to

understand diverse styles of thinking, there is a strong emphasis on community-related values and democratic virtues.¹⁵

The possible rationale for religious education from this text is not its remarkably Platonic reference to the “values of the true, the good and the beautiful” and not only its reference to “cultural, religious and social values”: religious values could also be fostered by other means than religion classes. Rather, the whole catalog of tasks and values mentioned here has affinities to the values and tasks fostered by many religions, at least in their “best forms of appearance.” On the other hand, religion is notoriously ambiguous in this respect: certain forms of religion (often seen as “deteriorated forms” or misgivings) endanger these values and tasks, as countless examples of intolerance, suppression of deviant standpoints, fanaticism, and religiously motivated violence show. Sociologists of religion like Olivier Roy have argued that religious extremism is empirically associated with ignorance of religion.¹⁶ For example, Islamic terrorists in France are not likely to have received a religious education from their family. Rather, they reinvent religion for themselves, based on a patchwork of contents from dubious inauthentic sources and detached from community practices. By contrast, people with an authentic religious education tend to be moderate.

Given this ambiguity, it may well make sense to include religious education toward the “best forms” of religion, carried out by competent teachers with some controllable quality standard, in the curricula, if “education” is understood similarly to section 2 (1) of SchOG.

So far, it has been adumbrated under which conditions religious education at public schools in democratic states might make sense. Religions – in their best forms – can be seen as powerful supporters of democracy and the “democratically virtuous citizen,” by fostering attitudes like mutual respect, understanding and differentiating standpoints, cultural openness, civilized and non-violent solution of conflicts, and solidarity, among other values.

But should religious education be done by *confessional* teachers approved by religious groups? Many have argued that neutral information – by a sort of religious studies education or a general ethics education (including basic information about the religions), for example – might do a better job; in some states, this is current practice. However, at least four in-principle arguments seem to favor the confessional solution as opposed to neutral information about religions.

First, twentieth-century philosophy of religion, such as of the Wittgensteinian tradition, has pointed out the limits of understanding and authentically presenting religions (and other worldviews or beliefs systems) from a merely external, noncommitted standpoint. Hence it is doubtful whether such an instruction would deliver the desired beneficial effects of religious instruction for the value stance of the pupils. Mere external information on religions that are not real-

ly a “live option” for the pupils would be rather theoretical (of course, hopefully, with some benefit of better understanding people with different religious backgrounds) and in danger of focusing on the doctrines and the rituals of various religions. Authentic introduction to religions, however, must illustrate “what it is like to be an X-ist,” and this task is hard to accomplish from an external standpoint.

Similar authenticity desiderata seem obvious in other respects: for music, physical education, or civics teachers, it appears natural to request the quality of a practicing musician or athlete or a righteous citizen with a positive attitude toward music, or sports, or democracy and the legal state, simply because a credible, authentic presentation of the subjects in question that accomplishes the intended pedagogical effects seems to require it. There is no reason why religious instruction should be treated otherwise in that regard. One might object that a good music teacher must only have a competence and passion for music in general, but not necessarily a preference for Brahms over Beethoven, or a good physical education teacher need not also be a soccer or tennis enthusiast, but these analogies are flawed. Just as there is no way of being a good, authentic music or physical education teacher without practicing or positively affirming *some* concrete forms of sports or music, there is no way of authentically teaching religion without having *some* concrete stance in the field of religion: be it membership to a certain confession, a marked sympathy for some of them, or perhaps also a marked rejection of religion in general. The clearest and most authentic models for the meaning and the role of religion in a human life are provided by teachers who unambiguously represent some concrete religion. This, of course, does not prevent making comparisons to other religions at appropriate points, and doing so is common in many of the religion classes of the kind in question. It is even widely seen as a competence requirement that one not teach one’s religion in isolation, neither from other religions nor from science or culture.

Second, worldview backgrounds of teachers cannot be fully concealed or neutralized anyway. Even purported “neutral” presentations of religious worldviews may involve biases of the teachers (perhaps of a more subtle kind). Even in the absence of obvious biases (like declared sympathies or oppositions to certain religions), neutral presentations may transport evaluative comments (such as “they are all equally irrational worlds of ideas” or “some style of religious thought can be found in everybody’s mindset”). Presenting religion (like democracy, human rights, and other topics) is among those matters where a complete bracketing or concealing of one’s own standpoint is difficult.¹⁷ Since the position of a neutral teacher of religion is freely chosen, the complete absence of any personal stance on the matter is hard to imagine. Conversely, undue worldview biases of teachers committed to certain religious groups can more easily be spotted and explained.

Third, for democratic citizens, serious information about one’s own religious background tradition is probably more important than knowing the characteristics and differences of other religions, simply because the former is more relevant for

personal and political behavior. But for a considerable number of pupils, some sort of confessional religious instruction is being done anyway: somewhere, by somebody, and under some circumstances, for better or worse. In the optimal case, it is perhaps taught by parents committed to the values connected with the democratic legal state and the values of a humanistically minded religiosity, or by a well-educated and pedagogically gifted appointed imam, rabbi, or parish catechist; in the worst case, perhaps by pseudoscientific creationist preachers or by the booklets, CDs, or websites of freelancing, self-appointed radical preachers of dubious provenance. Religious instruction in public schools done by approved, well-educated teachers can help to counterbalance and minimize the influence of such indoctrination.

Fourth, confessional religious instruction in public schools is not an intellectual one-way street. It has repercussion effects on the religious groups that could be welcomed by both the state and the religious groups themselves. The involvement of religious groups and institutions in the state's legal and school systems creates and requires a certain publicity and transparency, it brings the challenges of professionalization in the role of a teacher working on equal terms with colleagues from other disciplines and under a certain quality control (such as in the approval of curricula and textbooks), it requires and fosters a certain theological level on the side of the teachers, and it bears the chance of a broader exposition to attention in public discourse. Religion teachers in schools can be important factors in the religious life of their groups; their institutional embedding contributes to the stabilization of the religious groups. Conversely, it offers the chance for the state to stabilize cooperation with religious groups and to exert a certain pressure to comply with the values of the democratic legal state. All that could not likely be achieved without the model of *confessional* religious instruction. The Austrian and German efforts over the last decades to establish Islamic theology as a university subject and to professionalize Muslim teachers toward an academic level comparable with other teachers provide an example for such a process of potential mutual beneficence.

One might of course consider a more radical alternative: completely ignoring religions in public schools, that is, even in the mode of informing about them. But as Kent Greenawalt has rightly pointed out, completely ignoring religion, which is usual in many schools, represents by itself a sort of worldview statement and exerts an influence on the pupils' opinions.¹⁸ The heart of the problem and the main rationale for a ban are probably the doctrines of religions: there are obvious logical tensions between the beliefs of different religions, and tensions between some readings of some religions and some scientific beliefs (differences between Christianity and Islam/Judaism on radical monotheism or a triune God, or between some evangelical theologies and evolutionary biology, provide simple examples).¹⁹ As schools should deliver consensual content only – or so the reasoning goes – such controversial topics should best be banned from

school. On the other hand, some of these beliefs are factually important for many pupils and their families, and banning religion from school just conceals, rather than solves these tensions.

A viable way of dealing with them is giving these controversial positions access to public schools, and even letting them be taught with the claim of truth and by confessional teachers (though competent instructors may be expected to note that certain claims are controversial or considered scientifically falsified, for example). The notorious presence of tension-filled truth claims at schools is helpful in two ways: on the one hand, it does justice to the importance of such beliefs for the self-understanding of wide parts of the society, and it may, on the other hand, teach pupils, teachers, and parents the lesson that issues about religious and other worldview claims cannot simply be dealt with and settled in the way we handle scientific, historical, and related questions. The presence of partially incompatible religious truth-claims at schools mirrors a commonplace in the epistemology of religion: religions may have good arguments on their side, but their claims are not “provable”; being religious is a matter of reasons *and* commitment. A certain degree of cognitive tension in religious and worldview matters is hence something one has to live with. For the cultivation of mutual respect and worldview tolerance as civic virtues, such a lesson is useful.

Probably the core objection against religious education in public schools is the claim of an inappropriate preference of religion over other social activities, and/or a bias in favor of certain religious groups over others. The force of this objection depends on the contextual conditions mentioned above; in certain settings, some form of neutral introduction to various religions to foster mutual understanding would indeed seem more viable. But the Austrian case may be illustrative again. The overall friendly cooperation notwithstanding, the Austrian Constitution (like many others) explicitly claims religious neutrality and precludes any form of state church. In order to harmonize the tasks of maintaining neutrality and securing religious literacy, some rules and criteria are required to take into account the various religions present in Austria and the growing number of (factually or declaredly) nonreligious persons. In Austria, the current rules and criteria are as follows: Freedom of religion is provided in that everybody may freely practice and utter any religion, privately or in public, and freely join or leave any religious group.²⁰ The right to offer religious education in public schools, however, is restricted to those religious groups that are formally recognized by the state. By that recognition, religious groups become something like a statutory corporation or public body, although they fully govern their internal matters themselves.

In order to be recognized, a religious group must have existed for more than twenty years, it must have passed the preliminary legal status of a “registered community of religious confession” for five years,²¹ it must represent at least

0.2 percent of the Austrian population, and of course it must be religious in character, as opposed to, for example, a commercial, ethnic, political, or mere charity association. The latter criterion creates demarcation problems not so much with caricaturing groups like the “Church of the Flying Spaghetti Monster,” but with atheist and agnostic groups who claim the same privileges as religious communities. Austrian authorities have so far solved the issue by defining “religion” in an essentialist way: without a broad resemblance to the traditional religions and reference to some “transcendent” beings, powers, and so on, nothing can be regarded as religion. Moreover, the applying community must provide a credible financial system, it must have complied with the laws of the republic, and it must display a positive relation to the Austrian Constitution. Offering publicly financed religious education is then a *right* of the recognized churches and religious associations, but there is not a *duty* to offer it. Some religious groups decline that right by themselves, and smaller groups with locally dispersed members hardly use it for practical reasons.

One might still object that even this criteria-governed bestowal of state support for religious education is an undue preference for certain religious groups: it might be biased in favor of bigger over smaller groups, and biased in favor of religious groups over other social activities, especially those of other voluntary associations.

The former objection finds a partial answer in the generosity of the criteria: compliance with the laws and the constitution are musts for any association and as such are unproblematic. Concerning the quantitative thresholds, there are two points to consider: Unlike the religious freedom of their members, the right of a religious group to offer religious instruction in public schools is not something like a fundamental liberty (which would preclude any quantitative minimal thresholds at all). It is just a contingent liberty or a competence granted to certain significant religious groups. And since the gap between the per-capita administration costs and the number of benefitting members is widening the smaller the religious group is, it seems justifiable to introduce *some* minimal threshold; in the Austrian case (0.2 percent of the population, or about seventeen thousand members), it appears as generous anyway. The objection of an undue, arbitrary preference for bigger over smaller groups can hence be rejected.²²

But does religious instruction in public schools constitute an undue preference of religion over other social activities? The answer depends on the conception of religion and its role, and the conception of education. If religious groups and activities are conceived akin to charity associations, sports clubs, social movements, and the like – that is, something rather accidental in the individual and public life – then religious instruction in public schools might indeed appear as an unfair privilege and an undue preference. But according to the conception of education exposed above, school curricula have as their primary task to secure certain stan-

dards of literacy about scientific knowledge and cultural backgrounds, and to foster the commitment to certain values and practices of life (for this reason, for example, music, sports, and fine arts are subjects in most schools). It is not a task of schools to give equal “airtime” to various associations, even if they are of reasonable or charitable character. But in the light of the exceptional historical, cultural, and political relevance of religion, and especially its politico-cultural ambiguity, including it as a school subject does not constitute an undue bias for religion.²³

A special case is created by (new or older) non- or antireligious worldview movements claiming the same rights as religious groups. The essentialist standpoint of the Austrian administration is not more than a problem-shift: it is not obvious why only religions (however defined) and not humanist groups, for example, should be present in the school curricula. A lack of compliance to the laws and the constitution can hardly be the argument,²⁴ and the value-stance of these groups usually resembles the one circumscribed, for example, in section 2 (1) of SchOG. The strongest argument – its cogency might perhaps fade in the future – is the incomparably bigger cultural and historical role of the traditional religions in comparison with new humanist movements.

Beyond the aforementioned (and more fundamental) questions, there are some minor but significantly practical issues connected with religious education in public schools. First, there is a worry that the “friendly cooperation” (as a whole, not only regarding religious education) sets some religious groups under pressure to establish “Catholicism-like” organizational structures and to develop doctrine-focused “theologies,” which might partly be alien to their self-understanding. The Islamic Community in Austria (Islamische Glaubensgemeinschaft in Österreich, IGGÖ), for example, although it is as a statutory corporation the official addressee of the state in all issues regarding Muslims, factually represents only a fraction of the Muslims living in Austria, because of the generally lower interest of Muslims in registered membership and the chiefly ethnic structuring of the Austrian Muslim communities. The IGGÖ has a traditionally strong Turkish orientation and other ethnic groups do not perceive it as their representative. It may also be added that building up administrative structures, corresponding with state authorities, and complying with administrative regulations of the state are comparatively harder burdens for smaller religious groups, especially for those without a powerful financing system.

This problem is probably not solvable. Even if the status of a recognized religion is a favorable legal position granted on application, the factual chances of the various religions to benefit from this position are – for contingent historical reasons – not fully equal.

Second, though focused on authentic information on one’s own religion, religious education in public schools should not create something like parallel in-

trareligious filter-bubbles, but rather learning fields for democratic civic virtues, mutual understanding, tolerance, and respect for other religions. How a certain level of “cross-religious” information and encounter can be secured and how unhealthy confessionalism as a splitting, dividing, centrifugal tendency for democratic societies can be avoided is currently a much-discussed question. Various models are being tested in Europe, ranging from factual, occasional collaboration organized by engaged teachers (such as an “interreligious city walk” of the various religion classes to churches, mosques, synagogues, and Buddhist centers, or interreligious new year celebrations) via interreligious “windows” between the classes (that is, regular encounters to learn and discuss in interreligious groups) to permanent interreligious teaching (“dialogical confessional education”), be it by one or more teachers.

Third, not necessarily all religion teachers exemplify the ideal model of the “friendly and reasonable theist,” which is the tacit background of the Austrian and related models of religious education. The problem of keeping religious education free from anticonstitutional, antidemocratic, grossly anti- or pseudoscientific, or otherwise problematic content is not huge, but it deserves attention. A complete ban of religion from public schools would not imply that problematic content will not find its addressees via other channels. And conversely, one might recall the abovementioned pressure toward transparency, which emerges when religious groups are involved in the public school system. Where textbooks are publicly acknowledged and purchasable, where curricula are accessible on government websites, where teachers have to make their positions plausible in the multi-worldview environment of a teaching staff, problematic content is more likely to be spotted and eliminated. For serious cases, the withdrawal of the individual license to teach (or theoretically even the status of a recognized religious group, if the problem is of a deep-going and general nature) is a legal possibility. The individual and constitutionally guaranteed right to religious freedom would not be infringed by such a grave measure.

There is another worry that deserves attention. Sociologist Tariq Modood has identified five possible reasons why states might be interested in religion: truth, danger, utility, identity, and worthiness of respect.²⁵ One might suspect that the foregoing considerations hinge merely on danger and utility, which might appear unsatisfactory (or even reductionist) from a religious perspective: If at all, should not religious education at public schools rather be granted for truth, identity, and worthiness of respect? (“Identity” is not understood as theocracy, that is, an identity between religious and political regime, but the importance of religion for the sense of identity of the state or of religious groups, especially minorities.) The objection is not misguided, and it may invite to render the secular rationale for religious education in public schools more transparent.

In the context of “religion and democracy,” danger and utility are indeed the first that spring to mind, given the political ambiguity of religion. But the rationale for religious education in democratic states can be broader: if educational tasks and values roughly along section 2 (1) of SchOG are plausible, and if religions (in their best forms) pursue similar tasks and values, then even a secular state can recognize some aspects of truth in the religions. Religions have an ongoing relevance for the identity and cultural self-understanding of societies, certain societal groups, and individuals, and as such they are worthy of respect by the state and by other citizens. All these reasons are entirely secular and should hence be plausible for religious and most nonreligious people (strong secularists might be an exception).

There is probably no problem-free royal road toward securing minimal religious literacy in a democratic society. But religious instruction would be done anyway, somewhere, by someone, and in some fashion. Arguably, the solution to have it done via confessional religion teachers under the transparency conditions of public schools is not the worst among the available options.

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ENDNOTES

¹ For a survey, see Kent Greenawalt, *Does God Belong in Public Schools?* (Princeton, N.J.: Princeton University Press, 2005), chap. 1.

² Steven Kettell, “Secularism and Religion,” in *The Oxford Encyclopedia of Politics and Religion* (New York: Oxford University Press, 2019), <https://doi.org/10.1093/acrefore/9780190228637.013.898>; Craig Calhoun, Mark Juergensmeyer, and Jonathan VanAntwerpen, eds., *Rethinking Secularism* (Oxford: Oxford University Press, 2011); and José

- Casanova, “Rethinking Secularization: A Global Comparative Perspective,” *The Hedgehog Review* 8 (1–2) (2006): 7–22.
- ³ Ernst-Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit: Studien zur Staatstheorie und zum Verfassungsrecht* (Frankfurt: Suhrkamp, 1976), 60, translation from “Böckenförde Dilemma,” Wikipedia, https://en.wikipedia.org/wiki/Böckenförde_dilemma.
- ⁴ See Craig Calhoun, Eduardo Mendieta, and Jonathan VanAntwerpen, eds., *Habermas and Religion* (Cambridge: Polity Press, 2013).
- ⁵ Basics are regulated in the Federal Law of Religious Education (Religionsunterrichtsgesetz) of 1949; details would go far beyond the scope of this essay. For a survey on Europe, see the three-volume collection: Martin Rothgangel, Martin Jäggle, and Thomas Schlag, eds., *Religious Education at Schools in Europe* (Göttingen, Germany: Vandenhoeck & Ruprecht, 2014–2015). In the near future, ethics will most likely be introduced as a compulsory alternative subject for all those who opt out of religion. Interestingly, Poland (with its much more religious society) has an opt-in system.
- ⁶ The curricula, formally promulgated by the Federal Ministry of Education, can be retrieved with the search term “Lehrplan Religion” at the Legal Information System of the Republic of Austria (RIS), <https://www.ris.bka.gv.at/Bundesrecht/>. The “legally recognized churches and religious associations” (gesetzlich anerkannte Kirchen und Religionsgesellschaften) are, at present: Catholics, Protestants (Lutheran and Reformed), Old Catholics, Methodists, free churches, New Apostolic Churches, Mormons, Greek Orthodox, Armenian Orthodox, Syrian Orthodox, Coptic Apostolic, Jews, (Sunni) Muslims, Alevites, Buddhists, and Jehovah’s Witnesses.
- ⁷ The lamentably late unambiguously positive official statement of the Catholic Church to democracy in the Second Vatican Council 1962–1965, the antidemocratic stance of significant parts of German Protestantism between the World Wars, and the still somewhat ambiguous position of the Russian Orthodox church notwithstanding.
- ⁸ On that, see Greenawalt, *Does God Belong in Public Schools?* 28–33.
- ⁹ Numerous local differences are omitted here: for example, in Germany and Switzerland, school is a competence of the federal countries, and some of them have peculiar regulations.
- ¹⁰ Given that tradition, decisions on matters involving religion by national constitutional courts and the EU Court of Justice are rather scarce, and religious education is not in the foreground; cases rather revolve around religious symbols or clothing in the workplace, the consequences of divorce for employment in the Catholic Church, education, and medical fields. Critics notice a tendency in EU Court decisions to interpret “religious neutrality” more and more toward the “invisibility” and exclusion of religion, broadly along the French conception of *laïcité*; see, for example, Mark Bell, “Leaving Religion at the Door? The European Court of Justice and Religious Symbols in the Workplace,” *Human Rights Law Review* 17 (2017): 784–796.
- ¹¹ For principles of an “ethics of citizenship,” see Robert Audi, *Democratic Authority and the Separation of Church and State* (Oxford: Oxford University Press, 2011).
- ¹² More is not to be demanded, due to the notorious decision-theoretical impossibility of singling out “the one and only” perfectly just representation or voting system.
- ¹³ For basic information on the Austrian school system, see, for example, Federal Ministry of Education, Science and Research, Austria, *Educational Pathways in Austria 2019/20*

(Vienna: Federal Ministry of Education, Science and Research, 2020), https://pubshop.bmbwf.gv.at/index.php?rex_media_type=pubshop_download&rex_media_file=191223_bildungswege_eng_bf.pdf; and “Education in Austria,” Wikipedia, https://en.wikipedia.org/wiki/Education_in_Austria.

- ¹⁴ The only change was the later (and rather redundant) insertion of the “sporty-active lifestyle.” This stability over fifty-seven years is remarkable, since the paragraph could have easily been changed by any simple parliament majority. Section 2 is regarded as something like “de facto constitutional law,” which should stand beyond political conflicts.
- ¹⁵ There is an affinity between the ideas behind section 2 (1) of SchOG and the “ethics of citizenship” as defended in Audi, *Democratic Authority and the Separation of Church and State*. For the American debate on the appropriate individual moral/civic virtues component in the aims of education in public schools, see Greenawalt, *Does God Belong in Public Schools?* chap. 2, esp. 23–26.
- ¹⁶ Olivier Roy, *Holy Ignorance: When Religion and Culture Part Ways* (London: Hurst, 2010).
- ¹⁷ A similar point is discussed in Greenawalt, *Does God Belong in Public Schools?* 27–30.
- ¹⁸ *Ibid.*, 81–86.
- ¹⁹ This topic is almost irrelevant in Austria and most other European states, and most religion teachers hold some sort of compatibilism concerning science and religion. Probably, the long-term involvement of religion teachers in the public school system has positively contributed to this situation.
- ²⁰ Of course, this freedom is limited by the borders of the Constitution (such as the religious and personal freedom of others), penal law, construction laws that also concern religious buildings, laws regulating the use of drugs, noise annoyance, traffic rules, public order, and so forth. Documents stating this freedom are chiefly: Article 14 of the Basic Law on the General Rights of Nationals of 1867; Article 63 Section 2 of the State Treaty of Saint-Germain-en-Laye of 1919; and Article 9 of the European Convention on Human Rights of 1950.
- ²¹ In German: “Staatlich eingetragene religiöse Bekenntnisgemeinschaft.” Currently, there are nine, including the Baha’i, Shiite Muslims, Hindus, Seventh-day Adventists, and the Unification Church.
- ²² The Austrian Constitutional Court (B516/09, December 16, 2009) regarded the 0.2 percent threshold as constitutional, broadly along a similar line of argument.
- ²³ A complicated question that cannot adequately be treated here is the appropriate substitute for those pupils who freely opt out of religious education, do not belong to any religion, or belong to a religion that does not offer religious education. Solutions to that problem (in Austria and other states) may be free periods, joining the class of a related religious group (mutual agreement provided), or the obligation to join ethics classes instead of religion.
- ²⁴ Worldview instruction in public schools by groups having an explicitly *anti*-religious agenda (as opposed to a mere *non*-religious worldview) might be problematic in the light of the constitutional guarantee of religious freedom.
- ²⁵ Tariq Modood, “Moderate Secularism, Religion as Identity and Respect for Religion,” *The Political Quarterly* 81 (1) (2010): 4–14.

Conscience, Truth & Action

Lorenzo Zucca

Liberal democracies attempt to accommodate conscientious objections without having a clear understanding of the claims of conscience. This might lead to an Antigone claim, when conscience is irreconcilable with state authority. In this essay, I sketch three different models of conscience: a knowledge-based model where conscience gives priority access to moral norms; an emotional model that treats conscience as a natural capability that alerts us to wrongdoing; and a reflection model that argues that conscience works as our inner tribunal. Each model presents a different challenge to political authority. The conflict becomes tragic in Antigone's sense only when conscience is portrayed as providing knowledge of moral norms. The other two models can be squared with political authority in various ways, but they do not offer a final case for the authority of conscientious claims; at best, they show that political authorities should hear conscientious claims and engage with them in public deliberation. Conscience thus reconstructed can provide a constructive function in any society a) by holding political authorities to account; b) by forcing them to provide reasons for their actions; and, ultimately, c) by refining our deliberative and adjudicative practices to make sure that action is always anchored to truth.

Claims of conscientious objection are on the rise in Western liberal democracies. Not only do people object to military service or to performing abortions, but they now also claim the right to be exempted from providing services to a particular class of people.¹ This is not a good symptom: historically, the rise of conscience goes hand in hand with the decline of political authority. C. A. Pierce noted that: "It is clear that conscience only came into its own in the Greek world after the collapse of the city-state. The close integration of politics with ethics, with the former predominant, was no longer possible: there was no sufficiently close authority, external to the individual, effectively to direct conduct."² The examples of this predicament could be multiplied: the Corinthians rebelled against St. Paul by appealing to their conscience. Martin Luther spurred a protestant revolt against the Roman Catholic Church by appealing to conscience. Conscientious claims signal a deep disagreement with established authority. If conscientious claims become widespread, they might help undermine the established political order.

How can we accommodate claims of conscience in liberal democracies? This question presents various challenges: First, we need to grapple with the nature of conscientious claims. Second, we need to understand the structure of the conflict between authority and conscience. Third, we need to assess the moral authority of conscience. To do so, I map out the terrain in order to tentatively figure out what one might mean when one speaks about conscience and what that entails with regard to the conflict between law and conscience. Once the mapping is complete, I argue that conscientious objections do not entail a right to be exempted, but they do entail a right to be heard. I conclude by putting forward an alternative theory of how conscience could contribute to the search of truth in law and public policy.

We address claims of conscientious objection without knowing what *conscience* means. Conscience is an umbrella term that plays an important role in our moral life and serves as a bridge between beliefs and action. I am aware of the vagueness of this formulation, but I find it impossible to introduce conscience in a plain, noncontroversial way. We can refine it by saying what the umbrella covers: it spans from belief to action; the bridge between the two can either be via emotions or rational reflection. In technical terms, conscience plays a role in moral epistemology, moral psychology, and practical reasoning. The three areas are not necessarily linked by the workings of conscience, but they might be. If someone believes that conscience gives us access to moral knowledge, then that will also color the motivation to act in accordance with that knowledge.³

For the moment, let us keep those three areas to provide a typology of different types of conscience.⁴ Religious people tend to believe that conscience provides direct or indirect access to moral norms. Antigone believed, for example, that everyone had direct access to universal moral norms grounded in religion. She also believed that those moral norms trumped the legal norms of the City of Thebes in which she lived. Antigone's belief in the superiority of her conscientious objection leads to a stalemate with Creon's belief in the superiority of state law's authority. Tragedy inevitably ensues from that stalemate. I call this *Antigone's claim*, which illustrates a knowledge-based model of conscience and shows the perils associated with a conflict between conscience and authority. If Antigone believed that conscience gives us direct knowledge of religious norms, St. Paul – who brought conscience to the fore of Christian theology – believed that conscience gives us indirect moral knowledge of God's law. In his words: "Consciences bear witness [of the law]."⁵ In either case, conscience is cognitive; it gives us direct or indirect access to moral knowledge.

Other accounts of conscience focus on its emotional and motivational role. We have pangs of conscience or a perturbed conscience; we feel guilty or moved into action. Conscience pricks and prods us in multiple ways: it makes us bite our tongue or provokes a reaction. An image that is often associated with that an-

noying little voice is Pinocchio's cricket. Different accounts might claim that the cricket's voice is built into us from birth or is a reminder of social norms. What matters here is that conscience provokes an emotional reaction and our actions are filtered through that emotional response. And if the filter is not functioning, then we regard the person as a moral monster: think of Iago, for example, who does not seem to have any pang or prick of conscience at any point, not even when caught red handed, and yet he's capable of saying with a straight face: "Though in the trade of war I have slain men, / Yet do I hold it very stuff o' the *conscience* / To do no contrived murder."⁶ Interestingly, Othello is also lacking in conscience in that he does not seem capable of controlling his emotional outrage through conscience. Othello is a man of action: he acts first, and only reflects afterward.

This brings us to the third family of accounts of conscience: those that focus on introspection or reflection. In this case, conscience is presented as a deliberative device: we engage in a calm, rational reflection on our feelings and duties and we attempt to organize our thoughts before we can allow ourselves to get into action. From this viewpoint, conscience neither gives us access to moral knowledge, nor does it prick us or prod us. Rather, it requires a dispassionate rational activity; this account of conscience seems very appealing to priests and philosophers, but it does not appear to be close to reality.⁷ Moreover, conscience can be a real hindrance to action for those who are lost in a speculative space. Hamlet is there to remind us that: "Thus conscience does make cowards of us all; / And thus the native hue of resolution / Is sicklied o'er with the pale cast of thought, / And enterprises of great pith and moment / With this regard their currents turn awry, / And lose the name of action."⁸ Those who celebrate rational deliberation will dismiss Hamlet as an amateur philosopher and an immature man. But they overlook the fact that conscience can be a double-edged sword: it might regulate action, but it can also hinder it if we are lost in the introspective search. And in any case, it seems that a purely introspective account of conscience misses half of the picture.

The models presented do not aim to capture the way we think about conscience in practice; for we tend to see conscience as a blend of those models. It is still possible to find pure accounts of conscience as knowledge, motivation, or reflection. But we have also just seen that pure accounts of conscience tend to attribute to it an overinflated role that may lead to tragedy: Antigone relies on conscience as the exclusive source of moral knowledge. Othello's purely emotional conscience leads him to major mistakes: he trusts Iago, who wears conscience on his sleeve, and distrusts Desdemona, who is a pure and good soul. And Hamlet's conscientious introspection leads to more frustration than rational deliberation.

Conscience is so hard to pin down largely because it cannot be easily boxed into one of the three categories. Rather, conscience seems to be a hybrid notion that functions as a bridge between beliefs and actions. More often than not, philosophical theories of conscience combine two or more dimensions of conscience. For ex-

ample, Aquinas distinguished between *synderesis* and *conscientia*, in which *synderesis* does the epistemological heavy-lifting, while *conscientia* delivers the goods of practical deliberation as the conclusion of a practical syllogism in which the major premise is given by *synderesis* and the minor premise is the assessment of the circumstances in a given case. Of course, accounts of conscience can just as well combine practical reasoning with motivation: ideally, conscience would engage our rational deliberation and lead us naturally into action based on the best rational solution.

But action based on rational deliberation is in most people a rare occurrence. We also know that the most difficult cases of conscientious objection will come from those who claim to have knowledge of the dictates of conscience or from those who have deliberated and concluded that their conscience is at odds with some public policies. Those who have motivational issues of conscience are somehow less problematic. Let us turn to the conflict between conscience and the law.

For the moment, I have deliberately left open the definition of conscience. Its ambiguity is reflected in the way we address instances of conflict between law and conscience. Indeed, the way we frame the conflict depends on the way we conceive of conscience. I will begin with the case of conscience posing a motivational problem. There are people who object to going to war for conscientious reasons. They might have pondered the question long and hard, or they might have a strong intuition that taking up arms is always wrong. In both cases, those who object to war feel strongly that to be coerced to take part in a war is contrary to their moral convictions; thus, they would ultimately be highly unmotivated. It is not so hard to see why a state would want to recognize a limited number of exemptions from being drafted: it is not in the interest of the state, the army, or the soldiers to be burdened by a number of people who are likely to dampen the morale of the troops. Moreover, offensive war has very weak legitimacy to begin with, so to coerce objectors could be fatal for the legitimacy of the state.

For similar reasons, it is very hard to coerce medical doctors to perform actions that they consider incompatible with their conscience, such as abortion. An unmotivated doctor who is coerced to perform such an action is more prone to errors that could have devastating consequences on the patient. The comparison between war and abortion, however, ends there. In virtually all liberal democracies, legislation entrenches a right to abort. The state has a positive obligation to secure the efficacy of that legal right, which requires that women be assisted in the exercise of their right at no extra cost or burden. In some cases of scarcity of resources, that might even overrule a request for exemption or justify the woman's request for extra costs incurred.

When conscience is chiefly a matter of motivation to engage in certain acts, it is hard to justify state coercion that can compromise the autonomy underlying the act. In both cases, however, we assume that someone else will be available to

perform that action in good conscience. If that was not the case, and the country needed soldiers to defend itself, then again reasons of survival would trump conscientious objections. In the case of medical objection, as long as the medical intervention is legal, there might be a space for individual objection, but that also increases the responsibility of the health provider to find suitable alternatives to meet the needs of the patient. In both cases, the most important question has to do with the cost of conscientious objection: how big a cost can the society pay and who should bear it?

The second type of conflict between law and conscience has to do with conscientious objection based on a claim of moral knowledge, direct or indirect. In these cases, we are no longer trying to establish how big a cost the society can bear; rather, it seems that anything short of a full exemption would compromise the integrity of the individual. For, in these cases, conscientious objectors insist that their moral conscience is not disputable and points to the immorality of the law. They take exception to the morality of the law, even if the action requested by the law is itself a requirement of their job. In this case, objectors raise the rhetorical stakes by claiming that the law would make them complicit with evil-doing.⁹ An example of this scenario is the public officer who, for religious reasons, refuses to sign marriage certificates for homosexual couples. Note that in this case, the motivation and the emotional state of the conscientious agent is not central to the performance of the action: they can perform the action routinely for other people. Also note that the action is not controversial *per se*. Registrars do not object to signing the document; that is their job. They object to signing the document for a class of people. By doing so, they object to the morality of legislation that extends privileges to previously discriminated classes of people.

Conscientious objection is used as a sword against policies that have liberalized sexual and reproductive morality by decriminalizing abortion and contraception, and by legalizing marriage and adoption for sexual minorities. Conscientious objection is no longer aimed at showing that the state is making a mistake by engaging in military action. Rather, conscientious objection now aims to show that the basic values that underpin some fundamental liberal policies are wrong and cannot be regarded as a legitimate use of political authority. Ultimately, such conscientious claims aim to disrupt the moral and political order of liberal democracies.

Thus, the stage for a genuine conflict between conscience and authority is set. Legitimate authority claims to rule on the basis of right reasons. According to one prominent account, authority mediates between right reasons and people's actions. An authority provides a service to people by presenting them with a conclusive reason to perform a certain action on the basis of all the relevant reasons that apply to the agent. Legal authority works along those lines: it mediates between agents and the reasons that apply to them. Insofar as law does this, it can be considered as legitimate.¹⁰

But conscience-as-moral-knowledge also claims to be informed by right reasons. In fact, according to some accounts, conscience works analogously to authority.¹¹ It does not create any new reasons but it alerts us to the reasons that apply to the action we have taken.¹² Thus, conscience mediates between reasons and actions, and it performs a cognitive role in giving agents cause to act in a way that tracks all the right reasons.

If we were to accept an understanding of conscience-as-moral-knowledge, then we would have to conclude that both legal authority and conscience offer us what philosopher Joseph Raz has called exclusionary reasons. These are second-order reasons that exclude other reasons from deliberation; second-order reasons tell us to refrain from further deliberation.¹³ It follows that the conflict between conscience and law is a conflict between two exclusionary reasons. The consequences could not be starker: there is no room for compromise or accommodation between two exclusionary reasons. One or the other must give way.

Conscience-as-moral-knowledge works here on the assumption that if its claim is successful then the legitimacy of legal authority would be undermined. Blow by blow, a number of liberal policies could be questioned and ultimately revised. Those who define conscience as moral knowledge have an interest in presenting the conflict as total, rather than partial. A partial conflict implies that neither of the two reasons of conflict is nonnegotiable. In fact, it would just point out that on each side, there are defeasible reasons. But when there are two exclusionary reasons that conflict, accommodation is not possible because it would require reopening the balance of the first-order reasons that have been captured by the formulation of exclusionary second-order reasons.

Bakers and registrars claim that their conscience offers them cause not to act on the reason offered by legislation that requires them not to discriminate. This conflict between conscience and law is set up to question the rationale of some liberal policies. It is a total conflict, the point of which is to introduce a strong tension between competing worldviews and restore traditional values in matters of morality. But there seems to be a disruptive agenda, too: the intent is to dismantle the moral and political order so as to conquer it again.¹⁴ Just like the case of Greek city-states, the political institutions of liberal democracies are losing their grip on the ethical fabric of the society.

The third category of conflict between law and conscience is when a conscientious objector makes a claim based upon rational reflection. The thought process is more hypothetical here: what would we do if faced with such a situation? If the conscientious case is compelling, then it is likely to influence a policy or a legal change. If the law is blatantly wrong, then conscientious objection is the only right response available upon reflection. A public officer working under an apartheid regime could give up his job or refuse to implement the policies of the regime that are harming a category of people. The latter could be a deliberate strategy to

undermine the regime from within and so it must be the result of a mature reflection about the demands of conscience.

The conscientious case might in this case be so cogent that conscientious objection will slowly but surely become the voice of the majority and transform itself into civil disobedience. In this third scenario, conflict is never total: that is to say, it does not create a deadlock between the law and conscience, where one claim must give way to the other as a conclusive matter. Conscientious claims based upon reflection invite political authority to reflect on the moral basis of the law or of the policy. And if this type of dialogue can be established, then it is likely that the law will ultimately be open to change and to correct mistakes.

If a genuine conflict between law and conscience arises as described above, its treatment depends on the comparison between the authority of the law and that of conscience: it boils down to the strength of the reasons on each side, even if the inescapable problem is that both sides claim to have conclusive authority.

Sometimes a conflict can be avoided by restricting the scope of conscience. Conscience has been described as being necessary to avoid evil, but not sufficient to do the right thing. This was Paul's view.¹⁵ He thought that conscience was negative and backward-looking; conscience pricked those who had already committed a wrongful action. At most, conscience begs us to refrain from repeating that wrongful action, lest we be subject to the same pain that cannot be shaken away. In Paul's account, both the knowledge and the motivation tend to be negative: we have a reason not to act against the law, and we are also motivated to do so by the desire to avoid pain.

This understanding of conscience is modest and limited in scope: Conscience is not a guiding light of human action. It is rather a brake to what can be done. Another account that constrains the scope of conscience attributes to it a very specific role in practical reasoning, as Aquinas claimed. One thing is to ascertain the reasons that guide us, another is to apply those reasons to individual situations. Aquinas is careful to argue that conscience operates at the second level only. To be precise, the working of conscience can be presented as a syllogism. We have knowledge of first principles, and we are presented with a set of circumstances. Conscience is the capacity that applies basic principles to particular circumstances; it is the third, and final, step in a syllogism.

Because of its applied nature, conscience is fallible. First, we have a problem that has to do with the accessibility of right reason. Without questioning the existence of right reasons, we can question our human capacity to discover them. Since conscience is an act of application of knowledge to a set of facts, we can be mistaken about the particular facts or about how right reasons apply to particular facts. Whether we are correct or mistaken, we still feel that conscience binds

us and we would do something wrong if we acted against our conscience: when we experience it, we want to refrain from action and we provide conscience as a reason for not acting. But because conscience is fallible (if you follow Aquinas), then it cannot always excuse. It depends on the nature of the mistake: when the agent has no means to ascertain his mistake and the mistake is involuntary, then conscience binds and excuses. But if the mistake can be avoided or corrected, then conscience will not excuse the agent.

While the authority of *synderesis* is not questionable, the authority of conscience is by nature fallible. It follows that a conscience in this account does not necessarily lead to a deadlock with the law. There is space for the external authority to probe the reason of the conscientious objector and to assist with the reasoning if there is a mistake.

Another strategy to acknowledge legitimate authority to both the law and the claims of conscience while avoiding their conflict is by distinguishing their domains: law makes claims in the public sphere, while conscience makes claims in the private sphere. By doing so, one preserves the integrity of both, but might miss out on the dialogue between law and conscience.

Those who prefer to separate the domains tend to look at conscience as the outcome of an inner judicial process.¹⁶ The process is entirely played out within one's mind and the agent is at the same time the accuser, the accused, and the judge. The sentence reached through the inner judicial process can be one of acquittal or a guilty verdict. In the latter case, the punishment is the feeling of guilt. A trial model of conscience gives a rational basis to the authority of conscience, but it also takes away from conscience its more critical role *vis-à-vis* questionable public policies and laws.

It is possible to ground conscience's authority on an ideal deliberative process, in which the agent is in search of the truth, but she is also conscious that that research is complex and burdened by one's own epistemic and motivational biases. Reflection can begin with the questioning of the law or with the questioning of one's own moral norms. Individual development happens by testing the boundaries of external authority; children learn to internalize norms that way. At a second stage, children question the reasons that back parental directives. Most social and political norms are open to revision, and practical authorities are strengthening themselves when they can articulate in public their reasons in a successful manner.

A deliberative model of conscience is rooted in self-reflection but does not stop there. It constantly engages external authorities to test their limits and integrity; it also adjusts one's own norms in light of better forms of reasoning. The authority of conscience is therefore no longer seen as a second-order reason, but as a way to engage and test one's own beliefs and convictions in light of their impact on the external world.

Can we accommodate conscience? It is easier to accommodate reflection-based conscience than it is to accommodate knowledge-based conscience. The latter presents itself as a conclusive reason that bears no compromise. It does not recognize the authority in front of itself, while insisting on its own infallibility. Conscience-as-knowledge is bent on depriving the external authority of its own legitimacy and replacing it with the authority of individual conscience.

On the other hand, conscience-as-reflection is more modest while still authoritative. The individual recognizes her own practical reasoning as binding, but there is openness to the possibility of being mistaken. In such a case, the external political authority must also display a certain degree of humility and modesty. It must start by acknowledging the negative feeling of the individual and must attempt to engage in a dialogue in order to let claims of conscience be considered in the open. In this way, the most obvious mistakes with regard to right reason or to the examination of the facts of the case can be dismissed more easily.

Genuine claims of conscience must be the object of public and open scrutiny. This is the first step toward accommodation, and it is true in both cases of correct or incorrect conscience. If conscience is regarded as correct after public deliberation, then the political authority would have a strong reason to conform to it. An interesting test case was provided by Prime Minister Tony Blair's decision to go to war in Iraq. Blair presented his decision as dictated by his own conscience, and in this discussion, let us take him at his word. A mass protest, perhaps the biggest in recent British history, followed this decision, creating a stand-off between the prime minister's conscience and the public's conscientious objection to it. The public wanted the prime minister to avoid a major mistake: going to war without having sufficient evidence. Tony Blair resisted public pressure and brushed it off by claiming the authority of his inner conscience. History, and Sir Brian Leveson's public inquiry, showed us that Tony Blair should have listened and accepted that his conscience was mistaken. A public deliberation would have shown that there was no final evidence to support military action.

The prime minister's conscience was not merely accommodated, since he was leading the conversation on what to do. His voice needed to be heard and debated, but that does not mean that the legitimacy of his action cannot be contested. On the contrary, had he been open to contestation, he would still enjoy a reasonable degree of legitimacy, which he jettisoned the day of his decision. The legitimacy of political authority comes partly from its openness to being mistaken; and so it is for the moral authority of conscience: it should always be respected, and it is because it is respected that it should be scrutinized when it aims to guide action.

That is where accommodation stops: conscience can and should be heard. But it does not have the privilege of legal or political protection every time it makes a claim. Conscience can claim to be heard but does not systematically excuse who-

ever claims it: there is no general or special right to conscientious objection; rather, conscience is covered by a right to be heard.¹⁷

Conscience is at its best when it preserves a healthy distance from religious and political authorities. History shows us that conscience can become dangerously unhinged from its surroundings to the point of bringing about unrest and conflict. Liberal democracies suffer from a structural inability to give conscience its proper place. Because liberal democracies fail to grasp the structure of the claims of conscientious objection, they are liable to be undermined by Antigone's claim.

Liberal democracies display opposite attitudes toward conscience: either it is repressed in the name of right reasons or it is fetishized and undermines the legitimacy of the authority that protects it.¹⁸

There are two types of conscience fetishism: knowledge fetishism and reason fetishism. If a liberal democracy defines conscience as the ability to access one's own deepest convictions and beliefs, and if that polity provides special protection to those beliefs and convictions, then we can speak of knowledge fetishism. No political regime can survive the rise of conscientious claims of this kind: it only takes an organized group to use this weapon against the very fabric of the liberal democracy. I do not think that it makes sense to protect conscience as a preferential pathway to moral knowledge.

Reason fetishism is equally problematic. In its ideal form, it presents conscience as an inner tribunal in which the agent weighs reasons for or against a certain action. In these accounts, conscience is the centerpiece of private morality and public authority must respect the findings of the court of inner reason. The inner tribunal of conscience works in parallel with the public tribunal of law. That gives liberal thinkers the false impression that conscience and law have two separate domains in which reason plays the role of king. Reason fetishism amounts to the false belief that conscience can regulate itself from within.

I resist both knowledge fetishism and reason fetishism and will conclude by sketching an account of conscience as a potential assistant of public deliberation. Most philosophical theories of conscience present a mixed account that is rooted either in a knowledge-based or reflection-based idea of conscience. I favor an account that begins with emotional reactions to wrongdoing as a starting point for public deliberation on the merits of an action. Political authorities have an obligation to hear the claims of conscience. They also have a strong interest in understanding and evaluating the motivational force of conscience.

A well-balanced individual, unlike Hamlet, is engaged in the right amount of action and introspection. There is no solution of continuity between the two, nor is there priority of one over the other. In fact, someone who is thriving will engage in action and reflection in a spontaneous and seamless way. Conscience as a feel-

ing of guilt, as a pang, will only appear if there is a glitch in one's life: there might have been a mistake or an accident. At that point, conscience requests a review of one's action and can intimate a change in behavior. Other times, it is possible that one's action is perfectly fine, and the problem is with the external barrier to one's own action. In this case, conscience assists with the task of changing the external world so as to remove barriers of rightful action. Thus, conscientious claims can hold political authorities to account.

In this picture, conscience is in constant exchange with the external world: it is prepared to be corrected by, and to correct, norms of behavior that shape the normative landscape. The spark of conscience is a feeling that something is not quite right. To take seriously that spark of conscience is fundamental, but it cannot stop there: the feeling of something wrong can be an occasion to deliberate on what needs to be changed and adapted. In the case of Hamlet, once again, what is wrong is his psychological state that is afflicted by overwhelming emotions. His conscience, as a result, is incapable of breaking the vicious circle that forces him into a vortex of endless introspection.

The second step of my account of conscience is deliberative. Pangs of conscience make a legitimate claim on us and on external authorities to review the reasons that back certain norms of behavior. The best contribution of conscience is to ask us to revise mistakes that cloud our deliberation, and to review biases that color actions. As noted at the beginning, Othello is the example of a man who would benefit from the assistance of a healthy deliberative process. As a leader and commander in chief, Othello is too prone to follow his emotions without examination, and that leads him into a series of mistakes with regard to Iago's "honesty," Cassio's integrity, and Desdemona's loyalty. In contrast with Othello's tragic decision-making based on naked emotions stand the decisions of the republican city-state of Venice, taken by deliberation in council. Open deliberation allows councillors to examine problems and to discard basic mistakes and biases that can be a hindrance to a fair deliberation. For example, Brabantio's accusation that Othello used black magic to seduce her daughter is dismissed in a public session in which conclusive evidence showed that the accusation was based on racial bias.

Conscientious claims must be sifted and examined in a process of deliberation. Conscience can assist in that process by bringing to the attention of the public some cases that need to be discussed to dispel social biases and mistakes. Thus, conscience contributes to public deliberation by requiring public authorities to provide positive reasons for their actions.

It is in the interest of political authorities and individuals to have a continuous open search for truth that is serious about conscientious feelings and emotional reactions. Political authorities must be open to be mistaken and eager to respond to conscientious claims in a way that tackles the source of conscientious unrest. Likewise, in a functioning deliberative process, individuals trust external author-

ities to provide the right reasons against which their behavior can be assessed, guided, and corrected. In this way, conscience can assist the process of striving for the truth. But conscience can only be protected by the law when it can show that the law is making a mistake that needs to be rectified.

Other times, conscientious objection is openly in conflict with external authorities. In those times, Antigone reminds us that we must be wary of those warning signs: it might signal that collective authority is no longer anchored to a truth-seeking exercise. The very fabric of the society is threatened by claims of conscientious objection that are not open to be falsifiable during public deliberation. In these cases, rather than assisting deliberation by pointing out mistakes and biases and strengthening authority, conscientious claims point to the fact that the legitimacy of state authority is in sharp decline.

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ENDNOTES

- ¹ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. ____ (2018).
- ² C. A. Pierce, *Conscience in the New Testament* (London: SCM Press, 1955), 76.
- ³ Contemporary moral psychology highlights the fact that there is no sharp divide between cognition and emotion.
- ⁴ Later, I will construe my own concept of conscience on the basis of insights gathered in the following discussion.
- ⁵ Rom. 2:14–15.
- ⁶ William Shakespeare, *Othello*, 1.2.1–3; emphasis mine.
- ⁷ Joseph Butler seems to have a purely reflection-based account of conscience; see Joseph Butler, *Sermons Preached at the Rolls Chapel* (London: J. and J. Knapton, 1726).
- ⁸ William Shakespeare, *Hamlet*, 3.2.82–87.
- ⁹ Douglas NeJaime and Reva Siegel, “Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism,” in *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality*, ed. Susanna Mancini and Michel Rosenfeld (Cambridge: Cambridge University Press, 2018).

- ¹⁰ The *locus classicus* for this account is Joseph Raz, *The Authority of Law*, 2nd ed. (Oxford: Oxford University Press, 2009).
- ¹¹ Religious accounts of conscience treat it this way.
- ¹² It is unclear whether conscience can be considered as prospective or whether it is simply retroactive.
- ¹³ The main difference between legal authority and conscience is that the former is the result of public deliberation, while the latter is the result of inner deliberation.
- ¹⁴ Disruptive strategies are very strong in the marketplace: think of Uber, Airbnb, or Deliveroo. Political agents like Trump use similar strategies to conquer the political sphere.
- ¹⁵ Pierce, *Conscience in the New Testament*, 99.
- ¹⁶ Immanuel Kant provides an account of this kind. See Allen Wood, “Kant on Conscience,” available at <https://web.stanford.edu/~allenw/webpapers/KantOnConscience.pdf>.
- ¹⁷ I made this argument elsewhere; see Lorenzo Zucca, “Is There a Right to Conscientious Objection?” in *The Conscience Wars*, ed. Mancini and Rosenfeld.
- ¹⁸ With the exception of Raz. See Raz, *The Authority of Law*, chap. 15.

Do Human Rights Have a Secular, Individualistic & Anti-Islamic Bias?

T. Jeremy Gunn

There is a widely shared belief, both within and outside the Muslim world, that Islamic law cannot be reconciled with the modern human rights regime that developed out of the 1948 Universal Declaration of Human Rights (UDHR). Many Muslims perceive that the purportedly individualistic, secular, and Western orientation of human rights is alien to Islamic values. Abdulaziz Sachedina and other scholars of Islam have argued that the underlying tenets of the UDHR and its progeny are simply incompatible with Islamic law. In reality, the problem is not an underlying conflict between human rights and Islam, but the mistaken assumption that the modern nation-state is the proper institution for interpreting and enforcing Islamic law.

In 1889, one of England's most revered and reviled orientalist, Rudyard Kipling, penned "The Ballad of East and West." It begins with the famous line: "Oh, East is East, and West is West, and never the twain shall meet." The ballad describes an encounter near the Khyber Pass between Kamal, an Afghan brigand, and a British soldier. These two opponents symbolize the seemingly unbridgeable rift between East and West, Muslim and Christian, and indigenous peoples and colonial powers. Kipling's expression has been invoked ever since to point to an intractable divide – cultural, psychological, and sociological – between Orient and Occident. Divides such as that suggested by Kipling have been a staple of modern thought, perhaps most notoriously toward the end of the twentieth century with the publication of Samuel Huntington's "clash of civilizations" thesis. Huntington argued that "the paramount axis of world politics will be the relations between 'the West and the Rest.'"¹ Many versions of this divide, including Huntington's, presume, like Kipling, a "Western" superiority.²

Following World War II, and sixty years after Kipling suggested a persistent divide between East and West, many in the international community began to insist that, to the contrary, there are universal values of human rights that transcend cultures, peoples, and civilizations. The first comprehensive articulation of this vision appeared in the 1948 Universal Declaration of Human Rights (UDHR).³ More broadly, the half-decade between 1945 and 1950 saw the adoption of a remarkable collection of human rights treaties, declarations, and activities that expressed a

common respect for rights of individual human beings and for the dignity of the individual.⁴ Yet despite the importance of other instruments issued during this half-decade, the ultimate expression of human rights as a common value for all mankind appeared in the UDHR. In the words of Mary Ann Glendon, former U.S. Ambassador to the Holy See, “the Declaration is the single most important reference point for cross-national discussions of how to order our future together on our increasingly conflict-ridden and interdependent planet.”⁵ Human rights law scholar Henry Steiner famously called the UDHR the “spiritual parent and inspiration” for later human rights documents.⁶ The UDHR “has inspired more than sixty human rights instruments and legally binding treaties, has been enshrined in the national legislation and constitutions of many newly independent states, has arguably obtained the status of customary international law, and remains one of the most cited human rights documents in the world today.”⁷ The promotion of the universality of human rights, as articulated in the UDHR, continued such that by 1993, it had become an article faith of the international community: “the universal nature of these rights and freedoms is beyond question.”⁸

However much the human rights community insists that the universality of human rights is “beyond question,” it nevertheless *has* been questioned from the outset. In the UDHR drafting debates, Saudi Arabia’s representative, Jamil Baroody, challenged the Western bias of the document:

the authors of the draft [UDHR] had, for the most part, taken into consideration only the standards recognized by western civilization and had ignored more ancient civilizations which were past the experimental stage. . . . It was not for the [drafting] Committee to proclaim the superiority of one civilization over all others or to establish uniform standards for all the countries in the world.⁹

Baroody’s assertion that the UDHR incorporates a Western orientation has remained an enduring criticism not only of the UDHR, but also of the entire international human rights regime. From the beginning, the UDHR has been challenged as having its ideological origins not in a common human quest, but as having emerged from the Enlightenment and European and American declarations of rights. The roots of the UDHR, according to Baroody and others, are found not in the traditions and religions of Asia, the Muslim world, or Africa. Rather, Westerners selected some of their own peculiar values, renamed them “universal,” and thereafter promoted them as if they were the common sentiments and values of mankind. These scholars argue that the underlying Western bias in human rights constitutes a “false universalism.”¹⁰

Baroody’s complaint in 1948 has indeed been a recurring theme in debates about human rights and the UDHR. In their later history of the UN and human rights, Roger Normand and Sarah Zaidi forthrightly assert that the UDHR is fundamentally Western in its orientation. “There is little room for debating the simple histori-

cal fact that the Universal Declaration was based largely on western philosophical models, legal traditions, and geopolitical imperatives.”¹¹ The standards reflected “a dominant western paradigm of individual rights; practical disputes were resolved quickly and expediently on the basis of U.S. power and, when necessary, the vote.”¹² Tariq Ramadan, who has claimed for himself a position as speaking both for Islamic values in the West and for the values of democracy in the modern world, has argued that the “Declaration of 1948 is indeed the prolongation of rationalist thought which has risen in the West since the Renaissance.”¹³ The philosophy of human rights, Ramadan insists, “is culturally marked and belongs to a vast elaboration of analytic thought where all the postulates are significant in the Western history of mentalities. It carries in itself stigmas of the tensions which marked its history.”¹⁴ It would be better, such analysis suggests, for rights charters such as the UDHR to be identified not as universal, but as Western, culturally specific, and not speaking for Muslims. The supposedly universal values of democracy, modernism, secularism, and individualism, it is argued, are neither universal nor neutral.

One of the most famous retorts to Western or universal values, in keeping with the lead of Baroody in 1948, was delivered by Singapore’s Lee Kuan Yew, who privileged instead “Asian values”:

Asian societies are unlike Western ones. The fundamental difference between Western concepts of society and government and East Asian concepts . . . is that Eastern societies believe that the individual exists in the context of his family. He is not pristine and separate. The family is part of the extended family, and then friends and the wider society.¹⁵

From its inception, the UDHR has thus been challenged as being overly individualistic in orientation (rather than oriented toward the family or group), rights-oriented (rather than emphasizing duties and responsibilities), and secular and thereby disconnected from religious and moral foundations. In the spirit of Baroody and Lee, critics argue that better values do not arise from the West’s individualism, egocentricity, rights of free expression, or the freedom of choice, but from the family as the fundamental unit of society, from adherence to traditional roles for men and women, and from respect for the traditions and values of the larger community.

Nevertheless, when arguing for the differences among Western and non-Western values, Baroody and Lee, like Kipling and Huntington, appear to accept the existence of an enduring and apparently unbridgeable cultural divide between the competing values of the West and the rest, particularly with regard to human rights.

Many governments and religious scholars in the Muslim world have sought to distinguish the values of Islam from those of the international human rights consensus. The Organization of Islamic Cooperation

(OIC), the world's second-largest intergovernmental organization after the UN, asserts its authority to speak on behalf of Islam, to "defend the universality of the Islamic religion," to "promote . . . lofty Islamic values," to teach Islamic values to children, and to "protect and defend the true image of Islam."¹⁶ The universality of which the OIC speaks is not that of human rights, but of Islam. While including as members all majority-Muslim states, most of which have ratified the major international human rights treaties, the OIC does not fully embrace international human rights standards but rather standards that purportedly emerge from the teachings of Islam. The OIC adopted and promulgated the Cairo Declaration on Human Rights in Islam (1990) and the Covenant on the Rights of the Child in Islam (2004), both of which articulate human rights standards based on Islamic law.¹⁷

The OIC has also played a prominent international role in pushing back against human rights norms that would otherwise allow criticism of religions by urging the adoption of international standards to prohibit the defamation of religion. Within OIC member states, the term "*sharia*" has been added (particularly after 1979) to constitutions and laws as the guiding norm for the laws of their countries. Also since 1979 (and largely not before), OIC member states have asserted reservations to human rights conventions based upon the Islamic law of *sharia*, particularly with regard to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child.¹⁸ The OIC is known for vigorously arguing in favor of the rights of Muslim minorities living in Europe, Myanmar, and other non-OIC states, while at the same time issuing no statements regarding the rights of religious minorities living *inside* its member states.

Similarly, the twenty-two-member League of Arab States (Arab League) – each of whose members also belongs to the OIC and is majority-Muslim – created its own human rights instruments and institutions (based in Cairo) that set it apart from the international human rights regime. While the term "Arab" denotes an ethnicity and "Muslim" references a religion, all majority-Arab countries are also majority-Muslim countries, though the opposite does not hold. Indeed, the preponderance of Muslim-majority countries is not Arab. It has long been recognized that the Muslim-majority Arab world ranks particularly poorly with respect to human rights. According to the 2009 *Arab Human Development Report*, written by Arab experts for the United Nations Development Programme Regional Bureau for Arab States, "Arab states seem content to ratify certain international human rights treaties, but do not go so far as to recognize the role of international mechanisms in making human rights effective."¹⁹ The 2009 report cites Syrian scholar Radwan Ziyadeh in support of its assertion that,

What constitutions legally decree is, in practice, lost under a mass of legal restrictions and exceptional measures, and through a lack of safeguards for these rights. The situa-

tion is the same with respect to international charters and conventions. All too often, it appears that Arab states have endorsed these conventions with the aim of improving their international image but without bringing national laws into line and without ratification having any tangible benefit for the Arab citizen.²⁰

The resistance to implementation of international human rights standards in parts of the Muslim and Arab worlds is perhaps most salient with the panoply of rights related to religion. In terms of the UDHR, the core of the resistance is centered on issues of the right to freedom of thought, conscience, and religion (Article 18), prohibition of discrimination on the basis of religion (Article 2), and the prohibition of discrimination against women (preamble, Article 2, Article 16). The same resistance to universal standards, already present in the UDHR, continued in subsequent elaborations of human rights, including the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.²¹ In brief, the religion-related rights on which the Arab and Muslim worlds are perceived as being out-of-step with universal standards include such issues as whether non-Muslims in Muslim-majority countries are able to practice their religion fully without state interference, whether Muslims who dissent from the official state religion are allowed to follow their own practices (including Sunnis in Shia-majority countries or Ahmadiyya in Sunni-majority countries), the right to proselytize, the right to change religion, and the right of women to inherit, marry, divorce, and obtain child custody on the same terms as Muslim men. The term *sharia* is frequently invoked, particularly since the 1980s, to justify a Muslim exception to a universal standard. The alarm initially raised by Baroody in 1948 in defense of the Muslim and Arab worlds in the context of the UDHR has continued to resonate in the Muslim and Arab worlds, even as the responses to the alarm have varied over time.

There are many possible routes one might take to evaluate whether there is a significant values divide between the Muslim and Arab worlds, on the one hand, and the modern human rights regime, on the other. This essay focuses on the origins of the debate in the drafting and adoption of the UDHR in 1948. I approach this by engaging in a dialogue with an important scholar, Abdulaziz Sachedina, who has argued that the UDHR is undermined by its failure to establish space for Islam.²² While insisting that he is a strong advocate of human rights, Sachedina argues that the UDHR, *the* founding document of the modern human rights movement, has serious shortcomings: namely, that it is overly individualistic and expresses an unduly secularist worldview. Regarding these two points, I argue that Sachedina has made significant errors of analysis and that

his assertions are not well supported by the facts. This essay, it should be noted, does not discuss at any length one important and controversial issue involving the Muslim world and the human rights regime: whether the modern human rights regime assumes that Muslims have the right to leave Islam by changing their religion or by abandoning religion altogether.²³

Arguably the single most persistent and recurring criticism of international human rights is its rootedness in Western-oriented individualism rather than in the larger community. This was the core of the criticism articulated by Lee Kuan Yew above. Lee went on to say that the “expansion of the right of the individual to behave or misbehave as he pleases has come at the expense of orderly society” and that “the idea of the inviolability of the individual has been turned into dogma.”²⁴ Abdulaziz Sachedina, who has attempted to articulate the widespread Muslim concerns about human rights, likewise found that its individualism is at the root of the problem.

The overriding emphasis on the autonomy of the individual with an independent moral standard that transcends religious and cultural differences to claim rights without considering the bonds of reciprocity runs contrary to the Islamic tradition’s emphasis on the community and relational aspects of human existence.²⁵

Criticisms of Western individualism arose frequently during the UDHR drafting debates. Emile Saint-Lot, the Haitian representative and fierce advocate at the UN for movements of national liberation, expressed his concern that Article 3 of the Human Rights Commission’s June 7, 1948, draft – “Everyone has the right to life, liberty and security of the person” – was “too greatly influenced by the individualism of Jean-Jacques Rousseau.”²⁶ Ironically, agreeing with the anti-colonialist Saint-Lot was the delegate from the Kingdom of Belgium, the colonial power that then ruled over the Belgian Congo. An aristocrat and former Belgian prime minister, Count Henry Carton de Wiart, also found that Article 3 was overly individualistic, and he later criticized another proposal by Mexico that he similarly found to contain “excessive individualism.”²⁷ The Australian delegate to the UN, Alan Watt, agreed that an article then under consideration (draft Article 15) did focus on rights of individuals but that ultimately it was difficult to avoid an individualistic approach.²⁸ Representative Alexander Bogomolov of the Soviet Union argued that insufficient attention had been paid to the human being as worker, and that the UDHR was “unduly individualistic and thus unrealistic.”²⁹ Guy Pérez Cisneros of pre-Castro Cuba believed that there was an insufficient emphasis on duties and too much emphasis on the individualistic side of man’s character.³⁰ Even though his proposed amendment was not accepted, he later, on behalf of Cuba, was an enthusiastic supporter of the UDHR on the day it was adopted: the declaration “would mark the advent of a world in which man, freed from fear and

poverty, could enjoy freedom of speech, religion and opinion.”³¹ Unlike Pérez Cisneros, Yugoslavia’s representative, Ljuba Radovanovic, was not able to overlook the individualistic nature of the UDHR and abstained when the vote was taken. Explaining the position of his country, Radovanovic explained that the “text before the Assembly was based on individualistic concepts which considered man as an isolated individual having rights only as an individual, independently of the social conditions in which he was living and of all the forces which acted upon his social status.”³²

Assertions of the individualistic nature of the draft UDHR in particular and the human rights regime in general have been broadly acknowledged, even by human rights advocates. Michael Ignatieff, historian and past leader of the Liberal Party of Canada, has argued that the “best way to face the cultural challenges to human rights coming from Asia, Islam, and Western postmodernism is to admit their truth: rights discourse is individualistic.”³³ Elsewhere, Ignatieff confirms that “rights language cannot be parsed or translated into a non-individualistic, communitarian framework. It presumes moral individualism and is nonsensical outside that assumption.”³⁴ Perhaps the most notable champion of the universality of human rights against cultural relativism has been political scientist Jack Donnelly:

Human rights are inherently “individualistic”; they are rights held by individuals in relation to, even against, the state and society. But while traditional cultures, both western and nonwestern, usually view persons primarily as parts of a family or community, rather than autonomous individuals, not all forms of nonindividualistic or antiindividualistic politics are based in traditional culture – even where that culture remains vital.³⁵

With such observations, it might be tempting simply to acknowledge the UDHR as overly emphasizing the individual, and thereby delegitimize the UDHR and even the entire human rights regime for being overly individualistic and insufficiently community oriented. But it may be worth considering the validity of such a criticism both generally and specifically with regard to the right of freedom of religion or belief as stated in Article 18 of the UDHR and the ICCPR.

There are four arguments that seem to undermine the criticism of the human rights regime as being overly Western and individualistic.

First, and most generally, the term “individualistic” and its cognates perhaps unfairly bear the pejorative connotations of selfishness, egotism, narcissism, and self-centeredness. Thus, we should ask what exactly were the delegates’ *specific* criticisms when they attached the pejorative term? Remarkably, little was said to explain exactly what the specific problem was. In fact, “individualistic” and its cognates were used in ways similar to the criticism of labeling a provision as “Western,” as if attaching such labels was sufficient in and of itself to taint the

proposed amendments or the UDHR itself. Indeed, it appears to this author that the label “individualistic” served less as an explanation of the underlying problem and more of a rhetorical device to divert attention from the inability to identify with specificity what exactly was the problem.

Second, the text of Article 18, as adopted, explicitly states that the right is one to be exercised “*either alone or in community with others and in public or private.*” The UDHR does not contemplate an exclusively individualistic approach, but one that may be fully integrated into an entire religious community. While it certainly is true that the UDHR differs from the “minority rights” approach of the interwar period, the text is not designed to protect solitary individuals separate from society. Rather, society consists of individual human beings who have rights both as individuals and as members of groups with whom they are associated. Moreover, despite the frequent criticisms of rights as being overly individualistic, this was not a criticism that was raised specifically with regard to Article 18 in the *travaux préparatoires*, the official and collected records of the drafting process.³⁶

Third, and relatedly, the right to freedom of religion or belief – like many other rights – should be understood principally as a right that individuals and communities have *against the state*. The text of Article 18 does not per se separate individuals from society but protects individuals and society against state encroachment.

Finally, we should draw into question the suggestion that “Asian values” and “Islamic values” are opposed to the “Western individualism” of the UDHR, including particularly its Article 18 guarantee of the right to freedom of thought, conscience, and religion. Lee Kuan Yew’s “Asian values” and “family values” supposedly transcend the individualism of the West. But is this a serious argument or a rhetorical ploy? If we consider the cases of the most revered figures of East and West, the stereotypical individualist West versus the family and group-oriented East cannot readily be sustained. The greatest spiritual figure Asia has produced, Siddhartha Gautama (the Buddha), abandoned his parents, wife, and child to seek his own spiritual enlightenment. In Lee’s limited way of thinking, the Buddha should be categorized not as Asian, but as a quintessential Western selfish individualist. Yet in abandoning his family, the Buddha acted in a way entirely consistent with other high religious figures in both East and West. As a twelve-year-old, Jesus of Nazareth abandoned his family to seek learning at the temple in Jerusalem, and reproved his mother for challenging his religious obligation to do so.³⁷ Francis of Assisi stripped himself in the public square and returned his garments to his father, a cloth merchant, and spent the remainder of his life away from his family. The Prophet Muhammad, who became an orphan at age six, repudiated the pressure from his own Quraysh clan, which insisted that he worship the idols of the tribe. Rather than remain with his kin in Mecca, he went into exile with his fellow believers.

Both the Christian Bible and the Quran would seem to agree on the point that whatever obligations one owes to one’s parents, the greater obligation is to God:

From now on five in one household will be divided, three against two and two against three; they will be divided: father against son and son against father, mother against daughter and daughter against mother.

—Luke 12:52–53³⁸

And We have enjoined man concerning his parents – his mother bore him, weakness upon weakness, and his weaning was two years – give thanks unto Me and unto thy parents. Unto Me is the journey’s end. But if they strive to make thee ascribe as a partner unto Me that of which thou hast no knowledge, then obey them not.

—Luqman, 31:14–15³⁹

Both Luke and the Quran insist that whatever filial obligations we owe to our parents and families, our higher individual obligation is to God. The Patriarch Abraham (Ibrahim in Islam), a revered figure in Judaism, Christianity, and Islam, was prepared to sacrifice his son when told to do so by God. In religion, if there is a conflict between God and family, whether in the East or West, the priority goes to God. Lee did not characterize the West; he caricatured it.

The words “secular” and “secularism,” invoked by Sachedina and others, are widely understood in the Muslim world to be terms of opprobrium. “Islam is believed to be all-encompassing and all-pervasive; ‘secularism’ is therefore considered by many to be a concept not only alien to, but also incompatible with Islam.”⁴⁰ The terms often bear the connotations of being anti-religious, anti-Islamic, atheist, agnostic, modern, Western, and materialistic. Yusuf al-Qaradawi, one of the best-known religious figures in the Sunni Muslim world, sees secularism as distinctly Western. “Since Islam is a comprehensive system of worship and legislation, the acceptance of secularism means abandonment of Islamic law, a denial of divine guidance, and a rejection of God’s injunctions. It is indeed a false claim.”⁴¹ For Sayyid Qutb, arguably the most influential Islamist since 1948, the “essence of that confrontation between the Muslim nation and its opponents remains fundamentally the same today: secularism, international Zionism and modern-day Crusaders.”⁴²

In his *Islam and the Challenge of Human Rights*, Sachedina chose the term “secular,” applied in its pejorative sense, to identify what he saw as a fatal flaw of the UDHR and to explain why Muslims are critical of it. The 1948 Declaration is repudiated not only by those whom he describes as “traditionalists,” but also by “educated Muslims” who are unable to grant “wholehearted acceptance of the culturally dominant secular morality of the West, which they believe undergirds the Declaration.”⁴³ According to Sachedina, the “ongoing Muslim criticisms of the Declaration as being prejudicially antireligious and politically hegemonic are founded upon rejection of a universal claim of secular morality.”⁴⁴ The “aggressive human

rights discourse,” which is pervasive among its advocates, “reduces faith commitments to the private domain and denies faith claims a legitimate voice in the public forum.” This “inevitably backfires with the Declaration’s outright rejection by Muslims as culturally insensitive to Muslim social values.”⁴⁵ Muslims “who read the highly politicized secularism of human rights language” see it as “nothing more than the imposition of Western values on their culture.”⁴⁶ Sachedina in fact repeatedly uses the word “impose” to characterize the actions of the “secular advocates of human rights” who, he alleges, seek to “impose . . . a human rights regime,”⁴⁷ favor the “imposition of a Western conception of individualism,”⁴⁸ applaud a “corrosive individualism . . . imposed from outside,”⁴⁹ and “impose an aggressive human rights discourse that reduces faith commitments to the private domain.”⁵⁰

Although scathing in such denunciations of secular human rights advocates, Sachedina largely does not identify them by name, nor does he offer specific examples to illustrate their bias against religion.⁵¹ By neither naming nor quantifying those whom he accuses, he leaves his readers wondering whether the supposed problem is broad-based and pervasive or if Sachedina is simply exaggerating the importance of a few cranky straw men to make his argument more appealing.

Two of the principal purposes of Sachedina’s book on the UDHR are to condemn its secular foundations and assumptions, and then to suggest the necessity of providing an alternative moral foundation for human rights to be accepted in the Muslim world. Although Sachedina makes an interesting argument about the parameters of an alternative moral order, a discussion of this alternative is beyond the scope of this essay, with one important practical exception. Rather than engaging with his philosophical argument, I would like to challenge several of his specific assertions about the UDHR.

In several portions of his text, Sachedina criticizes the UDHR drafting process and its results.⁵² He argues that there was insufficient and inadequate representation from Muslims who were serious about their religion. He notes that representatives from Lebanon and Saudi Arabia were in fact Orthodox Christians, and other nominally Muslim participants were largely secular.⁵³ “This lack of serious Muslim participation has continued to cast a long shadow of doubt over the cultural and political contours of the Declaration that reveal an indubitable secular-Western bias.”⁵⁴ Due to the fact that many of those involved in the drafting process were Christians and secular, this resulted in a Christian, secular, and enlightenment bias in the text. “The secular liberal thesis that liberty can survive only outside religion and through secularization of a religious tradition was founded upon historical experience of Christianity and, hence, had little resonance in Islam.”⁵⁵ Thus, he would have us believe, understanding the drafting process helps reveal the origins and nature of the secular and Christian biases in the text. “The drafting of the Declaration clearly shows that there were several key sources for the writing of the articles that are now enshrined in the document.”⁵⁶

Sachedina understands the importance of using primary sources when analyzing how texts are written and how they should be interpreted. “I have always emphasized [to my students] to be critical, and to demonstrate their points with evidence from the sources that are primary rather than secondary.”⁵⁷ Given his awareness of the importance of primary sources, and given his assertions about the drafting process of the UDHR, we could reasonably expect that he would base his characterizations of the UDHR and conclusions regarding the values of the diplomats who wrote it on a solid review of the drafting materials (the *travaux préparatoires*) available for the UDHR, as well as a meticulous analysis of the UDHR text itself prior to making such claims. Unfortunately, Sachedina cites no primary source materials from the *travaux préparatoires*, all of which are now available online (and as later collected in the three-thousand-page edited volumes prepared by William Schabas).⁵⁸ With one minor exception, the only source he cites referencing the drafting process is a decidedly secondary source: political philosopher Johannes Morsink’s *Universal Declaration of Human Rights*.⁵⁹

So what primary-source evidence is there to support Sachedina’s bald assertions regarding the “aggressive secularism” in the UDHR drafting process? In short, there is none. Other than a few brief references to state-constitution provisions that included the word “secular,” the term was used only two times of which I am aware in the thousands of available pages of the *travaux préparatoires*: once by the delegate from India who said that her country was a secular state and once by the representative from Byelorussia, who referred to the United Nations as being a secular organization.⁶⁰ Although there were many references throughout the drafting process to the Enlightenment, liberalism, Western values, Christianity, Buddhism, Islam, God, the Creator, capitalism, socialism, communism, Rousseau, and individualism, *not one delegate ever used the term “secularism” with the negative connotations on which Sachedina repeatedly insists that the UDHR is founded.* There are *no* primary sources from the *travaux préparatoires* that support Sachedina’s assertion that his version of secularism was advocated or even mentioned in the three years of debates preceding the adoption of the UDHR.⁶¹ Secularism, simply put, did not figure in the debates. Sachedina’s “aggressive secularism” is a fantasy that sounds more like Sayyid Qutb and Yusuf al-Qaradawi than anyone who actually participated in the debates.

If we set aside the rather serious problem that primary-source evidence does not support Sachedina’s conclusion that “aggressive secularism” was part of the drafting process, and similarly put aside the caricature of the UDHR as embodying aggressive secularism, the vital question remains: *exactly which provisions* of the UDHR as presently constituted infringe on Muslims’ rights of religion or belief?

In order to clarify the question being posed, we can illustrate it using a hypothetical human rights convention that includes an article allowing states to prohibit their people from going on the Hajj or from praying. Such an article would

clearly infringe on the right of Muslims to practice their religion and to fulfill their religious obligations. Or suppose another provision in the hypothetical convention that authorized states to require public officials to profess a belief in the Trinity. With such a provision, it is again easy to see how the rights of Muslims would be infringed by effectively excluding them from holding public office because of their religious beliefs. Going from this hypothetical convention with its offending provisions, we need now ask which provisions, if any, within the UDHR violate the freedom of religion or belief of a practicing Muslim? We are *not* asking whether Muslims should agree with all provisions of the UDHR, but only whether any provision infringes on their conscience or religious practices.

Although Sachedina does not answer this question as posed here, we can identify the typical objections to the UDHR that are invoked by Muslim defenders of Islam and to some extent by Sachedina as well. Whereas the UDHR would seem to require gender neutrality and to prohibit state promotion of Islam, many Muslim states enforce laws that presuppose that Islam treats genders differently and that endorse Islam as the religion of the state. Five of the most frequently invoked examples of Muslim-majority state practices that are inconsistent with the UDHR include:

1. Contrary to principles of gender equality in the UDHR preamble, Article 2, and Article 16, some Muslim-majority states prohibit Muslim women from marrying non-Muslim men;
2. Contrary to principles of gender equality in the UDHR preamble and Article 2, some Muslim-majority states operate laws that provide different distributions of inheritance that favor male over female children;
3. Contrary to principles of the UDHR preamble and Article 18, some Muslim-majority states prohibit non-Muslims from adopting Muslim children while not prohibiting Muslims from adopting non-Muslim children;
4. Contrary to principles of the UDHR preamble and Article 18, some Muslim-majority states prohibit Muslims from converting to another religion (or renouncing Islam) while allowing non-Muslims to convert to Islam; and
5. Contrary to principles of the UDHR preamble and Article 18, some Muslim-majority states require that the head of state be a Muslim.

We should acknowledge that these five examples, at least at first glance, do indeed suggest a sharp incompatibility between standards of the modern human rights regime and the practices of many Muslim-majority states. We also can admit that it is entirely unlikely in the foreseeable future that states wishing to apply Islamic law, as they interpret it, would renounce any of the first three practices, and some states would be unwilling to rethink any of the five. Nevertheless, when we look more carefully at these five examples, we find no incompatibilities be-

tween the values of the UDHR and Islamic law. Sachedina and others who identify an incompatibility are mistaken due to an unwarranted and entirely unexamined assumption that they bring to the table: that the nation-state in majority-Muslim countries is the proper institution to be entrusted with interpreting and enforcing Islamic law.

It is important to recognize in these five examples the unstated but implicit assumption that the modern nation-state is the appropriate authority to interpret and enforce Islamic law, and that international human rights standards should not be allowed to interfere with the practice of Islamic law by compelling states to adhere to human rights norms. When we consider this closely, it becomes clear that the objections to human rights universalism ultimately is not in support of Muslims' right to practice their religion in accordance with Islamic law, but in *support of the power of the modern nation-state to decide what Islamic law is and to compel observance of state interpretations of that law*. The significance and seriousness of this fundamental mistake by Sachedina and others cannot be overstated.

To illustrate the fundamental mistake, let us begin with a case drawn from the first of the examples above: marriage between a Muslim woman and a non-Muslim man. It is widely assumed throughout the Muslim world that a Muslim woman is strictly prohibited from marrying a non-Muslim man (although a Muslim man may marry a non-Muslim woman). Let us suppose the case of a devout Muslim woman living in a non-Muslim state or in any state that does not enforce Islamic law. Is there anything in the UDHR (or other human rights instrument) that interferes in any way with the religious obligation of this woman to marry only a Muslim man? Of course, there is not. Indeed, UDHR Article 16 explicitly protects her right to marry only a Muslim man if she so wishes. Faithful Muslims seeking to practice their religion are entirely free to observe this obligation without any constraint and the state *must not* compel them to marry someone against their wishes. The UDHR, in this first example, does not violate Islamic law or values.

Similarly, with regard to the second case on inheritance, there is nothing in the UDHR that interferes with Muslim families' ability to distribute inheritance to their children as they wish (provided that they make the decision prior to the time that the inheritance is to take effect). The fact that a *state* does not enforce Islamic law does not imply that the UDHR is *in conflict* with Islamic law. Similarly, in the unlikely event that a Muslim-majority state were suddenly to abolish its marriage and inheritance laws, this would in no way infringe on the religious practices of Muslims who wish to follow Islamic law.

Thus, the issue between the UDHR and Islamic law is not the ability of Muslims to practice their religion as they understand it; the issue is whether the state should be empowered, entrusted, or required to enforce its interpretation of Islamic law. Sachedina's implicit argument, though he seems not to recognize it, is not in support of people's ability to practice Islam, but for empowering the mod-

ern nation-state to be an enforcer of Islamic law. Sachedina and others notably offer no Quranic authority showing that the modern nation-state should be entrusted with such authority.

The issue is largely the same with the UDHR proclamation on the “freedom to change religion.” Sachedina and others recognize, correctly, that this is perhaps the most controversial and intractable perceived conflict between human rights and the practices of many Muslim-majority states. However, once again, the issue is not simply whether there is a religious prohibition on Muslims not to convert to another religion. Let us assume, for the sake of discussion, that Islamic law is entirely clear on this point and that conversion outside of Islam is prohibited. This is an entirely different question from whether the modern nation-state should be responsible for prohibiting, criminalizing, and punishing conversions. The UDHR does not force people to change their religion or to violate Islamic law; it provides only that it is not the role of the modern nation-state to enforce and punish such violations. Thus, it appears that the real issue for Muslim critics of the UDHR is not that it interferes with the ability of Muslims to practice their religion, but that *it interferes with their wish* (which has no basis in traditional Islamic law) *to enlist the modern state to compel compliance with religious law.* Indeed, we might be so bold as to argue that there is a Quranic injunction against the state, or any earthly power, from using force to coerce compliance with religion: “there is no compulsion in religion.”⁶²

Although such arguments are unlikely to convince Muslim-majority states to cease enforcing what they perceive to be Islamic law, the arguments reveal that the real issue of contention is not one of an ill-founded UDHR interfering with religious beliefs or practices of Muslims, but one of whether it should be the role of the modern nation-state to be the enforcer of Islamic law. To assume the latter requires deference to the regimes of states under the control of profane officials like Bashir al-Assad, Hosni Mubarak, Saddam Hussein, and their appointees as enforcers of God’s law. Even if these odious regimes were found to be particularly objectionable, we continue to be justified in asking *exactly which majority-Muslim states* are recognizable for the piety and religious knowledge of their leaders? Why, we should ask, do Sachedina and other skeptics of the UDHR defer to these profane rulers rather than the principles of the UDHR, which guarantees Muslims the right to manifest and practice their religion according to their own religious beliefs? Why such deference to the profane nation-state as the interpreter, judge, and enforcer of sacred Islamic values?

In addition to his premise that the UDHR exemplifies “aggressive secularism,” Sachedina argues that Muslims will accept a human rights instrument, such as the UDHR, only if it has a moral foundation compatible with Islam. In making such an assertion, Sachedina – like many others – fundamentally misunderstands the practical origins of human rights texts. The UDHR was not based on any underlying

ing moral or philosophical position, whether it be secularism, natural law, Christianity, or individualism. For better or worse, the texts of human rights instruments did not emerge from common understandings about underlying philosophical doctrines or moral worldviews, however appealing such ideas might be, but from the very practical if uninspiring fact that the texts were adopted by a majority vote in drafting sessions followed by states' signing or ratification of the instruments. Whereas scholars may subsequently propose philosophical arguments in favor of the human rights instruments (such as a natural rights argument in favor of the UDHR), the instruments themselves are derived by a compromise reached from competing viewpoints rather than a common ideological understanding. Not one delegate asserts anywhere in the *travaux préparatoires* that there was a common understanding of a philosophical root for the rights enumerated therein.

Sachedina, who does favor human rights generally, nevertheless criticizes the drafters of the UDHR for not having drafted a document compatible with Islamic values. For reasons stated above, I find that he is mistaken in this regard. But let us suppose that he is correct in that the UDHR is not compatible with Islamic values and that the UDHR could have been drafted in such a way as to both protect Islamic values (as Sachedina understands them) *and* gather international consensus in favor of human rights. Sachedina fails to explain exactly what that hypothetical text would include. He criticizes them for their failure, but never offers a solution.

When making his argument that an acceptable moral foundation needs to be laid for human rights, Sachedina had significant advantages unavailable to the UDHR drafters who met in New York, Geneva, and Paris between 1946 and 1948. To begin with, he had available for his inspection the entire *travaux préparatoires* before beginning his study as well as sixty years of scholarly commentary on the UDHR, the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and other human rights agreements, including the Cairo Declaration on Human Rights in Islam. He also had the leisure, unlike the delegates in the drafting sessions, to reflect at his own pace and with his own deadlines to develop his thoughts and ideas. Throughout his book, Sachedina repeatedly acknowledges the importance of “practical decisions,” “practical considerations,” and a “practical consensus” in the field of human rights.⁶³ He also understood that the task of the UDHR drafters was to find the “exact universal language” that would provide specific “ways of protecting humans from indiscriminate violence and oppression.”⁶⁴

Sachedina criticizes the UN delegates for their insufficient attention to the moral foundations of human rights, for their insufficient knowledge of Islamic thought, and for having inserted their own secular and Christian biases. Let us now turn Sachedina's own language upon himself and ask what is his own “practical” proposal for the “exact universal language” that would be acceptable both to the international community and to skeptical Muslims? How *specifically* should

Article 18 be amended? What change in language does he propose that would receive more votes? What additional article should be added? What text should be deleted to make the UDHR more acceptable? Unfortunately, Sachedina offers no answers to such questions.

This essay began by quoting the first line of Kipling's famous 1889 ballad and the typical interpretation that it elicits regarding an enduring divide between East and West. Yet such an interpretation, like others related to Kipling, may be short-sighted. The first full quatrain of the ballad points in a somewhat different direction:

Oh, East is East, and West is West, and never the twain shall meet,
Till Earth and Sky stand presently at God's great Judgment seat;
But there is neither East nor West, Border, nor Breed, nor Birth,
When two strong men stand face to face, tho' they come from the ends of the earth!

The lines following the famous opening immediately suggest two counter-examples to Kipling's supposed permanent divide. First, in the presence of an all-knowing God, distinctions between East and West evaporate. The fissure that appears enormous to human beings disappears in the eyes of the all-knowing. It also evaporates when two men face each other, eye to eye. The supposed differences between East and West are neither permanent nor intractable. They are misleading and superficial human constructs that dissolve when confronted by sufficient wisdom or ample courage.

The "individualistic West versus group-oriented East" is a caricature in both directions. Rhetoric stating that human rights are individualistic because they protect the rights of individuals ignores the fact that all human beings are individuals and all collectively are protected by their universal ambitions. Human rights related to religion in the UDHR are explicitly described as applying to human beings both individually and in community with others.

Islam is often identified, both by Muslims and non-Muslims, as being an impediment to the implementation of human rights. Yet as we examine the underlying issues more carefully, it becomes clearer that the real conflict is not Islam versus freedom of religion and human rights, but the role that many Muslims wish to assign to the *profane* state: to use its power to enforce Islamic law. The UDHR does not interfere with the ability of faithful Muslims to practice their religion; rather, it challenges the power of the nation-state to act as religious judge and enforcer of religious orthodoxy. Islamic law nowhere requires states to impose religious orthodoxy. Indeed, Muslims living in non-Muslim areas do *not* want non-Muslim states to enforce religious law. It is only in states that *profess* to be Islamic where the perceived conflict between human rights and Islam occurs. Although Muslims might imagine that there could be an ideal Muslim state that properly enforces

Islamic law, they need only look to the *actual political authorities in majority-Muslim states* to see that such people are not the religious models for which one would hope.

Muslims themselves should insist that profane states and profane leaders not be entrusted with interpreting and enforcing Islamic law. The threat to Islam comes not from human rights instruments that protect the rights of Muslims to follow their beliefs, but from states that wish to impose their agenda on religious believers.

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ENDNOTES

- ¹ Samuel Huntington, "The Clash of Civilizations," *Foreign Affairs* 72 (3) (1993): 48. This same phrase was incorporated in the title of Niall Ferguson, *Civilization: The West and the Rest* (London: Allen Lane, 2011). Ferguson describes Huntington as having provided "the most influential recent definition of Western civilization"; *ibid.*, 15. Ferguson repeatedly refers to Huntington's 1993 article, but makes no mention of Stuart Hall's important but less famous chapter "The West and the Rest," which appeared the year before Huntington's article. Stuart Hall, "The West and the Rest: Discourse and Power," in *Formations of Modernity*, ed. Stuart Hall and Bram Gieben (Cambridge: Polity Press, 1992), 275.
- ² Henceforth, the author will not place the terms "East" and "West" in quotation marks. As will be made clear in this essay, the author rejects the usefulness of such terms to explain the very real ideological and values differences among people, and wishes to avoid redundancy of qualifiers such as "so-called East" or the proliferation of ungainly quotation marks around each use of the terms. Readers' indulgence is hereby requested to assume that the author never wishes to reify the terms or to use them as meaningful categories.
- ³ Universal Declaration of Human Rights, G.A. Res. 217A(III), Official Records of the Third Session of the General Assembly, Part I, U.N. Doc. A/810 (1948), 71. It should be noted that the word "universal" was not officially part of the draft Declaration's title until November 30, 1948.
- ⁴ The half-decade between 1945–1950 saw the emergence of human rights as a founding principle of the UN Charter (1945), the Tokyo and Nuremberg trials that held individuals internationally responsible for killing, the adoption of the Genocide Conven-

tion (1948), the Geneva Conventions of 1949, and the Universal Declaration of Human Rights (1948). Two regional human rights instruments similarly were promoted during this remarkable half-decade: the European Convention on Human Rights (1950) and the American Declaration of the Rights and Duties of Man (1948). The American Declaration is widely cited as the “Bogotá declaration,” since it was referenced throughout the Universal Declaration of Human Rights drafting sessions. It was distributed to UN bodies as American Declaration on the Rights and Duties of Man, as Adopted By the 9th International Conference of American States, ECOSOC E/CN.4/122 (June 10, 1948).

- ⁵ Mary Ann Glendon, *A World Made New* (New York: Random House, 2001), xvi–xvii.
- ⁶ Henry Steiner, “Political Participation as a Human Right,” *Harvard Human Rights Yearbook* 1 (1988): 79.
- ⁷ Grace Y. Kao, *Grounding Human Rights in a Pluralist World* (Washington, D.C.: Georgetown University Press, 2011), 173.
- ⁸ This according to the UN’s World Conference on Human Rights as articulated in the Vienna Declaration and Programme of Action, June 25, 1993, <https://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf>.
- ⁹ Third Committee of the United Nations General Assembly, A/C.3/SR.125 (November 9, 1948), 370, <https://undocs.org/A/C.3/SR.125>. For the role of the Third Committee as well as discussion of Baroody, see the following endnote.
- ¹⁰ See Richard Falk, *Human Rights Horizons* (New York: Routledge, 2000), 148–162. For other critics of undue or biased Western values having been insinuated under the guise of “universality,” see Michael Jacobsen and Ole Bruun, eds., *Human Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia* (London: Curzon Press, 2003), including Edward Friedman: “The ‘Western’ discourse which makes ‘individualism’ the base of democracy misunderstands the history of political freedom and impedes progress in human rights” (26); Maria Serena I. Diokno: “First, the international human rights regime is largely the product of Western thought and tradition that do not apply to Asian peoples and cultures, which have different, home-grown values of their own. Among these Asian values are the greater importance given to the community than the individual and the desire for harmony and order, in contrast to the West’s individualism and ‘exuberant’ freedom that threatens to rip Western social fabric apart” (74); Jon O. Hall-dorsson: Indonesian values “can be summarized for the moment as an organic notion of state and society; the traditional family as a model for society; respect for hierarchies; communitarianism over individualism; consensus in place of contest; and obligations over rights” (111); Hugo Stokke: “More generally, whereas the individualist West puts the individual over society, the communitarian East puts society (being government at the macro-level and the family at the micro-level) over the individual” (139); and Colm Campbell and Avril McDonald: “It is difficult to identify precisely the differentiating core of what are presented as Asian values, but insofar as it is possible to do so, it seems to have to do with notions of connectedness which are to be contrasted with Western individualism” (265). See also Leena Avonius and Damien Kingsbury, eds., *Human Rights in Asia: A Reassessment of the Asian Values Debate* (New York: Palgrave Macmillan, 2008); and Winnifred Fallers Sullivan, Elizabeth Shakman Hurd, Saba Mahmood, and Peter G. Danchin, eds., *Politics of Religious Freedom* (Chicago: University of Chicago Press, 2015).
- ¹¹ Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Bloomington: Indiana University Press, 2008), 195.

¹² Ibid., 177.

¹³ Tariq Ramadan, *Islam, the West, and the Challenges of Modernity* (Markfield, United Kingdom: The Islamic Foundation, 2001), 130 n.36.

¹⁴ Ibid., 99.

¹⁵ Fareed Zakaria, "Culture Is Destiny: A Conversation with Lee Kuan Yew," *Foreign Affairs* 73 (2) (1994): 113.

¹⁶ Charter of the Organisation of Islamic Cooperation (2008), <http://ww1.oic-oci.org/english/charter/OIC%20Charter-new-en.pdf>. Although the foundations for what was to become the OIC were laid in Rabat, Morocco, in 1969, the organization itself did not emerge until somewhat later. The OIC was originally named the Organization of the Islamic Conference. For a discussion of the mix of religion and politics in the OIC, see T. Jeremy Gunn and Alvaro Lagresa, "The Organisation of Islamic Cooperation: Universal Human Rights, Islamic Values, or *Raisons d'État*?" *Human Rights and International Legal Discourse* 10 (2) (2016): 248–274.

¹⁷ The Organization of the Islamic Conference, The Cairo Declaration on Human Rights in Islam, August 5, 1990, https://www.oic-iphrc.org/en/data/docs/legal_instruments/OIC_HRRIT/571230.pdf; and Covenant on the Rights of the Child in Islam, 2004, <http://ww1.oic-oci.org/english/convention/Rights%20of%20the%20Child%20In%20Islam%20E.pdf>.

¹⁸ Curiously, *sharia* was not introduced as a basis for a reservation to the International Covenant on Civil and Political Rights. Although the reasons for this go beyond the confines of this essay, some hypothesize that the term began to be invoked largely (though not exclusively) during the 1980s and after as a response to political events in the world.

¹⁹ United Nations Development Programme, *Arab Human Development Report 2009: Challenges to Human Security in the Arab Region* (New York: United Nations Development Programme, 2009), 57, https://www.undp.org/content/undp/en/home/librarypage/hdr/arab_human_developmentreport2009.html.

²⁰ Ibid., 59.

²¹ Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Proclaimed by General Assembly Resolution 36/55 of November 25, 1981, <https://www.ohchr.org/Documents/ProfessionalInterest/religion.pdf>.

²² Abdulaziz Sachedina, *Islam and the Challenge of Human Rights* (Oxford: Oxford University Press, 2009), 11.

²³ It should be noted here that perhaps the most controversial and poignant issue related to the relationship between Islam, religion, and the modern human rights movements is the contested right to change one's religion, which was explicitly allowed in the 1948 UDHR but was omitted, under pressure from Muslim and Arab states, from the 1966 ICCPR. This very important issue is omitted here because unpacking its complexity would simply require more space than is possible in this volume. The author is preparing a separate analysis of this issue to be published later. In short, while the issue of the right to change one's religion clearly arose in 1948 through Saudi Arabia's Baroudy and other representatives of Muslim-majority countries, the argument advanced publicly was less the right (or not) to change one's religion and more whether the UDHR could be seen as authorizing or promoting colonial-style missionary activities in lands seeking to remove their colonial legacy.

- ²⁴ Zakaria, “Culture Is Destiny,” 111, 112.
- ²⁵ Sachedina, *Islam and the Challenge of Human Rights*, 7.
- ²⁶ Third Committee of the United Nations General Assembly, A/C.3/SR.105 (October 18, 1948), 172. Saint-Lot’s referencing Rousseau in this regard seems misplaced. The issue here, however, is not whether the diplomat accurately characterized Rousseau’s thought, but that Saint-Lot found the UDHR to be overly individualistic and cited intellectual authority, however misplaced, to underscore his point.
- ²⁷ Third Committee of the United Nations General Assembly, A/C.3/SR.105 (October 18, 1948), 174.
- ²⁸ Third Committee of the United Nations General Assembly, A/C.3/SR.1269 (November 8, 1948), 384.
- ²⁹ Third Committee of the United Nations General Assembly, A/C.3/SR.178 (December 6, 1948), 876.
- ³⁰ Third Committee of the United Nations General Assembly, A/C.3/SR.155 (November 24, 1948), 665.
- ³¹ Plenary of the United Nations General Assembly, A/PV.181 (December 10, 1948), 877.
- ³² Plenary, A/PV.183 (December 10, 1948), 914, <https://undocs.org/A/PV.181>.
- ³³ Michael Ignatieff, “The Attack on Human Rights,” *Foreign Affairs* 80 (6) (2001): 113. See also Michael Ignatieff, “Human Rights as Politics,” in *Tanner Lectures on Human Values*, ed. Grethe Peterson (Salt Lake City: University of Utah Press, 2001), 335.
- ³⁴ Ignatieff, “Human Rights as Politics,” 329.
- ³⁵ Jack Donnelly, “Cultural Relativism and Universal Human Rights,” *Human Rights Quarterly* 6 (4) (1984): 411.
- ³⁶ For a further reference to the *Travaux Préparatoires*, see the text at note 58 below.
- ³⁷ Lk. 2:48-49.
- ³⁸ *The New Oxford Annotated Bible* (New Rev. St. Ed.), ed. Michael D. Coogan, fully rev. 4th ed. (Oxford: Oxford University Press, 1989).
- ³⁹ *The Study Quran*, ed. Seyyed Hossein Nasr (New York: HarperOne, 2015).
- ⁴⁰ Nazih N. Ayubi, *Political Islam Religion and Politics in the Arab World* (London: Routledge, 1991), 39; “In the Islamic memory the concept of secularism can be related only to periods of colonial hegemony, or, alternatively, to national attempts at experimenting with various Western ‘developmental formulas’ (such as capitalism, socialism, etc.) that appear not to have worked.” See also Madawi Al-Rasheed, *A History of Saudi Arabia*, 2nd ed. (Cambridge: Cambridge University Press, 2010), 164, 166; Mansoor Jassem Alshamsi, *Islam and Political Reform in Saudi Arabia: The Quest for Political Change and Reform* (New York: Routledge, 2011), esp. 11, 59, 67–70, 90, 107 (referring to a proposal to “ban the circulation of any publication engaging in propagation of ideas on unbelief, secularism, nudity, moral corruption or pornography”); Alaa Al-Din Arafat, *Egypt in Crisis: The Fall of Islamism and Prospects of Democratization* (Cham, Switzerland: Palgrave Macmillan, 2018), esp. 18, 42, 73, 134, 155; Shaul Bartal, *Jihad in Palestine: Political Islam and the Israeli – Palestinian Conflict* (London: Routledge, 2016), 130, 138, 188, 195; Richard Bonney, *Jihad from Qur’an to Bin Laden* (Houndsmill, United Kingdom: Palgrave, 2004), 365–366; and John L. Esposito, *Rethinking Islam and Secularism* (University Park, Pa.: Association of Re-

- ligion Data Archives, n.d.), 5, <http://www.thearda.com/rrh/papers/guidingpapers/esposito.pdf> (“Many Muslims, in particular Islamists, cast secularism as a completely foreign doctrine imposed on the Islamic world by colonial powers”).
- ⁴¹ Yusuf al-Qaradawi, *Islamic Awakening: Between Rejection and Extremism*, 2nd ed. (London: International Institute of Islamic Thought, 1991), 76. See also 36, 43, 72–76, 81.
- ⁴² Sayyid Qutb, *In the Shade of the Quran*, vol. 2, 7–8 (London: MWH, 1979). “Throughout his career as an Islamist, [Qutb] believed that the Muslims’ adoption of secularism and materialism had sapped the source of their historical strength.” John Calvert, *Sayyid Qutb and the Origins of Radical Islamism* (Oxford: Oxford University Press, 2103), 268.
- ⁴³ Sachedina, *Islam and the Challenge of Human Rights*, 190.
- ⁴⁴ *Ibid.*, 9.
- ⁴⁵ *Ibid.*, 191.
- ⁴⁶ *Ibid.*, 212 n.20.
- ⁴⁷ *Ibid.*, 11.
- ⁴⁸ *Ibid.*, 16.
- ⁴⁹ *Ibid.*, 227 n.36.
- ⁵⁰ *Ibid.*, 191. See also *ibid.*, 29 (“secularist advocates” of the UDHR typically are antireligious and antisacred); 30 (“there is a liberal-secular hold” over human rights instruments); and 34 (“In general, secular human rights activists are biased against religion”); as well as 57, 58, 63, 69, 87, 197–198.
- ⁵¹ Perhaps three of his targets may be Michael Ignatieff (*ibid.*, 11–16), John Rawls (*ibid.*, 51, 149, 157), and Richard Rorty (*ibid.*, 210 n.8), though he quotes none of them to illustrate what he attributes to the secularists.
- ⁵² *Ibid.*, 8–11, 16, 30, 157.
- ⁵³ *Ibid.*, 10–11.
- ⁵⁴ *Ibid.*, 11.
- ⁵⁵ *Ibid.*, 38. See also *ibid.*, 9–10, 16.
- ⁵⁶ *Ibid.*, 12.
- ⁵⁷ Maydan Editors, “An Interview with Abdulaziz Sachedina on His Life and Scholarship,” *Maydan*, September 13, 2017, <https://www.themaydan.com/2017/09/interview-abdulaziz-sachedina-life-scholarship/>.
- ⁵⁸ William A. Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires*, vols. 1–2 (Cambridge: Cambridge University Press, 2013). Copies of the original documents from the drafting process are available in PDF format at the UN’s Dag Hammarskjöld Library, <http://research.un.org/en/undhr>.
- ⁵⁹ Johannes Morsink, *Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999). Sachedina makes one footnote reference to the 1947–1948 UNESCO symposium study, which arguably should be considered part of the *travaux préparatoires*, although it was not included in Schabas’s published version. Sachedina dismisses its “contrived assessment of world history.” He does not mention, however, that it directly considers and rejects the idea that human rights charters must have a moral foundation. He also does not mention that it, too,

discussed possible roots of human rights in liberalism, religion, the Enlightenment, and other philosophical beliefs, but that it also says *nothing* about secularism generally, and certainly contains no discussion of “aggressive secularism” lurking behind the UDHR. Sachedina, *Islam and the Challenge of Human Rights*, 223 n.1.

⁶⁰ Third Committee of the United Nations General Assembly, A/C.3/SR.165 (November 30, 1948), 764, 765. The only two references coincidentally were made the same day.

⁶¹ One of the problems, as suggested above, is that Sachedina provided no nuanced or rigorous definition of secularism, preferring instead to use the term in the highly pejorative sense documented above. Regardless, he offers no primary sources whatsoever supporting his or any other understanding of secularism.

⁶² Quran, Al-Baqarah, 2 :256.

⁶³ For his recognition of the importance of practicality in the discussion about human rights, see *ibid.* 36, 37, 66, 83 (practical consensus), 108, 109 (practical ethical decisions), 126, 131, 177–178, 193.

⁶⁴ *Ibid.*, 8.

Judaism, Pluralism & Public Reason

Jonathan A. Jacobs

Central values of Judaism and the historical experience of Jews are sources of strong Jewish support for democracy, especially in the United States, where Jews did not have to wait for citizenship and rights to be conferred on them – and possibly withdrawn. Judaism is strongly committed to the political order in the United States and to the pluralistic, dynamic civil society it helps make possible. Jews have the freedoms that others have, and those freedoms resonate with fundamental Jewish values in ways that matter even to nonpracticing Jews. Moreover, there are reasons to regard the Constitution’s nonestablishment neutrality as comparing very favorably with a notion of public reason as a political approach to the question of state and church relations. Neutrality does not impose upon or require bracketing of individuals’ constitutive commitments and their conceptions of what matters most integrally to them. Public reason is vulnerable to that troubling possibility.

Jews’ commitment to democracy is strong, especially in the United States. From a Jewish perspective, the state neutrality toward religion expressed in the U.S. Constitution compares favorably to conceptions of public reason in addressing questions about religion in liberal democracy. One of the chief reasons for this has to do with the ways Jewish identity is important to both religious and nonreligious Jews and how public reason can be problematic for that identity. Because of how state neutrality relates to civil society, it enables people to acquire habits and attitudes of toleration and noninterference with others in ways that are perhaps more efficacious than (widespread sociopolitical) employment of a standard of public reason.

Notions of citizens of a democracy as “free and equal” and meriting respect on the basis of the worth and dignity of all human beings come quite naturally to Judaism. In some key respects, such notions have their origin in Judaism. Biblical conceptions of the fellowship of humankind, the worth of the individual, the political imperative of “justice, justice you shall pursue,” and the moral obligation to care for the widow, the orphan, the stranger, and the poor are anchored in Jewish sources.¹ In addition, much of the early modern theorizing about the liberal state, especially the arguments of numerous English and Dutch theorists, was shaped in large part by the ways they regarded the Hebrew Bible as a source of political ideas.

Milton, Harrington, Selden, Grotius, Cunaeus, and other English and Dutch Protestant thinkers – some of them monarchists, some republicans – regarded reading the Hebrew Bible as a way of connecting directly with the word of God without corrupting intermediaries.² They looked to the Hebrew Bible as an authoritative source concerning notions of the rule of law, of people being made a nation by the rule of law, of the critique of empire, and of a religious authority having control over political authority. In addition, many of the early modern Christian Hebraists regarded the Noahide Laws, with their textual basis in Genesis 9, as a model of natural law, and the rabbinic tradition has long regarded the Noahide Laws as applying universally to all human beings (the children of Noah), not only the Jewish people. Those laws are as follows: It is forbidden to deny God. It is forbidden to blaspheme God. Murder, incest, adultery, homosexual relationships, and stealing are prohibited. Eating a part of a live animal is prohibited. Finally, courts and a legal system must be established. Actually, there is little explicit tradition of natural law theorizing in Judaism, and from antiquity until Joseph Albo (1380 – 1444), there was no discussion of it by Jewish thinkers. In recent decades, numerous scholars have argued that natural law is implicit in Judaism or that Jewish law contains resonances of natural law. Whatever our interpretation of the natural law issue, it is clear that scripture commands each Jew to love the stranger as oneself, that there is to be one law for the stranger and the Israelite alike, and that charity in the form of food and clothing should be offered to those in need.³ Moral notions such as these shaped some of the early modern thinking about universal rights and obligations to all people.

The period of fascination with Hebraic sources was impactful but short, lasting roughly from 1500 to 1650. Enlightenment views of Jewish sources generally were much less generous and much less interested in Judaism, often regarding it as a form of primitive religion. Religious conceptions had a much smaller role in eighteenth-century political thought, and in some parts of Europe, such as France, there was fierce anti-clericalism. Still, several among the American founders were familiar with many of the Hebraists' works and were influenced by them.

In more recent history, the United States has not had the legacy of virulent anti-Semitism found in Europe, and the nonestablishment clause of the U.S. Constitution has, from the founding of the United States, protected against a state religion or religious favoritism. Throughout American history, Christianity in various forms (numerous Protestant denominations, Catholicism, and smaller numbers of Orthodox Christians) have constituted the majority religion of America. The overall culture of the United States has been shaped and influenced by Christianity in numerous ways, though the Constitution has been a bulwark against unchecked religious interests and influences shaping education and other aspects of civil society. While some state constitutions encouraged religion and morality,

and some “required oaths of office that only Christians could honestly take,” the experiences of Jews in the United States, right from the founding of the nation, have differed from Jews’ experiences elsewhere.⁴ In many European countries, Jews were not even granted citizenship until the modern era, and then in the twentieth century, their rights were severely curtailed again.

In some respects, their experience in Europe helped to prepare Jews for the form of liberal democracy found in the United States. Prior to the Enlightenment and a key period of Jewish emancipation in Europe between the eighteenth and twentieth centuries, there had been several centuries of Jewish self-rule: quasi-democratic government under Christian or Muslim political authority. While lacking ruling political authority, Jews often had their own courts, and the most common form of Jewish political association was the *kehilla*, a council or group from the community exercising governing functions for the public good. As Yiddish literary scholar Ruth Wisse has argued, “unable to rely on coercive power, Jews had been forced to compete at a severe disadvantage. Like athletes that train with weights, Jews were more than ready for the competition once their handicaps were lifted.”⁵ This occurred in France, England, the Netherlands, Austria, and Hungary in the eighteenth and nineteenth centuries, though full citizenship was not available to Jews in Germany until after World War I. Being a minority, and typically subject to various exclusions, Jews had lengthy practice with certain forms of self-government and with trying to protect their interests and promote their welfare without antagonizing non-Jewish majorities.

While those handicaps were lifted, emancipation and integration remained fraught in many parts of Europe. In Germany, widely popular anti-Semitism developed rapidly, and *The Protocols of the Elders of Zion*, one of the most infamous and enduring anti-Semitic works, was first published in Russia in 1905. The removal of official, legal handicaps did not mean that there would not be vicious populist anti-Semitism. In some respects, emancipation “freed” Jew-haters in those societies to indulge in all sorts of popular hatred, humiliation, and caricature of Jews in the press, in theater, and in politics, even if the state did not officially enforce anti-Semitic measures. Very swiftly, the notion that “Jews were unworthy of the legal and social position conferred upon them” became widespread and powerful.⁶ Thus, there were important respects in which the liberal and slowly democratizing European states still did not regard Jews as full-fledged members and participants, even once they had citizenship. In “On the Jewish Question,” Marx maintained that the “emancipation of mankind from *Judaism*” depended on “the emancipation of the Jews from *Judaism*.”⁷ In Europe, the so-called “Jewish question” remained open, whether or not Jews were permitted to address it. A century later, the answer came in the form of a program of extermination. That program was broadly popular across much of Europe even if extermination of the Jewish people was not an official commitment of nations the Nazis invaded. While there

are many episodes of non-Jews helping and rescuing Jews, in Ukraine, Latvia, Romania, Hungary, and Poland, for example, local populations often participated in the expulsions, expropriations, and mass murder.

Jews have regarded the United States with special affection, in part, because their participation in civil society did not have to wait upon others conferring rights on them or removing disabilities from them. Jews have experienced anti-Semitism in the United States, especially in parts of the Midwest and South, but generally it did not take the more menacing forms it took in Europe. Jews had a degree of confidence in the ability of political and legal institutions in the United States to address issues of exclusion and to protect against a majority religion taking a state-endorsed role. As scholar of Islam Hillel Fradkin has observed, “Given the liabilities of their premodern circumstances as a disenfranchised and much persecuted minority, it was natural for Jews to see modern democracy as a great blessing that promised not only legal and physical security but dignity as well.”⁸ In the increasingly open and competitive circumstances of American life, as quotas and impediments were eliminated from universities (both regarding admission and employment), professions, civic organizations, and other institutions, Jews overall became politically active and prospered.

Many American Jews continued to feel some trepidation about arousing anti-Semitic sentiment, and even though Jews were not apprehensive about asserting their rights, “profound disagreements existed within the still nascent Jewish leadership over how best to gain their objectives without provoking an anti-Semitic response from the dominant Christian culture.”⁹ Regarding the issue of sectarian religion in public schools, the Anti-Defamation League (ADL) maintained that

the most effective strategy was to work through community relations channels – alerting school boards to religious practices offensive to Jews, educating school principals on the cultural and religious traditions of Judaism and encouraging schools to include Jewish holidays in their seasonal celebrations.¹⁰

At the same time, while the ADL, for example, had “begun with the elemental purpose of giving Jews a public voice in the fight against defamation, the ADL emerged after World War II as a fully grown and sophisticated political interest group determined to represent the interests of its constituents in American public and private life.”¹¹

Overall, the diversity of the Jewish groups that came to America – that is, ethnic diversity, economic diversity, diversity in religious practices, and so forth – resulted in a pluralism of Jewish attitudes and organizations to protect and promote Jewish interests, sharing a commitment to democracy. Many Jews felt that Jews would be best served by the elimination of discrimination against minorities, whoever they are.

One way to characterize the uniqueness of the American experience for Jews is that in the United States, the basic political-legal order did not need to be *revised* in order for Jews to be citizens and to have the rights that others have. Also, civil society in the United States was pluralistic from the start. Pluralism was not a latter-day, unfamiliar development. Granted, free society was basically white and Christian: slavery was not abolished until well into the second half of the nineteenth century, and there were diverse ways in which exclusions, quotas, and other impediments to participation and inclusion limited Jewish participation in civil society (including universities, professions, housing, fraternal organizations, and so on) for many decades. But the inclusion of Jews did not come about after a period of official exclusion from citizenship.

A key reason for the distinctiveness of the American experience concerns the relation between its liberal democratic constitutional order and its dynamic, pluralistic civil society. One of the chief points of the present discussion is that the relation of mutual reinforcement between the political-legal order and civil society in the United States has been crucial to the experience of Jews in U.S. liberal democracy.

From the Jewish perspective, the political culture of the United States at its founding contrasted in fundamental ways with the political cultures of European nations. The constitutional order in the United States is *liberal* in recognizing extensive individual liberties and rights as fundamental elements of the political-legal order. Also, all Americans are entitled to equal protection of the law and equal status under the rule of law. It is *democratic* in having multiple modes of popular participation in the political process: from voting, running for office, and campaigning, to forming interest groups to influence legislation, expressing views in the media, and so forth. Constitutional amendments ended slavery and guaranteed fundamental rights for new groups of citizens, rights that were later more explicitly upheld at the state level. In 1920, through the Nineteenth Amendment, women achieved suffrage, and while non-white women were still subject to the same de facto discrimination and disenfranchisement as non-white men, the political culture in the United States was becoming more democratic and the civil society more inclusive.

That kind of political order sustains a dynamic, pluralistic civil society, by which I mean those spheres of action, interaction, and association in which people participate in largely voluntarily ways. This includes people's occupations, buying and selling goods and services, education, religious life, culture, leisure, professional organizations, groups formed around all manner of interests, and so forth. When individuals and groups feel that they are able to pursue their aims and interests and enjoy extensive freedoms, *participation in civil society* can be an important *source of support for the political-legal order*. Jews have valued very highly that relation of mutual support and the framework it reflects. Commitment to the

legal institutions and norms making civil society possible can be motivated by appreciation of the freedoms exercised in participation in civil society. The relevant sort of civility at issue here is not just a question of manners, but includes dispositions of trust, trustworthiness, willingness to compromise, honesty, respect for others, and concern for the dignity of others. Those are key features, making possible the countless interactions between people, who are often strangers to each other but interact – as agents – according to norms they implicitly acknowledge. The diminished civility of society can result in weakened support for the liberal democratic political order. In conditions of diminished civility, respect for those values and principles might appear to be unavailing, ineffective, or in some ways optional. (To an extent, the current situation in the United States, with its polarized politics and open expressions of distrust, shows evidence of this.)

That relation between the constitutional order and the character of civil society has been especially important to Jews in America.¹² They have valued their rights and liberties as citizens, and they have wanted to be participants in the many aspects of civil society while, at times, also feeling the need to be somewhat circumspect, concerned to avoid anti-Jewish backlash. In Europe, many Jews (among those who did not conclude that the only viable future was a Jewish national homeland) were politically active on the left as social democrats, socialists, or communists. The left seemed the only tenable alternative to the forces of reaction and sometimes vicious, widely popular anti-Semitism. In the United States, liberal democracy was not, as it were, a transplant, grafted on to what was a significantly different political and national culture. Liberal democracy in Europe has a very mixed and uneven record of success. For most of its history, Europe has had few stable, enduring liberal democratic states, and the character of many European societies developed in quite other conditions. The character of a society and the prevailing attitudes and perspectives do not change overnight (or maybe even over a generation) just because a new legal order has been implemented. In many parts of Europe, the relation between liberal democracy and genuinely civil society has been fragile.

The relation between the liberal democratic political order and civil society in the United States has been in some respects more “organic” than in much of Europe and other parts of the world. Jews could participate in civil society with considerable freedom in the United States in large measure because the state has been neutral regarding religion since its founding. The United States really did have a founding constitutional moment, establishing a republic if not quite a liberal democracy at the start, creating a political order meant to enable and preserve forms of civil society that were already developing. And as noted above, Jews had prior experience with forms of basically democratic self-rule and as a minority group needing to protect its interests. However, by the late-nineteenth century and in the twentieth century, anti-Semitism in Europe often characterized Jews’ commitment to liberal democracy as part of a diabolical plan to weaken the majority

(ethno-national/religious) culture. “Every humane value that Jews claimed as an attribute of their moral achievement is interpreted as a secret means to achieve world domination, and every aspect of Jewish accommodation is construed as a stratagem of conquest.”¹³ Jews’ improved political status was not also accompanied by civil society welcoming their participation as legitimate or natural.

In the United States, Jews have been vocal proponents of democracy and the basic political order. Their main concerns have not been whether they can be free to practice their religion, but the extent to which they can participate in civil society on equal terms with others.

During the first half of the twentieth century, many Jews were strongly committed to assimilation. They wanted to participate in American civic culture and distance themselves from much of what they regarded as a more insular, more tradition-bound, and socially limiting form of life in “the old country.” In a sense, Jewish commitment to church-state separation and to limiting the role of religion in public schools seems to have been motivated by fears of populist oppression of Jewish culture and identity. The separation was a way to keep whatever faith happened to be the majority from enlarging the presence and role of its religion in public education. At the same time, because religious identity was very important to many Jews, even if religious worship and knowledge of sacred texts were not, the neutrality of the state toward religion was a way of preserving Jewish cultural identity, in contrast to Jewish children growing up thinking that being Christian is “normal.” Many Jews in contemporary American society have a strong sense of Jewish identity, though they do not practice the religion. Still, it is important to them to be able to participate in civil society as Jews. As Hillel Fradkin has noted, “Perhaps most Jews today, including many who are not very observant, see a strong link between democracy and traditional Jewish teachings. They regard this link so seriously that they believe it may inform their own political actions and justify their own understanding of what democracy requires.”¹⁴

Among American Jews, by now, the tradition they are upholding is secular with regard to religion, but Jewish with regard to culture.¹⁵ For only about one-third of American Jews is the practice of religion an important part of their lives. Almost a third seldom or never attend a religious service, and nearly half seldom or never pray. Less than one-fifth regard religion as a source of moral guidance. It is among Orthodox Jews that belief in God and religious practice remain centrally important, and the Orthodox – though only 10 percent of American Jews – are more likely than non-Orthodox Jews to marry, to have a Jewish spouse, to have several children, and to raise their children to be observant Jews. However, there are differences among the Orthodox: Haredi Jews and Modern Orthodox Jews have sharply differing views and commitments regarding many issues, including their relation to non-Jews in society. Still, Orthodoxy is the fastest growing group of Jews in the United States.

The Pew Research Center notes, “Jews are among the most strongly liberal, Democratic groups in U.S. politics. There are more than twice as many self-identified Jewish liberals as conservatives, while among the general public, this balance is nearly reversed.”¹⁶ Part of what is striking about the firm commitment of Jews to liberal democracy in the United States is that the most traditional, observant groups among Jews are generally the most politically conservative, and nearly 57 percent of this group identify with or lean toward the Republican Party. The Pew survey indicates that on numerous moral issues, Orthodox Jews are aligned with evangelical Protestants and Mormons. A sizable majority of Jews favor a larger state role in regard to welfare concerns such as social security and provision for health care. This is most pronounced among those between eighteen and twenty-nine years old, followed next by those in the sixty-five-and-older age group. Orthodox Jews tend to endorse smaller rather than bigger government: almost 60 percent compared to about one-third of non-Orthodox Jews.¹⁷

Why do Jews favor the neutrality of the U.S. Constitution regarding religion, and why might a standard of public reason not share its merits? It will help to distinguish (at least) two ways in which people can be said to be religiously serious. One of them is that religious commitment, worship, and practice are important to this group of people and matter to them in fundamental ways. A second sense of religious seriousness is having a strong sense of identity – usually cultural, valuative, and concerning ancestry – that is important to uphold *even if that identification is not also expressed in forms of worship or acceptance of religious doctrine*. For those who are religiously serious in the first sense, their commitments could include elements that are illiberal and undemocratic, and there are reasons a state could consider prohibiting such harmful practices. But if their commitments shape how they live in civil society without harming or coercing others, there is at least a *prima facie* basis for permitting religious practice based on them. Granted, it will not always be clear and indisputable whether commitments cause harm to others. Still, in a sense, people are religiously serious when they regard their religious commitments as substantively constitutive, as integral to their conception of themselves and their view of the world.

Jews who are religiously serious in the first sense might be expected to strongly endorse state neutrality and freedom of religion. And while there are overlaps between religions – especially the Abrahamic monotheisms – many religious people are committed to one particular tradition, with its distinct concrete elements, and not to a kind of identikit religious morality. A kind of overlapping consensus can be acknowledged and valued without also being the focus of commitment. The meaningfulness of commitment might be rooted in history and culture, not as ineliminable sources of irrationality but as crucially important origins, supports, and grounds of valuative solidarity. For example, the Pew survey reported:

Overwhelming majorities of both Jews by religion and Jews of no religion say they are proud to be Jewish (97% and 83%, respectively). Most Jews by religion also say they have a strong sense of belonging to the Jewish people (85%) and that they feel a responsibility to care for Jews in need (71%).¹⁸

Even nonobservant American Jews often have a strong sense of being part of the Jewish people, regard its history as important, and have active concern for the current conditions of Jews' lives. Nearly three-quarters of those surveyed maintained that remembering the Holocaust and leading a morally sound life are important.¹⁹

If these points describe, in either sense of being religiously serious, a plausible characterization of the way many Jews see their commitment to justice, then it is understandable that notions of public reason could be problematic for many Jews.

Neutrality permits expression of the fullness of one's identity, while guarding against, for example, religious groups influencing education or using educational institutions in ways that promote sectarian aims. The role of neutrality in the political culture of the United States has meant that many forms of religious life and culture have been at home in civil society without blurring the lines between political order and civil society, especially in regard to education but more broadly as well. For many Jews, the ability to enjoy the freedoms of civil society without feeling continuous dread about interactions between state and church is a notable merit of American democracy.

Many Orthodox Jews are religiously serious in the first sense. Many other, and perhaps most, American Jews are religiously serious in the second sense. For many who are serious in the second sense, their concerns extend beyond their own sense of identity and relate more to respecting the dignity of others and guarding against demeaning, exclusionary, derisive treatment and other forms of enforcing second-class citizenship. For example, the mission of the Anti-Defamation League, founded in 1913, is "To stop the defamation of the Jewish people, and to secure justice and fair treatment to all."²⁰ Thus, opposing terrorism, bigotry, bullying, bias, and cyber-hatred are now part of the organization's mission, which is strongly supported by American Jews. The Pew Research Center found that nearly 70 percent of Jews said that leading a morally good life is essential to their sense of Jewishness, and nearly 60 percent said that working for social justice and equality is part of their sense of their own Jewishness.²¹

For many people who are religiously serious in the second sense, their motivations might be largely secular, but the roots of their values are religious/cultural and they may have developed commitment to those values through upbringing framed in a particular religious tradition, even if without worship and ritual. They might find it difficult, even in their own case, to fully disentangle certain commitments from the traditions, images, historical narratives, and valuative examples through

which they were first introduced. There can be a strong sense of religiously anchored identity and value commitment even without religious practice. For many nonreligious Jews, leading a morally sound life is understood as what the religion requires.

Given the fact that many Jews do not practice Judaism, and given the central place that freedom and equality have in the religion, it might seem natural to suppose that something like a Rawlsian conception of public reason would appeal strongly to Jews. Yet neutrality could have much stronger appeal. The key points here apply to both senses of religious seriousness.

Rawls writes, “The idea of public reason specifies at the deepest level the basic moral and political values that are to determine a constitutional democratic government’s relation to its citizens and their relation to one another.”²² Further,

A citizen engages in public reason, then, when he or she deliberates within a framework of what he or she sincerely regards as the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens might also reasonably be expected reasonably to endorse.²³

Public reason requires that “we assume that, in an ideal overlapping consensus, each citizen affirms both a comprehensive doctrine and the focal political conception.”²⁴

Since the political conception is shared by everyone while the reasonable doctrines are not, we must distinguish between a public basis of justification generally acceptable to citizens on fundamental political questions and the many nonpublic bases of justification belonging to the many comprehensive doctrines and acceptable only to those who affirm them.²⁵

Grounds for apprehension about public reason concern the way that the relevant consensus involves disentangling grounds of commitment and bracketing elements felt to be constitutive. The disentangling might be regarded as either artificial, threatening, or both.

Robert Audi has elaborated a view of the relation between democracy and religion that reflects the important fact that religious rationales often figure in ways that people are (reasonably, not just dogmatically) reluctant to give up and should be encouraged to express; though he also maintains that in a liberal democracy it is appropriate to expect of people a secular motivation for their views. Regarding the first point, he articulates “the principle of religious rationale”:

Religious citizens in a democratic society have a prima facie obligation not to advocate or support any law or public policy that restricts human conduct, unless they have, and are willing to offer, adequate religious reason for this advocacy or support.²⁶

This acknowledges the importance of religious commitments to many people and urges them to be honest in how they represent their commitments. Unlike a

conception of public reason, this does not require a bracketing of religious considerations, concealment of them, or worse, acquisition of a habit of hypocrisy about them. Regarding the second point – that a secular motivation can be called for – Audi formulates “the principle of secular motivation.” He writes, “Citizens in a democracy have a (prima facie) obligation to abstain from advocacy or support of a law or public policy that restricts human conduct, unless in advocating or supporting it they are sufficiently *motivated* by adequate secular reasons.”²⁷ This approach does not prohibit religious considerations from having a justificatory role and it does not separate out comprehensive views in a systematic way.

Those who are religiously serious in the second sense might find that it is not very difficult to fulfill the principle of secular motivation (though it does not preclude religious reasons *also* being sufficient). However, as mentioned, disentangling the elements of one’s view from the ways that one has come to have them can be very difficult. It can be challenging to know, even in one’s own case, how important religious ideas have been to the formation of one’s ethical commitments. While it is appropriate to ask that fellow citizens articulate reasons that are accessible, what actually constitutes accessibility is not a simple matter. Nor is the issue of how much justificatory and motivational efficacy any given considerations have. Many political matters can be resolved eventually on the basis of good faith bargaining, the presentation of facts, and the willingness to listen genuinely to views other than one’s own. But even someone able to articulate a secular rationale for certain moral commitments might actually have them as the result of inculcation of a religious tradition, and may also regard the tradition as valuably illuminating. I suspect that this is the case for many Americans: that it is through religious education, even if informal, that they first learn certain moral values, though they come to hold those values as adults on the basis of secular reasons or *also* on the basis of secular reasons.

It will not do to insist that religious ideas, images, and practices be excluded from moral education, whether formal or informal. That would be a significant imposition. Those values and commitments often have a constitutive role in one’s conceptions of themselves and of what is fundamental in their lives. I do not mean this in the sense of thoughtless zealotry or mere dogmatic insistence without reflective, informed, and critical awareness. People who are religiously serious in the first sense would be skeptical of there being any exclusively secular rationality or motivation, even if they can recognize ways of articulating their values in secular terms; and that is not necessarily an unreasonable view.

Those considerations might be a potential difficulty for Audi’s motivation principle, though that view is much more plausible – with a more realistic appreciation of how religion figures in people’s lives – than a Rawlsian conception of public reason as guidance for fundamental political conceptions and the expression of basic political values. In any case, it is reasonable to understand many Jew-

ish persons' concern for justice as rooted in religious commitments and values in ways that are clearly compatible with state neutrality but not so clearly compatible with a standard of public reason. State neutrality allows for the flourishing of diverse forms of religious seriousness and religious life in civil society, and without state-privileging of any religion. In the United States, that has been especially welcome to Jews because it meant that, right from the founding of the state, civil society did not include a role for the state in religion, and the political order has not required Jews to suspend or disavow religious seriousness for their participation in political life.

One of the most striking impacts of Jews' emancipation from second-class status – or worse – in Europe was that Judaism, for the first time, had become *voluntary*. That changed the character of Jewish community and, in numerous ways, how one led a Jewish life. It led to many Jews giving up tradition and worship and community life, but not necessarily in ways that dissolved bonds of solidarity. That voluntariness and the way even nonobservant Jews see the importance of membership in a historical community are not inconsistent. For many Jews, it remains important that they are members of a historically continuous (if spatially scattered) people to whom covenant is integral to their relation to God and to each other. Thinking of oneself as a member of a people, even if one does not mark that by regular performances of ritual or by worship, is often a part of one's Jewishness. Many Jews have chosen not to accept the responsibility to fulfill the commandments – that is, the fullness of the covenant – while still identifying strongly as Jews, as members of the Jewish people, committed to democratic values.

The wisdom of neutrality, in contrast to an endorsement of public reason, is that it does not disturb the diverse sources that underwrite the evaluative commitments crucial to liberal democracy. Granted, neutrality can encounter plenty of difficulties on account of contested interpretations. But neutrality does not require participants to bracket, suspend, or otherwise disengage from values and commitments that might be basic to how people understand themselves and others, and how they understand what justice requires. Neutrality and public reason make different sorts of demands on people. For neutrality to succeed, it is important that people acquire habits and attitudes of toleration, and for those to be realized efficaciously in the ways people interact. That is different from requiring a standard of or criterion of admissibility in the manner of public reason. The latter can require people to reconstruct their values or at least the articulation of them, to a certain extent, to make them presentable. The required reconstruction can be interpreted as a form of disqualification of one's commitments and even the culture to which they are integral. From the perspective of public reason, it can seem that the source and support of one's commitments is, in a sense, politically illegitimate or at least inappropriate.

To be sure, Rawls is careful to formulate his conception of public reason so that it does not condemn as unreasonable values and commitments that do not satisfy its requirements. Still, for persons who value liberal democracy in part because of how it does not burden or judge such commitments, the standard can seem to require setting aside some of what matters most. Rawls writes, “the elements of the political conception of justice must be separated from the analogous elements within comprehensive doctrines. We must keep track of where we are.”²⁸ Neutrality requires habits of respectful toleration rather than an analytical deconstruction of one’s comprehensive view, separating out only some contents as suitable, and only in certain terms, for inclusion in politics. Public reason has considerable merit because it is meant to protect politics against illiberal views and uncivil attitudes and commitments. But if there is a serious deficit of civility, it is hardly likely that politics will remain an untainted preserve of public reason. Given the realities of history, Jews are fully alert to the ways that serious deficits of civility can be as menacing and lethal as discriminatory laws. That is one reason to regard the habits and attitudes people acquire and how they are exhibited in social relations as vitally important to politics. Greater, rather than less, mutual acknowledgment and mutual comprehension is crucial to a pluralism in which people effectively regard each other as free and equal in the fullness of their commitments. (Of course, there are limits; not just *anything* goes.)

The American form of liberal democracy involving state neutrality with respect to religion protects Jews’ sense of what matters to them about their Jewishness. They do not feel required to give up aspects of their identity or practices to participate in civil society and in the political process. Neutrality is a political form that enables and protects pluralism while being responsive to the reality of the diverse ways that people regard their religious commitments. It does not impose any form of religious life, and it does not require separating oneself from aspects of religious life. That has been of primary importance to Jews’ commitment to democracy, especially in the United States.

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ENDNOTES

- ¹ The passage quoted is *Deut. 16:18* from *Tanakh: The Holy Scriptures* (Philadelphia: The Jewish Publication Society, 1985).
- ² For scholarship on Political Hebraism, see Fania Oz-Salzberger, “The Jewish Roots of Western Freedom,” *Azure* 13 (5762) (2002): 88–132; Frank Manuel, *The Broken Staff: Judaism Through Christian Eyes* (Cambridge, Mass.: Harvard University Press, 2002); and Jonathan Jacobs, “Return to the Sources: Political Hebraism and the Making of Modern Politics,” *Hebraic Political Studies* 1 (3) (2006): 328–342.
- ³ For a fuller discussion of this point and relevant Scriptural passages, see Suzanne Last Stone, “Judaism and Civil Society,” in *Law, Politics, and Morality in Judaism*, ed. Michael Walzer (Princeton, N.J.: Princeton University Press, 2006), 17.
- ⁴ Walter Berns, *Democracy and the Constitution* (Washington, D.C.: AEI Press, 2006), 161.
- ⁵ Ruth R. Wisse, *Jews and Power* (New York: Schocken Books, 2007), 91.
- ⁶ Quoting sociologist Jacob Katz in *ibid.*, 87.
- ⁷ Marx’s *On the Jewish Question* was written in 1843 and published in 1844. Italics in original.
- ⁸ Hillel Fradkin, “Judaism and Political Life,” *Journal of Democracy* 15 (3) (2004): 122–136, 128.
- ⁹ Gregg Ivers, *To Build a Wall: American Jews and the Separation of Church and State* (Charlottesville: University of Virginia Press, 1995), 33.
- ¹⁰ *Ibid.*, 63.
- ¹¹ *Ibid.*, 62.
- ¹² For a discussion of Jewish values and perspectives in relation to important currents of political theorizing in the contemporary world, see, for example, Lenn Goodman, *Religious Pluralism and Values in the Public Sphere* (New York: Cambridge University Press, 2014). See also Daniel H. Frank, *On Liberty: Jewish Philosophical Perspectives* (Richmond, United Kingdom: Curzon Press, 1999).
- ¹³ Wisse, *Jews and Power*, 93.
- ¹⁴ Fradkin, “Judaism and Political Life,” 131.
- ¹⁵ See Pew Research Center, *A Portrait of Jewish Americans: Findings from a Pew Research Center Survey of U.S. Jews* (Washington, D.C.: Pew Research Center, 2013), 54, <https://www.pewresearch.org/wp-content/uploads/sites/7/2013/10/jewish-american-full-report-for-web.pdf>.
- ¹⁶ *Ibid.*, 95.

¹⁷ Ibid., 102

¹⁸ Ibid., 52.

¹⁹ Ibid., 54–55.

²⁰ See Anti-Defamation League, “Our Mission,” <https://www.adl.org/who-we-are/our-mission>.

²¹ Pew Research Center, *A Portrait of Jewish Americans*, 14.

²² John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 441–442.

²³ Ibid., 450.

²⁴ Ibid., xix.

²⁵ Ibid.

²⁶ Robert Audi, *Democratic Authority and the Separation of Church and State* (Oxford: Oxford University Press, 2011), 69.

²⁷ Ibid., 143.

²⁸ Rawls, *Political Liberalism*, xix.

Religion & Transitional Justice

Colleen Murphy

Transitional justice refers to the process of dealing with human rights abuses committed during the course of ongoing conflict or repression, where such processes are established as a society aims to move toward a better state, and where a constitutive element of that better state includes democracy. A philosophical theory of transitional justice articulates what the moral criteria or standards are that processes of transitional justice must satisfy to qualify as just responses to past wrongdoing. This essay focuses on the roles of religion in transitional justice. I first consider the multiple and conflicting roles of religion during periods of conflict and repression. I then argue against conceptualizing transitional justice in a theologically grounded manner that emphasizes the importance of forgiveness. Finally, I discuss the prominent role that religious actors often play in processes of transitional justice. I close with the theoretical questions about authority and standing in transitional contexts that warrant further examination, questions that the roles of religious actors highlight. Thinking through the relationship between religion and democracy from the perspective of transitional justice is theoretically fruitful because it sheds more light on additional dimensions to the issue of authority than those scholars of liberal democracy have traditionally taken up.

This essay considers the relationship between religion and democracy through the lens of transitional justice, drawing on the case of South Africa. Transitional justice broadly refers to the formal and informal processes of dealing with past wrongs committed during the course of ongoing conflict and repression. Such processes are established in the context of an attempted transition away from protracted periods of conflict and/or repression and toward democracy.¹ There are many forms such transitional justice processes take, from criminal trials, truth commissions, amnesty, and memorials, to reparations and programs of lustration whereby individuals are barred from serving in specific public roles. Transitional justice processes are defended as important for their own sake and, in particular, insofar as they satisfy the rights of victims and moral demands on perpetrators. They are also valued for instrumental reasons, especially their contributions to democratization.

There is no neat or simple relationship that exists between religion and transitional justice, as the mixed roles of religion in conflict and repression in South

Africa make clear. But how should we understand the “justice” of transitional justice? That is, on the basis of what moral criteria or standards should processes of transitional justice be evaluated? As my discussion makes clear, one of the central tasks of transitional justice processes is to help establish the authority of the state, when state institutions are discredited. The prominent participation of religious actors in processes of transitional justice generate novel questions about authority and point toward questions that warrant further theoretical investigation.

Transitional justice processes have been established in dozens of societies around the world over the past few decades. A few of the many contexts in which processes of transitional justice have occurred include South Africa during its transition away from apartheid to democracy, the countries that made up the former Yugoslavia following the wars that accompanied its breakup, and Colombia today as it continues to implement the terms of a peace agreement aiming to end more than fifty years of conflict between the Colombian government and the Revolutionary Armed Forces of Colombia (commonly referred to by its acronym FARC). The South African Truth and Reconciliation Commission (TRC) established in 1994; the International Criminal Tribunal for the former Yugoslavia (ICTY), which operated from 1993–2017; and the currently functioning Special Jurisdiction for Peace (JEP) in Colombia are some of the more prominent examples of such processes.

Societies that call for transitional justice vary in many ways. However, at a certain level of abstraction, we can identify common features.² I focus on three such features and illustrate them using the case of apartheid South Africa. The first is the existence of what I call *pervasive structural inequality*. Structural refers to the general terms of interaction among citizens and between citizens and officials, as laid out in institutionally defined rules and norms. For example, legal rules specify who is eligible to hold political office and the process through which political office-holders are selected. Criminal law delimits conduct that is legally impermissible, setting minimal baselines for interaction among citizens. The institutions that help to define the terms of interaction among citizens and between citizens and officials are many, including legal, political, cultural, and economic institutions. Such institutions define terms for interaction by specifying who is permitted to, required to, or prohibited from acting in certain ways, and what the formal and informal penalties for violating such terms are.

When institutionally defined terms for interaction are *unequal*, there exists differential restrictions on opportunities for certain groups of citizens, constraining what they can effectively do and become of value (such as being educated, being employed, participating in government) and constraining their ability to shape the institutional rules for interaction themselves. *Pervasive structural inequality* is such that it calls into question the legitimacy of the institutional order; citizens

have a right to rebel. Apartheid South Africa was a paradigmatic case of pervasive structural inequality, where institutional rules and norms differentially and systematically constrained the opportunities of black South Africans and excluded black South Africans from any effective role in defining the institutional order.³ Under apartheid, black South Africans were stripped of the right to vote, were forcibly relocated according to government-designated racial categorizations, and faced employment restrictions and discrimination. Structural inequality can exist in a less explicitly intentional and centralized manner. Differential investment or allocation of resources in certain regional areas, access to economic opportunities structured on the basis of clientelist networks, and patterns of informal discrimination not effectively prohibited by law and sanctioned according to social norms are some of the many forms structural inequality can take.

The second feature that characterizes transitional societies prior to the establishment of any process of transitional justice is what I call *normalized collective and political wrongdoing*.⁴ This feature highlights the fact that during periods of conflict and/or repression, human rights violations (the *wrongdoing*) become *normalized*: that is, a basic fact of life for (certain groups of) citizens. The normalization of human rights violations is reflected in the numbers of victims of rights abuses that exist in transitional societies, ranging from hundreds to thousands to hundreds of thousands and, in some cases, millions. Wrongdoing is *collective* in the sense that it characteristically targets groups of citizens on the basis of a particular affiliation or identity; religious identity can be one targeted identity, ethnic and national identities are others. Wrongdoing is *political* in two ways. First, it implicates state agents or actors acting with the permission of the state or informally on behalf of the state, as in the case of paramilitaries. Groups contesting the state may also be implicated in rights violations, with contexts varying in the proportion of rights abuses committed by government forces versus groups contesting the state. Second, wrongdoing is political in the sense of being bound up with the pursuit of political objectives. Maintaining a regime, acquiring effective control of land, overthrowing a regime, separating politically from a state, or eliminating a particular group via a genocidal campaign are a few of the objectives pursued. For example, in defense of apartheid, South African security forces routinely arrested and tortured anti-apartheid activists; the death of Black Consciousness leader Steven Biko in detention was one especially prominent case. The systematic torture, killing, abduction, and severe ill-treatment that occurred during the apartheid era became the subject of the mandate of the South African TRC.

Religion plays no simple or single role in pervasive structural inequality or in normalized collective and political wrongdoing. Religion has been a root cause of conflict, a marker of those targeted for repression and subject to structural inequality, and a source of justification of repression and the basis for privilege in an unequally structured institutional scheme. When religion becomes intertwined

with ethnic and national identity, as is the case in Northern Ireland, for example, then differences in national aspiration, rather than differences in theological belief, explain the root sources of conflict. In other cases, theology itself can provide resources in defense of and/or resistance to repression and oppression. The Afrikaans Reformed Church vigorously defended apartheid on religious grounds.⁵ By contrast, the South African Council of Churches (SACC) was heavily involved in supporting the anti-apartheid movement.⁶ The Catholic Church supported dictators in South America such as Chile's Augusto Pinochet and the military junta in Argentina, while also serving as a source of moral critique of such regimes.⁷

Victims of human rights abuses have been targeted because of their religious affiliation and the perpetrators of human rights abuses have included religious officials.⁸ In Rwanda, thousands who tried to escape the genocide by finding refuge in a Catholic church were instead killed.⁹ In contrast, in retaliation for speaking out on behalf of the poor and against human rights violations committed by the government during the civil war in El Salvador, Catholic priest Saint Óscar Romero was assassinated as he said mass.¹⁰

The first two features discussed characterize repressive regimes and contexts of ongoing conflict and repression. What distinguishes transitional societies from such ongoing situations is a third additional feature, what I call *serious existential uncertainty*. Societies become transitional when there is a credible attempt to end conflict or repression and transition toward a normatively more defensible state of affairs, such as democracy. The toppling of a dictator or the signing of a peace agreement may signal the beginning of a transition. However, normative aspirations to transition away from war and/or repression do not always materialize into concrete gains. Serious existential uncertainty captures the fact that success in any given transition is far from clear. In South Africa, the transition from apartheid to multiracial democracy occurred amidst serious uncertainty as to whether the transition would produce democracy or instead racial civil war. During periods of transition, war may, and often does, resume. Democratic changes may not go deeper than the basic holding of elections, which may not be repeated and which vary in the extent to which they are free and fairly conducted. The fact that transitions attempted are not necessarily achieved creates subjective uncertainty for citizens who do not know which conflicting narrative about unfolding events is most realistic. A peace agreement may be best thought of as a harbinger of a permanent period of peace or a temporary pause in civil conflict.

The transitional narrative – the beginning of the achievement of a multiracial democracy or the beginning of racialized civil war, for example – adopted by citizens and officials shapes their conduct. The success of transitions and the vindication of a narrative that a community is in fact headed to a normatively better place is often profoundly affected by whether there are efforts made to deal with the past wrongdoing via transitional justice processes. In the midst of this existen-

tial uncertainty, whether and how a community addresses past wrongs can play a signaling function. Processes that deal with past wrongs in a serious manner can underscore a recognition on the part of government officials that the modes of interaction in the past are unjustified and can reflect a commitment to establishing different forms of interaction in the future.

In the aftermath of extended conflict and repression, societies attempting to transition from war to peace and from repression to democracy increasingly engage in efforts to reckon with past wrongdoing. Processes of transitional justice are formal and informal responses to legacies of human rights violations stemming from conflict and/or repression. Philosophical literature and literature in political theory on transitional justice focus on how to understand the moral defensibility of choices about how to treat past wrongdoing. While the processes established in the name of transitional justice continue to expand and can include private undertakings, I focus here on the objectives and the justification of processes of transitional justice in the context of formally established and government-funded responses to legacies of wrongdoing, such as criminal trials, truth commissions, and governmental reparations programs.

The need to provide criteria for assessing the moral defensibility of choices concerning transitional justice processes is driven not only by theoretical interest in the general question, but also by the practical fact that there is deep disagreement about the defensibility of choices made in transitional contexts. There is no consensus among citizens, politicians, or scholars about the moral justifiability of granting amnesty to perpetrators of egregious wrongs, of linking amnesty with the operation of a truth commission, and/or of pursuing reparations that necessarily fall short of what corrective justice would demand. Notably, there is also no agreement on criteria or terms that would need to be satisfied for justifiability to be (or fail to be) demonstrated.¹¹ Disagreement over criteria has many sources. One source of disagreement is prompted by recent social scientific studies that examine the impact of transitional justice processes in particular contexts, showing that their efficacy is much more limited than advocates of transitional justice often implicitly assume.¹² A second, but related, source of disagreement is competing understandings of what the pursuit of justice means when you are dealing with large-scale wrongdoing that implicates the state and that no single process of transitional justice has the capacity to fully and completely address.

One way of conceptualizing the disagreement about justice would be in terms of the appropriate balance to strike between justice and mercy, or the relationship between justice and forgiveness. The most frequent form of transitional justice response in practice is amnesty, whereby individuals or groups are granted immunity from civil and criminal liability. One might frame amnesty as a choice of mercy, to refrain from what one has a right to do: punish perpetrators. Retributive justice

is taken to demand deprivations that typically cause suffering, characteristically in the form of punishment, of perpetrators of wrongdoing. Insofar as responses to wrongdoing fail to punish perpetrators, such responses require justification, and one kind of justification could be a choice to engage in an act of mercy. The emphasis of many on forgiveness as a necessary condition for the possibility of transition, given the widespread and deep anger felt by many victims as conflict and/or repression ends, and on processes such as truth commissions, which might under certain conditions cultivate forgiveness, could similarly be viewed as a choice of forgiveness over justice.

But there exists a prior disagreement about the very meaning of justice in transitional contexts, which needs to be resolved before discussion of the relationship between justice and mercy can occur.¹³ To see this, consider another kind of justice frequently appealed to in transitional contexts: restorative justice. Core tenets of restorative justice include conceptualizing crime or wrongdoing as a problem in part because of its impacts on relationships, both between perpetrators and victims; and among victims, perpetrators, and their broader community. Practices that can repair the relationships ruptured by wrongdoing are emphasized, including, in particular, ones that provide an opportunity for perpetrators to make amends to their victims and for victims to forgive their perpetrators. Through amends and forgiveness, the claim is, reconciliation can be achieved.¹⁴ Thus, for restorative justice advocates, forgiveness is an essential part of justice, not a value distinct from and potentially in tension with justice. Moreover, retributive and restorative justice are seen as fundamentally in tension, and in the face of this tension, restorative justice advocates believe that it should be prioritized over retribution.¹⁵ Restorative justice proponents do disagree about whether punishment is compatible with its demands. For those who view punishment as outside the parameters of what restorative justice permits, a choice to refrain from punishment is not necessarily a choice of mercy but rather a choice of justice.

While restorative justice can be and is defined in secular terms, the core ideas of restorative justice are also defined in religious terms in the literature on transitional justice. Political scientist Daniel Philpott, for example, has developed a conception of reconciliation that incorporates the core components of the idea of restorative justice articulated above and shows how it can be the subject of overlapping consensus among members of the Abrahamic faiths.¹⁶ Religion and religious understandings, theologian Alan Torrance has argued, can provide additional resources in defense of forgiveness, resources that in fact made possible remarkable transitions like that of South Africa. Consider, he writes, the Judeo-Christian conception of God's covenant of grace with humanity, unilaterally established by God, whereby God freely committed to be faithful to Israel *unconditionally*, regardless of considerations of human worthiness. Once we realize that God's love and forgiveness are unconditional, Torrance argues, this inspires repentance and commitments to

be faithful to our obligations to God and to humanity. When relating to human beings, the covenant suggests that we are to love one's enemies and friends unconditionally and to forgive unconditionally. Such forgiveness is not contingent upon conditions and can inspire the repentance in others that our recognition of God's unconditional forgiveness inspires in us.¹⁷ Guided by this conception, forgiveness and repentance can be achieved among citizens in transitional communities.

In contrast, in my own work, I have argued for a distinctive conception of transitional justice, not reducible to either retributive or restorative justice. Drawing on David Hume's notion of the circumstances of justice, I argue that in the circumstances of *transitional* justice, the problem of justice that is salient is distinctive from the problem addressed by familiar forms of justice such as retributive or corrective justice. The circumstances of transitional justice include the three features highlighted above: namely, pervasive structural inequality, normalized collective and political wrongdoing, and serious existential uncertainty. Rather than turning to theology, I defend the claim of the distinctiveness of transitional justice by developing a philosophical account of justice that takes context seriously.¹⁸ My argument examines the circumstances of what I call "stable democratic societies," circumstances implicitly assumed to be present in the societies for which philosophers articulate conceptions of what retributive or distributive justice require. Such features include limited structural inequality (so that the institutional order remains legitimate even as reform is always possible) and individual and personal wrongdoing (so that ordinary criminality not implicating the state is presumed to be the subject of a retributive response). Shifting circumstances to transitional contexts, however, the core arguments for why retribution, for example, is necessary become much less plausible. For one thing, responding to perpetrators is only part of the problem salient in transitions. The standing of the state to respond to past wrongs is something to be established and cannot be assumed (for reasons I discuss below). And the efficacy of the punishment of one perpetrator to restore the equality of the victim, who was subjected to a form of normalized wrongdoing implicating the state and committed against a background of pervasive inequality, is doubtful.

The core normative aim of transitional justice, I claim, is transforming political relationships in a just manner.¹⁹ The overarching goal is to alter the basic terms structuring interaction among citizens and between citizens and officials so that recent histories of apartheid, genocide, systemic impoverishment, and corruption will not define or be repeated in the future. This process of transforming relationships links transitional justice with political reconciliation, the process of repairing damaged political relationships. In fleshing out what such transformation requires, I draw on core concepts in the liberal tradition that include relational concerns. For example, consider the ideal of the rule of law, which specifies how legal institutions should structure political relationships. If you adopt a perspec-

tive on the rule of law like that of legal scholar Lon Fuller, then a number of social and moral conditions must be in place for law to govern conduct in a manner that is reciprocal and respectful of agency.²⁰ Such conditions include faith in law on the part of citizens and basic decency on the part of officials.²¹ Mutual trust among citizens and between citizens and officials is part of what the rule of law can create; departures from the rule of law in turn generate, in Fuller's view, resentment and distrust. Distrust, the erosion of the rule of law, and lack of faith in law or decency on the part of officials are all actual, acute problems characteristically found in transitional contexts. As illustrations of the problems that transitional justice processes must help societies address, the South African TRC report highlighted the multiple and systematic ways in which South African security officials operated outside of what declared rules permitted. The TRC was highly critical of the legal profession for the failure of lawyers and judges to adhere to the rule of law in more than a superficial sense.²² Pursuing transformation in a *just manner* requires satisfying the moral claims of victims and the moral demands on perpetrators to a threshold level.²³ Such demands include, for example, the right of victims to repair harm suffered and the demand on perpetrators that they acknowledge responsibility for wrongs in which they are implicated.

When faced with competing understandings of what justice requires in transitional circumstances, which understanding should be adopted? One criterion for selection is which conception provides theoretical resources communities need to navigate away from conflict and repression as they deal with past wrongs. In the view of many scholars, the conception of justice most suited to transitional contexts is restorative justice. According to such views, successful transitions in fact depend on forgiveness. Forgiveness in turn is best justified in theological terms. Consider Philpott's anthology, *The Politics of Past Evil*, which focuses on the moral dilemmas and challenges facing transitional societies and in particular on the role that theology should play in "the theory and practice of reconciliation."²⁴ Contributors such as Torrance, philosopher Nicholas Wolterstorff, and theologian David Burrell all defend a conception of restorative justice and argue that forgiveness plays an essential role in creating a just society. In Burrell's view, people will often view the same act differently, especially in divided contexts. Some will view the infliction of suffering characteristic of punishment as an act of justice; others will see it as an unwarranted act of injustice or revenge. These conflicting perspectives on the same act help us understand why punishment contributes to a spiral of violence. Those who see the suffering constitutive of punishment as revenge or unjustifiable will engage in a counterattack. Thus, as Burrell has noted, there is "mounting evidence that nothing short of the quality of forgiveness at once demanded and facilitated by the Abrahamic revelations will be able to empower people to make a fresh start after the devastation endorsed by the shadow sides of those same religious faiths."²⁵

The explicit appeal by some scholars to theological justifications for forgiveness in the context of the justification of public policy choices for dealing with past human rights abuses is controversial. Indeed, appealing to the importance of justifying policies on the basis of public reasons, scholars such as Amy Gutmann and Dennis Thompson have explicitly argued that justifications of processes of transitional justice must be based on reasons that are accessible to all citizens and therefore cannot include an appeal to specifically religious considerations of the kind articulated above. In response to the justification of the South African Truth and Reconciliation Commission offered by many of its proponents, including Archbishop Desmond Tutu, which framed the work of the TRC in terms of the cultivation of restorative justice through forgiveness, Gutmann and Thompson worry that that justification failed to be *moral in perspective*. They argue that the reasons in defense of having any particular transitional process must be, as far as possible, broadly accessible and inclusive of those who seek a moral justification. This requires an appeal to public reasons that are not specifically religious reasons that will appeal only to fellow adherents. In the context of the TRC, forgiveness, they argued, depended upon a particularly Christian understanding of reconciliation that would fail to be sufficiently publicly accessible.²⁶

Some scholars take the critique of Gutmann and Thompson to point to a potential tension between the commitments of liberalism and of transitional justice. And some scholars have argued that we should choose theologically grounded notions of reconciliation and its prescriptions for transitional justice over liberalism. There are two main reasons advanced in defense of this choice: First, they claim, liberalism lacks the conceptual resources for sufficiently spelling out core transitional concepts, like reconciliation and transitional justice itself. Second, liberalism lacks the conceptual resources for creatively and accurately offering prescriptions for transitional contexts.²⁷ In other words, liberals lack the theoretical resources for analyzing the character of communal, political relationships and the process of their restoration. Nor can liberals thus make a successful case for the claim that reconciliation is a significant goal. Philpott writes that “theology will be required to account not only for reconciliation’s intelligibility but also for its warrant: that is, the reasons why we should endorse it. It may turn out that only theological commitments can explain why restoration, not justice as desert or rights or entitlement, ought to be the conceptual lodestar of justice.”²⁸

In response, I first want to note that there are many versions of public reason and liberalism that permit the articulation of religious justifications of policy choices.²⁹ Thus, it seems overstated to suggest there may be a fundamental tension between liberalism and religion as such in transitional contexts. However, insofar as there is tension that requires a choice, the choice should, in my view, be in favor of liberalism. For one thing, both of the criticisms of liberalism are overstated. Liberalism does not lack the conceptual resources for dealing with the

concept of political reconciliation or the challenges of transitional contexts. Secular liberal accounts of transitional justice, such as my own, can and do articulate it as a substantial value that is rich in content and that speaks to actual challenges in transitions.

For another, to reject liberal democracy is to reject a constitutive element of the aspiration of transitional societies. This aspiration should, I believe, influence our understanding of reconciliation and of concepts including transitional justice itself. Transitional justice concentrates on a subset of the transitions of which we might speak. Instead of talking about a transition to liberal constitutional democracy, we could talk of a transition to authoritarian rule or an Islamic republic. But those objectives do not normatively respond to the moral complaints of citizens during conflict and repression in the manner that liberal democracy does. It is with demands for respecting human rights and for democratic inclusion that protest movements lead to the fall of repressive regimes. Moreover, respect for rights and democracy are needed for citizens to be equals within the community, for only with opportunities for democratic participation can citizens have turns to both rule and be ruled. The normative aim of a liberal democratic political community should influence our understanding of the kinds of relationships we want to promote, and the basis on which official policies and processes designed to deal with past wrongdoings should shape our understanding of the goals to which such policies should strive.

A different rejoinder to my argument would not reject the priority of liberalism but would suggest that it is possible to have religious conceptions of justice that justify forgiveness in liberal democratic contexts. As noted earlier, and echoing philosopher John Rawls's notion of justification as the product of an overlapping consensus, Philpott, in his later work, defends his notion of transitional justice, which draws on restorative justice and thus prioritizes forgiveness in part by showing how it could be the subject of an overlapping consensus among Muslims, Christians, and Jews.³⁰ I note here first that an extension of this strategy would be needed to be applicable to the many political contexts in which transitional justice occurs, which extend far beyond societies in which members of the Abrahamic faiths reside.

But even if forgiveness can be defended from the perspective of an overlapping consensus as a valuable and important dimension of individual responses to wrongdoing, it is still a mistake to include this as a necessary component of transitional justice. Transitional justice processes of interest in this essay are those established by governments. In evaluating whether a given process "worked," the answer will be shaped by what the policy was intended to do. Policies intended to foster forgiveness, because forgiveness is what transitional justice demands, will be deeply problematic especially in transitional contexts for a number of reasons. First, they place the burden of relational repair on victims. Policies predicated on forgiveness will be successful only insofar as victims overcome their anger or resentment at having been wronged. However, the majority of victims in transition-

al contexts are frequently from already marginalized backgrounds, and the experience of victims has been one of denial of their experience on the part of governments and isolation or ostracism within their communities in the aftermath of certain rights violations. Victims often bear the consequences of their wrongdoing alone and those consequences, not just in terms of immediate harm but also in terms of social effects, are ongoing. Thus, paying attention to the context in which forgiveness is being urged is critical. Requiring for policy success that victims overcome their anger risks failing a second time to take seriously the wrongs to which they were subjected and the right of victims to be angry in response. Second, overcoming anger on the part of victims does not resolve the broader background structural inequality and normalization of wrongdoing that rendered victims vulnerable and contributes to the ongoing effects they suffer from their victimization. Moreover, it is precisely this structural inequality and the conditions that enabled the normalization of wrongdoing that must be addressed to prevent a recurrence of conflict, repression, and their characteristic wrongdoing.

Rejecting the suitability of forgiveness as an aim toward which public policies and processes of transitional justice should strive does not imply any evaluation of the permissibility or justifiability of forgiveness as an individual choice of particular victims. Nor is it to set limits to what private organizations, including religious organizations, may advocate. It is rather to criticize framing policy success or failure as a function of overcoming the anger and resentment constitutive of forgiveness.

One further area regarding religion has received less attention in the literature than one might expect. This is in part because it is bound up with questions of authority that have garnered less interest than they should. As Philpott has correctly noted, religious figures frequently play a critical role in the promotion of transitional justice and political reconciliation, and indeed take up official roles in transitional justice processes. In Philpott's words,

In South Africa, Christian churches and theologically minded leaders, as well as Muslim leaders, urged a truth and reconciliation commission. . . . Religious communities in Brazil courageously conducted an underground inquiry into the truth. Similarly, Chile's Catholic Church was instrumental in investigating abuses under the rule of General Pinochet. . . . East Timor's Nobel Prize-winning Bishop Carlos Belo was instrumental in calling for reconciliation. . . . In Guatemala, Bishop Juan Gerardi . . . even formed and conducted an entire separate commission.³¹

The fourth and final circumstance of transitional justice, what I call *fundamental uncertainty about authority*, provides resources for explaining why religious figures play such prominent roles. There are two dimensions of uncertainty with respect to authority present in transitional contexts. The first narrowly concerns

uncertainty with respect to the standing of the state to deal with past wrongs. Philosophical explanations of the authority of the state to deal with wrongdoing through criminal trial and punishment characteristically assume that the government of concern is legitimate and that it is not directly implicated in the wrongdoing under consideration. As such, the standing of the state to respond to wrongdoing stems from its ability to be an impartial party and its status as a representative of a community's defensible values, which criminal wrongdoing flouted.³² That explanation of why retributive justice is appropriately meted out by the state will not always work in transitional contexts. As mentioned above, the state is characteristically implicated in the wrongs that may now become the subject of criminal prosecution, such as when security contractors hired by and representing the state commit torture or massacre a group of civilians. Thus, there arises a fundamental question of establishing the basis upon which the government has standing to deal with such wrongs. Against a background of questions about the authority of the state, it is unsurprising that in practice, in transitional contexts, nonstate groups or individuals representing such groups deal with past wrongs in ways that do not generate questions about their standing to do so. Questions of standing that would otherwise be raised in a stable democratic context – were the Catholic Church to undertake an official inquiry into police brutality or ethical violations by government officials, for instance – do not come up in transitional contexts.

The second source of uncertainty about authority is a function of the fact that the authority of the new government to rule during a transition is not completely established. In transitional contexts, it is practically impossible to completely overhaul existing institutions, practices, and personnel in the immediate term. Thus, as foreign policy scholar Thomas Carothers has pointed out, transitional societies characteristically

have some attributes of democratic political life, including at least limited political space for opposition parties and independent civil society, as well as regular elections and democratic constitutions. Yet they suffer from serious democratic deficits, often including . . . frequent abuse of the law by government officials, elections of uncertain legitimacy, very low levels of public confidence in state institutions.³³

A transition is necessary because of the pervasive inequality in the structure of political relationships among citizens and between citizens and officials during conflict and repression. Yet during the transitional period itself, democratic structures of authority are being constructed and established but have not yet been consolidated. Indeed, part of the function of transitional justice processes becomes trying to bootstrap into existence the authority of the new government where it has been absent.

Thus, in transitional periods, there exists this background challenge of building the legitimacy of government institutions both to deal with wrongdoing and,

more broadly, to rule. In this context, the authority of any official involved with transitional justice processes is often not taken to be a function of the process by which he or she was appointed, as it is in stable democratic contexts. Intense scrutiny of the particular choices made for commissioners of truth commissions or judges for courts also occurs against a background of weak domestic institutions; the pervasive influence of international nongovernmental organizations, especially in transitional societies in the Global South; the monitoring of the International Criminal Court; and the historical exclusion of certain groups from positions of decision-making within particular transitional societies. As a result, the justification of the authority of officials running truth commissions or deciding which transitional justice process will be adopted becomes much more individualized.

Emphasis has been placed on the diversity of actors exercising domestic and effective decision-making power, so that individuals representing different communities within a society are present.³⁴ In addition, the authority of such representative decision-makers and commissions has been made not by pointing to the process by which someone was selected as an official, as is typical in government processes in stable democratic contexts. Rather, the extent to which an individual was a moral exemplar during the period of conflict and repression often influences his or her authority to chair a truth commission. It is in the context of these discussions that we can situate the prominent role of religious figures in many transitional justice processes. Here, their fittingness to assume the role of commissioner in a transitional justice process is a function of individual biography and the moral authority that biography generates.

In this essay, I have provided a broad overview of the role of religious figures and the debates about religious justifications for public policy choices that are prominent in the literature on transitional justice. By way of conclusion, I want to highlight some of the further questions raised by the *de facto* reliance on the individual moral standing of commissioners to establish their authority to choose or run transitional justice processes.

One question is whether this appeal to individual moral standing is justified. I provided reasons to explain why this appeal has come about, given the absence of a stable framework of the authority of a government to rule and more specifically to deal with past wrongs. However, those reasons do not themselves provide a defense of this practice.

Second, insofar as more individually based standards for authority are defensible, there are questions about the constraints that should appropriately be placed on an individually based analysis of authority or standing.

A fundamental goal of transitional communities is to consolidate the authority of a new government and/or institution established by a government to deal with

past wrongs. When consolidated, the explanation for why any official has the authority to issue rules governing the conduct of citizens or investigate past wrongs in an official capacity will not appeal to his or her moral stature. Rather, it will appeal to the process through which he or she came to assume the position he or she now holds. A final question warranting further explanation is how to understand the relationship between the (ideally temporary) reliance on moral exemplars for the authority of transitional justice processes and the goal of legitimizing state institutions. Whether and when moral exemplars contribute to the bootstrapping into existence of the credible authority of a state needs to be articulated.

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ENDNOTES

- ¹ That transitional justice processes are established as a society aims to move toward a better state and that a constitutive element of that better state includes democracy have been the subject of critique, where the possibility of transitional justice processes in societies not in transition and in the context of a nondemocratic transition have been raised.
- ² I argue at length for these conditions in Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (New York: Cambridge University Press, 2017). See, in particular, chap. 1.

- ³ I use “black South African” to refer to South Africans categorized as Indian, Coloured, or African during the apartheid regime.
- ⁴ Murphy, *The Conceptual Foundations of Transitional Justice*, chap. 1.
- ⁵ See Truth and Reconciliation Commission of South Africa, *Final Report, Volume 4* (Cape Town: Truth and Reconciliation Commission, 1998), 91, <http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf>.
- ⁶ Rita M. Byrnes, ed., *South Africa: A Country Study* (Washington, D.C.: Government Publishing Office for the Library of Congress, 1996), <http://countrystudies.us/south-africa/53.htm>.
- ⁷ Katharine Davis, “Katharine Davis on the Role of the Catholic Church in Politics in Chile,” Georgetown University Berkley Center for Religion, Peace and World Affairs, March 1, 2007, <https://berkleycenter.georgetown.edu/posts/katharine-davis-on-the-role-of-the-catholic-church-in-politics-in-chile>; and Julia G. Young, “The Catholic Church & Argentina’s Dirty War: Victims, Perpetrators, or Witnesses,” *Commonweal* 142 (16) (2015), <https://www.commonwealmagazine.org/catholic-church-argentinas-dirty-war>.
- ⁸ For a comprehensive discussion of the role of religion, see R. Scott Appleby, *The Ambivalence of the Sacred: Religion, Violence, and Reconciliation* (New York: Rowman & Littlefield, 2000).
- ⁹ Harriet Sherwood, “Pope Francis Asks for Forgiveness for Church’s Role in Rwanda Genocide,” *The Guardian*, March 20, 2017, <https://www.theguardian.com/world/2017/mar/20/pope-francis-asks-for-forgiveness-for-churchs-role-in-rwanda-genocide>.
- ¹⁰ “St. Óscar Romero,” Encyclopaedia Britannica, <https://www.britannica.com/biography/Oscar-Arnulfo-Romero>.
- ¹¹ On these disagreements, see Murphy, *The Conceptual Foundations of Transitional Justice*, introduction; Antjie Krog, *Country of My Skull: Guilt, Sorrow, and the Limits of Forgiveness in the New South Africa* (New York: Broadway Books, 2007); and Colleen Murphy, “Judging the Justice of the Colombian Peace Agreement,” unpublished draft.
- ¹² See, for example, Pdraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Cheltenham, United Kingdom: Edward Elgar Publishing, 2017).
- ¹³ Eric Posner and Adrian Vermeule, “Transitional Justice as Ordinary Justice,” *Harvard Law Review* 117 (3) (2004): 761–825; Jonathan Allen, “Balancing Justice and Social Utility: Political Theory and the Idea of a Truth and Reconciliation Commission,” *University of Toronto Law Journal* 49 (3) (1999): 315–353; and Lucy Allais, “Restorative Justice, Retributive Justice, and the South African Truth and Reconciliation Commission,” *Philosophy and Public Affairs* 39 (4) (2012): 331–363.
- ¹⁴ Daniel Philpott, *Just and Unjust Peace: An Ethic of Political Reconciliation* (New York: Oxford University Press, 2012).
- ¹⁵ Jennifer Llewellyn and Robert Howse, “Institutions for Restorative Justice: The South African Truth and Reconciliation Commission,” *University of Toronto Law Journal* 49 (3) (1999): 355–388.
- ¹⁶ Philpott, *Just and Unjust Peace*.
- ¹⁷ Daniel Philpott, *The Politics of Past Evil: Religion, Reconciliation, and the Dilemmas of Transitional Justice* (Notre Dame, Ind.: University of Notre Dame Press, 2006), 55.

- ¹⁸ Chapter 2 of Murphy, *The Conceptual Foundations of Transitional Justice*, focuses on this argument in particular.
- ¹⁹ See chapters 2 and 3 in *ibid.*
- ²⁰ Lon Fuller, *The Morality of Law*, rev. ed. (New Haven, Conn. : Yale University Press, 1969).
- ²¹ Colleen Murphy, *A Moral Theory of Political Reconciliation* (New York : Cambridge University Press, 2010).
- ²² “Part of the reason for the longevity of apartheid was the superficial adherence to ‘rule by law’ by the National Party (NP), whose leaders craved the aura of legitimacy that ‘the law’ bestowed on their harsh injustice. Significantly, this state of affairs was not achieved in the early stages of NP rule. It began after the coloured vote crisis in the mid-1950s, when the restructuring of judicial personnel and the Appellate Division took effect, and the white electorate lent its support to the constitutional fraud resorted to by the government to circumvent the entrenched clauses of the South Africa Act. It was manifestly abandoned when emergency executive decree became the chosen medium of government towards the end of formal apartheid—from the mid-1980s—when a climate of ‘state lawlessness’ prevailed and the pretence of adherence to the rule of law was abandoned by the Botha regime.” Truth and Reconciliation Commission of South Africa, *Final Report*, para. 32.
- ²³ I lay out these claims and demands in chapter 4 of Murphy, *The Conceptual Foundations of Transitional Justice*.
- ²⁴ Philpott, *The Politics of Past Evil*.
- ²⁵ *Ibid.*, 124–125.
- ²⁶ Amy Gutmann and Dennis Thompson, “The Moral Foundations of Truth Commissions,” in *Truth v. Justice: The Morality of Truth Commissions*, ed. Robert I. Rotberg and Dennis Thompson (Princeton, N.J. : Princeton University Press, 2000), 22–44; and David Dyzenhaus, “Survey Article: Justifying the Truth and Reconciliation Commission,” *Journal of Political Philosophy* 8 (4) (2000): 470–496.
- ²⁷ Philpott, *The Politics of Past Evil*, 13.
- ²⁸ *Ibid.*, 34.
- ²⁹ On this point, see Jonathan Quong, “Public Reason,” *The Stanford Encyclopedia of Philosophy*, Spring 2018 ed., Edward N. Zalta, ed., <https://plato.stanford.edu/archives/spr2018/entries/public-reason/>.
- ³⁰ Philpott, *Just and Unjust Peace*.
- ³¹ Philpott, *The Politics of Past Evil*, 5. He notes that this has not uniformly been the case. There are societies with strong religious communities (such as Northern Ireland) that have not provided an impetus for a truth commission and societies where the religious communities did not contribute, given their implication in previous abuses, like Rwanda.
- ³² See, for example, Jean Hampton, “Correcting Harms versus Righting Wrongs: The Goal of Retribution,” *UCLA Law Review* 39 (6) (1992): 1659–1702.
- ³³ Thomas Carothers, “The End of the Transition Paradigm,” *Journal of Democracy* 13 (1) (2002): 9–10.
- ³⁴ On the place diversity considerations figure, see Colleen Murphy, “The Ethics of Diversity in Transitional Justice,” *Georgetown Journal of Law and Public Policy* 16 (2018): 821–836.

Patriotism & Moral Theology

John E. Hare

This essay examines the question of the moral justification of patriotism, given a Kantian view of morality as requiring an equal respect for every human being. The essay considers the background in Kant's moral theology for his cosmopolitanism. It then considers an extreme version of cosmopolitanism that denies a proper place for love of one's country, and it engages with a contemporary atheist cosmopolitan, Seyla Benhabib, suggesting that there are resources in Kant's moral theology to ground the hope that she expresses but does not succeed in grounding. Finally, it considers patriotism as a perfection of cosmopolitanism, in the same way that love of an individual can be a perfection of love of humanity. The essay suggests that defensible versions of cosmopolitanism put constraints on what kind of love of one's own country is morally permissible. But these constraints require the background in a Kantian moral theology.

Patriotism has often been negatively evaluated. Theologian Reinhold Niebuhr, for example, said that “patriotism from an absolute perspective is simply another form of selfishness,” that social groups are held together by emotion rather than reason, and that love for one's country “slews into nationalism.”¹ This essay is an attempt to locate a kind of justifiable patriotism. I will be arguing from a modified Kantian ethical framework, which is widely considered by political theorists to be among the major moral frameworks that can guide democratic societies. Since Kant is also one of the founders of cosmopolitanism, which is the view that we are citizens (in Greek, *politai*) of the cosmos, I will need to consider whether patriotism and cosmopolitanism are consistent.²

Kant proposed as the supreme principle of morality what he called a “categorical imperative,” of whose formulations or formulas I will mention two.³ The formula of universal law states: “Act only in accordance with that maxim through which you can at the same time will that it become a universal law.”⁴ I interpret this to mean that Kant is asking us to prescribe for an imagined system of moral permissions: that is, like the system of nature, covered by universal laws that eliminate singular reference from my maxims (where a maxim is the prescription of an action together with the reason for that action), and thus eliminate reference to *me*, the agent. “It follows from universalizability that if I now say that I ought to do a certain thing to a certain person, I am committed to the view that the

very same thing ought to be done to me, were I in exactly this situation, including having the same personal characteristics and in particular the same motivational states.”⁵ The second formula, the formula of humanity, states: “So act that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end and never merely as a means.”⁶ Kant based this kind of respect for the dignity of a person on what all rational beings have in common: namely, their autonomy.

The kind of justifiable patriotism I want to defend will require a modification of these formulas of the categorical imperative interpreted in these ways. Strictly, for a maxim to prescribe love for a country *morally* would require, by universalizability, that I be able to eliminate singular reference to that country (that region of space and time). The name for a country is a singular term, making singular reference. If I say, for example, that all Canadians are virtuous, I am making reference to a particular region of space and time in which those people live. I think we should allow that maxims can be morally permissible where singular reference is not eliminable, even in principle.⁷ It is morally permissible for me to help my friend Elizabeth get bats out of her house, even if I cannot eliminate reference to her even in principle from the maxim of my action, because my obligation comes out of the particular texture of our relationship and its history.

This kind of moral particularism allows that it might be morally permissible to love a country even if that love is not for universal properties possessed by that country that another country could also possess (such as having lofty mountains and fruitful plains), but for some singular property (for example its history) that it alone can possess.⁸ But now we need to make another distinction. Love for one’s country can take two different forms and is typically a mixture of both. The first form is love for the country itself. I can love my country without any reference, even implicit reference, to myself being a citizen of it. The second form is that I can love my country in a way that does not allow the elimination of my relation to the country from my love. Consider by way of analogy that I can decide, when watching two sports teams play a match on television, that I will support one of the teams because it makes the game more interesting to me. It is for the moment my team, but I do not care at all about what happens to the team after I have finished watching. On the other hand, I can cheer for the team because of its merits independent of my attachment.

One way to think about the first kind of love of a country is by analogy with the practical love for a person. Suppose a country has an individual indefinable essence in the same way that a person does. Philosopher and theologian Duns Scotus suggested that my individual essence (my “haecceity”) is a perfection of my common essence (my humanity).⁹ One basis of my love for another will then be her individual perfection, not something she has in common with all others. By analogy, my practical love for my country and the obligations internal to that

love will not be expressible in maxims that eliminate singular reference, even if (by this first kind of love) the maxims can eliminate reference to *me*. But there are large difficulties with this view. Countries are internally diverse and contain different cultures that are themselves constantly in flux. Even if we grant that there is a personal identity that can survive across a person's life, this is harder to grant for a country. If I ask, "Was England the same country after 1066?" the year of the Norman Conquest, the right answer might be "That is a bad question." Perhaps England was in some ways the same and in other ways different, and there is no fact of the matter about whether it is "the same country." The point about singular reference can be made, however, without relying on individual essences of countries. I can love Canada in a way that is not reducible to universal properties or characteristics that another country could also possess. The present objection to an unmodified Kantian morality is that it does not follow from the fact that Canada is a singular term that I cannot have a *moral* obligation toward or practical love for Canada. The requirement of universalizability has to be modified.

But suppose I love my country in the second way, where the object of my love contains essential reference to my relation to that country, even if that reference is implicit and not articulated as such. Does that mean that this is no longer a *morally permitted* love? Here, what is required is not a modification of Kant, but a recognition that his way of doing ethics allows in some instances preference for oneself. The formula of humanity requires an agent to treat humanity in *her own person* always at the same time as an end and never merely as a means. The trouble is that if she treats herself merely as one, and not as more than one, her own purposes are in danger of being morally outweighed by the competing purposes of others. We need a recognition that rationality allows not merely this kind of equal treatment of herself, but a preference for herself. One way to accomplish this is to distinguish between different *levels* of moral thinking.¹⁰ The *critical* level is an approximation to the thinking of a being who knows all the relevant facts and loves all people equally. The *intuitive* level is the level of our everyday moral thinking, when we do not have enough time or calm to think out what principles to live by, but have to rely on principles already established. Here is a statement of a principle from philosopher Derek Parfit, but now to be interpreted at the intuitive level: "When one of our two possible acts would make things go in some way that would be impartially better, but the other act would make things go better either for ourselves or for those to whom we have close ties, we often have sufficient reasons to act in either of these ways."¹¹

This principle allows that we can have in certain circumstances sufficient reason both for impartiality and for self-preference at the intuitive level. Here is a typical philosopher's thought experiment: "An adult is plummeting from a tenth-story window, and you, on the sidewalk below, know that you can save that person's life by cushioning his fall. If you did so, however, you would very likely

suffer broken bones, which would heal, perhaps painfully and imperfectly, over a period of months.”¹² To philosopher Richard Miller, it is clear that you can do your “fair share in making the world a better place while turning down this chance for world-improvement.” This allows that it is not merely *rational* but *morally permissible* to grant some degree of self-preference, even while doing your fair share, though it will take a lot more philosophical work to determine what this fair share would be. I think we should grant that it is a false rigorism to deny any moral permission to prefer ourselves or those to whom we have ties of kinship, friendship, or citizenship. This means that we also have to deny what I will call extreme or strong cosmopolitanism.¹³

Cosmopolitanism comes in many degrees. Robert Audi defines cosmopolitanism as giving “some degree of priority to the interests of humanity over those of nations, and the stronger the priority, the stronger the cosmopolitanism.” In this sense, *extreme* cosmopolitanism holds that the “interests of humanity come first in any conflict between them and national interests (other things equal).” A less prejudicial name would be “*strong* cosmopolitanism,” which holds, according to philosophers Gillian Brock and Harry Brighouse, “that we have no right to use nationality (in contrast with friendship or familial love) as a trigger for discretionary behavior.”¹⁴ Applied to global economic justice, this would mean, as philosopher Darrel Moellendorf puts it, that morality requires us all, including the citizens of Switzerland, to aim toward the situation in which “a child growing up in Mozambique would be statistically as likely as the child of a senior executive at a Swiss bank to reach the position of the latter’s parent.”¹⁵

There is a tradition of opposition to strong cosmopolitanism in the so-called political realism that has been one ingredient in U.S. foreign policy for over one hundred years.¹⁶ In the United States, the most conspicuous political realists of the twentieth century were Reinhold Niebuhr and Hans Morgenthau.¹⁷ What is surprising is that the political realists followed a teaching of Kant no less than the cosmopolitans did. Kant thought that we are born with radical evil, under what Luther calls “the bondage of the will.”¹⁸ Niebuhr takes a similar view, quoting Luther and insisting that the essential characteristic of Christian love is self-sacrifice. But this leads him to conclude that it is reasonable to hope for love in a tainted form from individuals in some contexts, but it is never reasonable to hope for it from groups. For him, “patriotism from an absolute perspective is simply another form of selfishness.”¹⁹

In the light of the realist argument, Kant’s own position seems paradoxical. He starts with the pessimistic premises of the realist and ends with the optimistic conclusions of the liberal and cosmopolitan idealist. He starts with radical evil and ends with the conclusion that humans will ultimately form a *foedus pacificum* (a zone of peace created by the eventual free association of liberal states). What

enables the transition, however, is that he adds divine assistance, which makes the zone of peace really, as opposed to merely logically, possible.²⁰ Otherwise, he would be vulnerable to the realist attack against the liberals' pie-eyed optimism. Kant's liberal followers have to a large extent dropped the theological context and thus made themselves liable to the charge that they have not taken seriously what the theological sources call original sin. On the other hand, both Kant and the realists have been misled by a false rigorism about local attachment. Niebuhr gives several explanations as to why, in his view, groups are inevitably selfish. Social groups, he says, are held together by emotion rather than reason. They are therefore, he holds, less likely to feel moral constraints, since these cannot operate in the absence of a high level of rationality; moreover, even altruism on the part of the individual is corrupted and "slewed into nationalism," since what is outside the nation is "too vague to inspire devotion."²¹ Here the implication is that love of the nation cannot be in itself a moral emotion: first, because morality operates at the level of rationality, not emotion and, second, because it is only human beings as such ("what is outside the nation") who are the proper objects of moral respect. But Niebuhr is surely exaggerating here. Groups can form around *rational* interest, and cosmopolitans can be *emotionally* devoted to their own cause.

There are two empirical reasons for rejecting strong cosmopolitanism.²² Kant made the ambitious prediction in the 1790s that states with a republican constitution would not fight with each other, and that the resulting zone of peace (the *foedus pacificum*) would gradually expand (though not without setback and tragedy) to a worldwide federation of states that no longer use war as an instrument of policy against each other.²³ This kind of optimism about democracy (understood as the freedom, equality, and independence of every citizen) was one fundamental rationale for a policy of promoting democracy worldwide. It was Woodrow Wilson's rationale during and after World War I and it was Bill Clinton's rationale for U.S. policy enunciated by his national security advisor, Anthony Lake, in 1993, that "The successor to a doctrine of containment must be a strategy of enlargement, enlargement of the world's free community of market democracies."²⁴ But this optimistic story does not take into account that states have gone in and out of the pacific union; moreover, some of the bloodiest wars of history have been fought by powers that were at one time in the union but had left. The first objection to the optimism of the enlargement story is the familiar conservative objection to the corrosive acid of modernism, that the strong cosmopolitan agenda has the effect of fostering a kind of rootlessness that in turn makes the local attachments return in a more virulent form under certain historically observable circumstances.²⁵ This agenda itself tends to undermine, in certain circumstances, the success of the regimes that are trying to implement it; in other words, the strong cosmopolitan agenda can be self-defeating. The philosophical and ideological differences here are likely to be meshed with all sorts of other causal factors, but they are

important all the same. We are seeing in the United States and in Europe swings toward a kind of antic cosmopolitan agenda that is a response, in part, to the same kind of neglect of the value of local attachment by the liberal elite.

The second empirical objection to the strong cosmopolitan agenda is that it makes conflict by liberal regimes with nonliberal ones more likely and worse in some circumstances. This was Niebuhr's complaint about Wilsonian idealism. It turned World War I into a crusade to make the world safe for democracy and therefore legitimated a scale of destruction that would otherwise have been intolerable. A similar complaint would be true of World War II. One of the mechanisms at work here is that in order to persuade liberal democracies to go to war, the enemy has to be demonized – painted in subhuman colors – so that negotiating a cessation of hostilities without the enemy's unconditional surrender becomes more difficult. So much momentum, so to speak, has to be generated to get the war started that it is much harder to get it stopped. The idealism becomes itself an obstacle to diplomacy. The picture of the opponent as not fully civilized also legitimates inhumane treatment. Moreover, Niebuhr and Morgenthau pointed to the self-deception that strong cosmopolitanism tends to produce. During the Cold War, for example, a veneer of communist internationalism (paying lip service to cosmopolitanism) disguised Russian hegemony under the Brezhnev Doctrine, and the same confusion of national interest with idealist rhetoric was true of the British in Egypt in 1881–1882 and has sometimes been true of U.S. foreign policy.²⁶

I said earlier that what made Kant satisfied that he could overcome the objection to a realist pessimism was his moral theology.²⁷ He believed that there is progress toward and there will eventually be the realization of a juridico-civil union of states, but this requires the activity of providence. If we do not follow Kant's belief in the *moral* progress of the human race, can we still be cosmopolitans? Yes, because if Kant was right about the juridico-civil union of states, it does not require moral progress at all. He said that the union can be achieved even by “a nation of devils.”²⁸ But he thought we will still require, for rational stability, a ground in providence for believing in this union as a real (as opposed to a merely logical) possibility.

Let us now look at the work of a contemporary cosmopolitan who denies the place of theology that Kant gave to it: namely, Seyla Benhabib.²⁹ Benhabib takes from Habermas the theme of what he calls the “Janus face of the modern nation.”³⁰ “All modern nation-states that enshrine universalistic principles into their constitutions are also based on the cultural, historical, and legal memories, traditions, and institutions of a particular people and peoples.”³¹ Benhabib similarly distinguishes between “the *ethnos*” (“a community of shared fate, memories, and moral sympathies”) and “the *demos*” (“a democratically enfranchised totality of all citizens, who may or may not belong to the same *ethnos*”).³² Because the modern nation-state has these two faces, there will very often be “a

dialectic of universalistic form and particular content,” in which the cosmopolitan aspiration of the *demos* is in tension with the loyalties to the *ethnos*. Since we are now living, Benhabib says, “in a post-metaphysical universe,” we cannot appeal as Kant does to God as a coordinator of the ethical commonwealth.³³ Nonetheless, her book *Another Cosmopolitanism* is full of teleology. The final sentence of the book is: “The interlocking of democratic iteration struggles within a global civil society and the creation of solidarities beyond borders, including a universal right of hospitality that recognizes the other as a potential co-citizen, anticipate another cosmopolitanism – a cosmopolitanism to come.”³⁴ But the hope is rationally unstable without the theological ground for the hope.³⁵ Whether we do in fact live in a postmetaphysical universe, or whether (as most people in the world believe) the moral order is sustained by some kind of divine being or beings, is a different question, and one beyond the limits of this essay.

Benhabib quotes with approval Kant’s statement of the principle of cosmopolitan right, “The Law of World Citizenship Shall be Limited to Conditions of Universal Hospitality.”³⁶ The term “hospitality” here is, as Kant realized, misleading. It refers not to the kindness or generosity one might display to guests, but to the right of an individual to engage in commerce on a foreign territory (in a broad sense of commerce) without being attacked by the nationals of that territory. Benhabib takes hospitality, even though limited in this way, to have implications for “all human rights claims which are cross-border in scope.”³⁷ And she has confidence that even though there did not exist in Kant’s time, and still does not in ours, the enforcement mechanisms that lie behind domestic law, these will come and are “signaled” by this principle. “I follow the Kantian tradition in thinking of cosmopolitanism as the emergence of norms that ought to govern relations among individuals in a global civil society. These norms . . . signal the eventual legalization and juridification of the rights claims of human beings everywhere, regardless of their membership in bounded communities.”³⁸

What are the grounds of her confidence in this eventual juridification? I will mention two.³⁹ The first is the observation of the progress that has already been made. Benhabib is here in the same position as Kant, looking at the international response in Europe to the ideals of the French Revolution. Kant was tremendously encouraged by this response, even though he was horrified by some of what the Revolution produced.⁴⁰ If we restrict our attention, however, to the treatment over the last few years of immigrants in Europe and the United States, observation gives us at best equivocal results (this essay was written in 2019 and Benhabib’s volume came out of a set of lectures in 2004). Kant himself was aware that he could not ground his hope in observation because the evidence was at best ambiguous, and his argument was therefore transcendental and finally theological.

Second, Benhabib appeals to the notion of “democratic iterations”: that is, “linguistic, legal, cultural, and political repetitions-in-transformation, invoca-

tions that also are revocations. They not only change established understandings but also transform what passes as the valid or established view of an authoritative precedent.”⁴¹ She suggests that politics can be a “jurisgenerative process,” which creatively intervenes to “mediate between universal norms and the will of democratic majorities.” I think she is right to point to this possibility. But as a ground for *hope*, we need more than this possibility, because there is equally the possibility of regress. Democratic iterations can go both toward and away from cosmopolitan norms, and she recognizes that these norms do not depend for their validity upon what actually transpires. If democratic practice gets closer to the norms, the norms are the measuring stick for our rejoicing; if the practice gets further away, these same norms are the measuring stick for our lament. But then we have the same objection as the first one; our observation over the last few years gives us at best equivocal evidence.

Should Benhabib keep the elucidation and prescription of the cosmopolitan norms and drop the teleology? The trouble is that this will put her in the difficulty that Kant raises for Mendelssohn: “he could not reasonably hope to bring this about all by himself, without others after him continuing along the same path.”⁴² In “Religion,” Kant puts the point in terms of “the idea of working toward a whole of which we cannot know whether as a whole it is also in our power.”⁴³ Benhabib needs the teleology because she needs the sense that despite the equivocal evidence, she is, so to speak, on the winning side; the cosmopolitan norms will in the end prevail. But then she needs to give us the grounds for the teleology. In Kant’s work, the grounds are theological. The question is whether we can have such grounds when we “live in a post-metaphysical universe.”

There is a way to look at the relation between love of country and love of humanity that derives from the distinction mentioned earlier between our individual and our common essence. Scotus suggested that our individual essence, our *haecceity*, is a perfection of the common essence of our species – namely, humanity – in the same way that humanity is a perfection of the common essence of the genus, animality. I have already conceded that countries probably do not have individual essences in the way that individual humans do, so that the analogy here is incomplete. But my point is that we do not have, when the case of patriotism and cosmopolitanism is properly understood, two competing loves. In the same way, my love for another human being in her particularity does not compete with my love for humanity.

There are other sources than Scotus of this sort of view of particularity. Philosopher Søren Kierkegaard says,

Humanity’s superiority over animals is not only the one most often mentioned, the universally human, but is also what is most often forgotten, that within the species

each individual is the essentially different or distinctive. This superiority is in a very real sense the human superiority; the former is the superiority of the race over the animal species. Indeed, if it were not so that one human being, honest, upright, respectable, God-fearing, can under the same circumstances do the very opposite of what another human being does who is also honest, upright, respectable, God-fearing, then the God-relationship would not essentially exist, would not exist in its deepest meaning.⁴⁴

I want to emphasize two things about this passage. First, Kierkegaard is not saying that our distinctiveness is something different from our humanity; he is saying, rather, that our human greatness resides in our ability to be distinctive. Second, he locates this distinctiveness in the unique relation each of us has to God.

George Eliot's novel *Daniel Deronda* is about a man who discovers as an adult that he has Jewish ancestry.⁴⁵

It was as if he had found an added soul in finding his ancestry – his judgement no longer wandering in the mazes of impartial sympathy, but choosing, with the noble partiality which is man's best strength, the closer fellowship that makes sympathy practical – exchanging that bird's eye reasonableness which soars to avoid preference and loses all sense of quality, for the generous reasonableness of drawing shoulder to shoulder with men of like inheritance.

Again, I want to emphasize two points. The first is that Eliot is calling the partiality that presupposes our difference from each other “our [that is, our human] best strength.” The second is that both the bird's-eye view and the shoulder-to-shoulder view are described as forms of reasonableness. We do not need to leave reason behind in order to identify with our particular ancestry.

I will proceed by giving three brief personal vignettes to illustrate what loving one's country might be like if it was construed as a perfection of loving what human collectives do well. I write with a sense of loss, as an emigrant from Britain to the United States, which is now my country. I will also immediately concede the dangers of this way of seeing the love of one's country, and the corruptions to which it is liable. Take, first, the aesthetic style that is characteristic of a particular country's music at its best periods, for example, the Tudor and Jacobean writing of vocal and consort music (say, Byrd and Gibbons and Tomkins). I can love this music in preference to any other, and this is undoubtedly due in part to my having grown up with it in a boys' choir from an early age. There is nothing irrational about such a preference. This is truly great music, and I do not have to be shaken in my love by the recognition that the attachment derives from my upbringing. Perhaps, if I had grown up in New Orleans, I would have loved the jazz of the 1920s and 1930s in just this way. There is a kind of attachment here that requires a person's early contact, so that the music is, so to speak, in the bones. But I can

recognize the good fortune that there is an excellent manifestation of the human spirit to which I have been given access by the accident of my circumstances. Second, I can love a particular piece of land, perhaps the downs above the Chiltern village where I grew up, and where I know by name all the species of flowers that grow there. Wendell Berry writes in his novels and essays about this kind of love, that is of the land and, indissolubly mixed with this, of the people who have made that land what it is over the generations.⁴⁶ I think this is possible also in a city; one could love Greenwich Village in this sort of way. But if Berry is right, it is harder because this sort of value requires stability across the generations, and the city is constantly in flux. Love of a national musical style (as in the first example) or of a piece of land (as in the second example) are not the same as love of one's country. But they are, so to speak, streams that run into that sea. A third example is the solidarity one feels when one's country is attacked. I remember being surprised by the intensity of my feeling when the United States was attacked on 9/11. Or one can watch in a pub a football match in the World Cup, where one's national team has won a surprising victory, and the communal elation can be overwhelming, hugs and cheers all round, with nothing mean-spirited to spoil it. We seem to need something larger than ourselves to be proud of in order to be at our best.

These are three vignettes, and in each of them we can see how things could easily go wrong. I distinguished earlier different ways we might love our country. We might love it because of universal properties that some other country might have, such as tall mountains and fertile plains, or for some unique property, such as its history. Or we might love it because it is *our* country. I urged that it was a false dichotomy to allow moral value only to judgments that exclude singular reference and a false rigorism to deny moral permission to any self-preference. Now we can return to the case of the Jacobean motet, which I love because it is great music (perhaps Thomas Tomkins's "When David Heard"), and we can make another distinction. It may be that the object of my love is valuable for its universal properties, but the quality of my love may depend upon my history with this object. I may love the motet because I sang it as a boy, and it has a certain resonance for me because of my memory of the people I sang it with. This fact about the quality of my love does not make my love irrational and does not in any way pollute it. The value of the motet is a human value. By that I mean that it is a manifestation of a particular excellence that humans have, of making music together. The scholastic language of a "perfection" fits well here. Music is a human excellence, but this motet exemplifies spectacularly well what that excellence enables us to do. The fact that I get access to that perfection because of my personal history does not make my preference suspect.

But now suppose the choir master who loves Tudor and Jacobean vocal and consort music refuses to allow the choir to sing anything else. There is other equally great music with the same properties of complexity and expressiveness

(perhaps even from roughly the same period, but from Tomás Luis de Victoria, for example, from the Spanish Counter-Reformation), which he cannot enjoy or allow us to enjoy. Now something has gone wrong with his love. It has become blind and bigoted. There is what I will call a “practical contradiction” between his love for the Tomkins motet and his refusal to allow value to the Victoria. A practical contradiction is generated between two maxims when the first maxim prescribes an action or attitude that acknowledges some value and the second prescribes an action or attitude that denies that same value.

We can see the same kind of shift in the other two vignettes. Perhaps I love some particular piece of land. Again, it may be beautiful, if it is farmed land, because it manifests a human excellence, but here there will be a large admixture (in the folds of the hills, for example) of a natural beauty beyond the merely human. If this is in a city, the human excellence will predominate. My love for this land is not made somehow morally suspect by the fact that I grew up there. But there are people who cannot see this beauty anywhere else (in Burgundy, for example), and again, there is a practical contradiction in their refusal. In terms of the third example, if I find myself moved by love for my country when it is attacked, and I endorse that morally as an initial response before going on to evaluate whether the attack was unprovoked, I should (for the sake of consistency) recognize that when my country attacks another, I should endorse the similar initial response of that country’s citizens. There is a human value here, a solidarity that manifests the human excellence of our associating with each other into *poleis*, “cities” in the ancient Greek sense, and this solidarity is a value wherever on the globe it occurs.

We can now propose one criterion for when a local love *does* become illegitimate by reasonable cosmopolitan standards. It becomes illegitimate when it involves a practical contradiction with a human value. Suppose, for example, that I say “America first,” and I propose that this means closing the national borders, making it almost impossible for refugees to pass the initial standards for credible fear, and separating children from their parents who cross the border whether they are applying for asylum or not, so as to discourage such application.⁴⁷ Why should I think that America is at least potentially great and deserves this kind of love? Perhaps I love internal freedom of the will (a human excellence), and therefore the external freedom that allows the expression in outward behavior of this internal freedom.⁴⁸ Perhaps I love in America a relatively high degree of external freedom. But now we can see the practical contradiction. There are two maxims here and the first maxim (the love of freedom) prescribes an action or attitude that acknowledges some value and the second (closing the border and separating families) prescribes an action or attitude that denies that same value. Kant himself, as discussed earlier, phrased this failure as a failure of hospitality. There are indeed international laws that guarantee the right of the persecuted to seek sanctuary in other countries, and these make concrete the right to hospitality in Kant’s

sense.⁴⁹ The right to seek sanctuary very plausibly includes the right to have one's story of persecution listened to carefully, and the right not to be forcibly separated from one's family.

How can we avoid this kind of practical contradiction? This returns us finally to the moral theology. Kant did not think, and he was right not to think, that merely pointing out a contradiction is sufficient to change behavior or policy. We are born, he says, under the evil maxim that prefers our happiness to our duty. This is the basis for the American political realists' pessimism about politics in general and international politics in particular, as discussed earlier. If we are under the evil maxim, and we find that some practice that gives precedence to our own group is inconsistent with the moral demand, then we will reject the moral demand for that case. Kant himself, however, was not pessimistic about the prospects of a pacific union. The basis for his optimism was his belief in providence. I will conclude by claiming that a moral theology helps us understand that patriotism, so far from "sluicing into nationalism" as Niebuhr says, can in fact fit a moderate cosmopolitanism. These points start from Kant's moral theology but go beyond it.

The essential point is about the commands of the God of the great monotheisms, though there may be a way to make it in nontheist terms; that is not the project of this essay. This God both includes us within community and then sends us out beyond it. I will try to show the implications of this for love of one's country by distinguishing, as Kant did, God's legislative, executive, and judicial functions.⁵⁰ God's including and sending out is part of God's legislative function. We should recognize, Kant says, our duties as God's commands.⁵¹ Much contemporary evolutionary psychology has emphasized the role of religion as what social psychologist Jonathan Haidt calls a "hive switch," the crucial social practice that enables group formation: "If religion is a group-level adaptation, then it should produce *parochial* altruism."⁵² It is true that Judaism, Christianity, and Islam emphasize duties within the group, but they also emphasize that God commands us to love or show mercy to the enemy and stranger and they promise resources, because of the nature of the commander, for doing so. I am not learned enough to go beyond the limits of these three faiths, but I believe the same is true beyond those limits in Hinduism and Buddhism. Within Judaism, we should look at the Noahide Laws, for example; within Christianity, at the parable of the Good Samaritan; and within Islam, at the Mu'tazilite position on duties to the stranger.⁵³ My point is that it is the very same God who does both the including and the sending out, so that the devotion that is encouraged by the group identity of believers itself sends them beyond the group to strangers in need.

In terms of God's executive function, the tension between happiness and duty that lies behind the political realists' pessimism is surmounted if Kant was right

about the real possibility of the highest good, which is the union of the two. This is why Kant says, in the preface to “Religion,” “morality inevitably leads to religion.”⁵⁴ Real possibility is different, for Kant, from merely logical possibility, and in this case, he thinks the real possibility of the highest good is grounded in the existence of the “supersensible author of nature” who brings our attempts to follow the moral demand and our happiness together. This means that we can rationally believe that we do not have to do what immorally privileges ourselves or our national or political group in order to be happy. Kant held that God coordinates our individual attempts to do good so that “the forces of single individuals, insufficient on their own, are united for a common effect.”⁵⁵ How does this coordination work? We need to be modest here in our claims to understand divine working. Kant says in “Toward Perpetual Peace” that “from a *morally practical* point of view . . . as e.g. in the belief that God, by means incomprehensible to us, will make up for the lack of our own righteousness if only our disposition is genuine, so that we should never slacken in our striving towards the good, the concept of a divine *concursus* is quite appropriate and even necessary.”⁵⁶ *Concursus* (concurrence) is where God and mankind work together, though this kind of cooperation goes beyond the limits of our understanding.

In terms of God’s judicial function, God is merciful as well as just. Kant here translates a Lutheran version of the Christian doctrine of justification. In strict justice, God would not be able to reward with eternal happiness a life that was not purely good. But God “to whom the temporal condition is nothing” regards, by intellectual intuition, a human life that is moved by the predisposition to goodness as already completely what it is not yet: namely, holy.⁵⁷ Intellectual intuition is productive, unlike human intuition which is merely receptive. The divine regard here is, I take it, a translation of the Lutheran doctrine of the divine imputation to us of Christ’s righteousness.⁵⁸ The present point is that our political attachments are to relative goods not absolute goods. To think of my *polis* as an absolute good would be idolatry, even though love of country can be a perfection of love of humanity in the way I have been discussing. God’s mercy allows our love of human beings to be mediated through our love of a particular political grouping, so long as there is no practical contradiction of the type I have mentioned.

My point in this final section has been that patriotism and moderate cosmopolitanism do not need to be seen as competing loves. I have tried to use some theological resources in order to see how obstacles to this reconciling project might be removed. But it remains to determine what is the best balance of these commitments in any given polity. For example, Germany accepted over one million asylum seekers fleeing war and instability in the Middle East in 2015.⁵⁹ Was Germany up to that challenge, or did the sudden influx of immigrants create a backlash that dangerously propelled the rise of nationalist anti-immigrant parties? The moderate cosmopolitanism in my essay does not answer this question. But it points to a

possible practical contradiction between large-scale exclusion and a love of Germany that lived through the pulling down of the Berlin Wall and repents of the nationalism of the first half of the twentieth century.⁶⁰ It is democracies that are best able to find the balance here because they best give voice to the stakeholders within the country. But a Kantian moral theology adds that the refugees also are ends in themselves, and God's help is offered to meet the moral demand that God makes of us.

AUTHOR'S NOTE

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ENDNOTES

- ¹ See Harry R. David and Robert C. Good, eds., *Reinhold Niebuhr on Politics: His Political Philosophy and Its Application to Our Age as Expressed in His Writings* (New York: Scribner's, 1960), 85; and Reinhold Niebuhr, *Moral Man and Immoral Society: A Study in Ethics and Politics* (New York: Scribner's, 1932), 91.
- ² There is a large literature on the relation between cosmopolitanism and patriotism. One recent collection of sources is Claudia Schumann, "Which Love of Country? Tensions, Questions and Contexts for Patriotism and Cosmopolitanism in Education," *Journal of the Philosophy of Education Society of Great Britain* 50 (2) (2016). She is responding to a shift in Martha Nussbaum's position. Nussbaum had argued for a replacement of patriotism by cosmopolitanism in Martha Nussbaum, "Patriotism and Cosmopolitanism," in *For Love of Country? Debating the Limits of Patriotism*, ed. Joshua Cohen (Boston: Beacon Press, 1996), 3–17. More recently, she has argued for a reconciliation in Martha Nussbaum, "Towards a Globally Sensitive Patriotism," *Dædalus* 137 (3) (Summer 2008): 78–93. An excellent earlier collection of sources is Pauline Kleingeld, "Kantian Patriotism," *Philosophy and Public Affairs* 29 (4) (2000): 313–341. I will be making use of some of her distinctions, but she does not acknowledge the centrality of Kant's moral theology.
- ³ I have done more exegesis of Kant in John Hare, *God and Morality: A Philosophical History* (Oxford: Blackwell, 2009), 145–156. I am relying on an interpretation that derives ul-

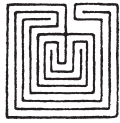
timately from H. J. Paton, from whom my father R. M. Hare learnt it as an undergraduate. See H. J. Paton, *The Categorical Imperative: A Study in Kant's Moral Philosophy* (Tiptree, United Kingdom: Anchor Press, 1946), 133–164; and R. M. Hare, *Moral Thinking: Its Levels, Method and Point* (Oxford: Clarendon Press, 1981), 107–116.

- ⁴ I will reference Kant's texts by the volume and page number of the Berlin Academy Edition (Berlin: George Reiner, later Walter de Gruyter, 1900–). The English translations I will use are from *The Cambridge Edition of the Works of Immanuel Kant*. Immanuel Kant, "Groundwork of the Metaphysics of Morals (1785)" [Berlin Academy Edition, vol. 4, 421], in *Practical Philosophy*, ed. and trans. Mary J. Gregor (Cambridge: Cambridge University Press, 1999), 73.
- ⁵ Hare, *Moral Thinking*, 108.
- ⁶ Kant, "Groundwork of the Metaphysics of Morals (1785)" [429], 80.
- ⁷ I have defended this kind of moral particularism in John E. Hare, *God's Command* (Oxford: Oxford University Press, 2015), 147–151. It is a good way, but not Kant's way, to understand the formula of humanity, that it requires me to love what is unique about my neighbor as well as her humanity, because (as I argue in this essay) what is unique (the haecceity) is a *perfection* of what is held in common.
- ⁸ Kleingeld, in "Kantian Patriotism," distinguishes between three kinds of patriotism: civic patriotism, nationalist patriotism, and trait-based patriotism. In the first, a person is committed to support her own country because it is just and democratic and cannot sustain that character without the support of its citizens. Nationalist patriotism is based on love for one's own nation as necessary for a good psychological identity-formation, and Kleingeld cites Alasdair MacIntyre as a proponent, based on Alasdair MacIntyre, "Is Patriotism a Virtue?" in *Theorizing Citizenship*, ed. Ronald Beiner (Albany: SUNY Press, 1995), 209–228. MacIntyre laments the condition of being "doomed to rootlessness, to be a citizen of nowhere." Trait-based patriotism is loyalty to one's own country because of features it possesses that could in principle be possessed by other countries.
- ⁹ Duns Scotus, *Lectura II*, dist. 3.
- ¹⁰ I am taking this distinction from Hare, *Moral Thinking*, 44–64.
- ¹¹ Derek Parfit, *On What Matters*, vol. 1 (Oxford: Oxford University Press, 2013), 137. He calls this a "wide value-based objective view," but he is not distinguishing, as I have just done, between two levels of moral thinking.
- ¹² This is from Richard W. Miller, "Cosmopolitan Respect and Patriotic Concern," *Philosophy and Public Affairs* 27 (3) (1998): 209. It is discussed in Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (New York: W. W. Norton & Company, 2006), 164 ff.
- ¹³ The term "extreme cosmopolitanism" is from Robert Audi; see Robert Audi, "Religion, Politics, and Citizenship," in *Reasons, Rights, and Values* (Cambridge: Cambridge University Press, 2015), 286.
- ¹⁴ Gillian Brock and Harry Brighouse, *The Political Philosophy of Cosmopolitanism* (Cambridge: Cambridge University Press, 2005), 3.
- ¹⁵ Darrel Moellendorf, *Cosmopolitan Justice* (New York: Westview, 2002), 49.

- ¹⁶ Robert Osgood, *Ideals and Self-Interest in America's Foreign Relations* (Chicago: University of Chicago Press, 1953).
- ¹⁷ I have written about these two thinkers as well as George Kennan at greater length in John Hare and Carey Joynt, *Ethics and International Affairs* (New York: St. Martin's Press, 1982), esp. chap. 2. See also Reinhold Niebuhr, *Moral Man and Immoral Society* (New York: Scribner's, 1932); and Hans Morgenthau, *Scientific Man vs. Power Politics* (Chicago: University of Chicago Press, 1946).
- ¹⁸ Immanuel Kant, "Religion within the Boundaries of Mere Reason" [Berlin Academy Edition, vol. 6, 29–39], in *Religion and Rational Theology*, ed. and trans. Allen Wood and George di Giovanni (Cambridge: Cambridge University Press, 1996).
- ¹⁹ David and Good, *Reinhold Niebuhr on Politics*, 85. Morgenthau attended Niebuhr's lectures at Harvard and called him the greatest political thinker of his generation. For Morgenthau, as for Niebuhr, morality characteristically demands complete self-sacrifice, and we cannot achieve this politically because we are infected by the *animus dominandi*. He quoted Luther here, just as Niebuhr did, in Morgenthau, *Scientific Man vs. Power Politics*, 192–196.
- ²⁰ For Kant, real possibility, unlike merely logical possibility, must be grounded in what is actual.
- ²¹ Niebuhr, *Moral Man and Immoral Society*, 91.
- ²² I have addressed this in more detail in John Hare, "Kantian Ethics, International Politics, and the Enlargement of the *Foedus Pacificum*," in *Sovereignty at the Crossroads: Morality and International Politics in the Post-Cold War Era*, ed. Luis E. Lugo (Lanham, Md.: Rowman and Littlefield, 1996), 71–92. There is an excellent response by David Lumsdaine, "Moral Rationality and Particularity: A Response to John Hare," in the same volume.
- ²³ Immanuel Kant, "Toward Perpetual Peace (1795)" [Berlin Academy Edition, vol. 8, 356], in *Practical Philosophy*, ed. Gregor, 311–351. A state is only a republic in the required sense if it operates three principles of government: the freedom of every member of the society as a human being, the equality with every other member as a subject, and the independence of every member of a commonwealth as a citizen. Michael Doyle, in a series of articles in the 1980s, argued that with a couple of exceptions, Kant's prediction has turned out to be correct. Michael Doyle, "Kant, Liberal Legacies, and Foreign Affairs," *Philosophy and Public Affairs* 12 (3) (1983): 205–235, 325–253. Kant himself distinguishes between republicanism and democracy. See Kant, "Toward Perpetual Peace (1795)" [352–353], but he is talking about democracies that do not respect individual rights.
- ²⁴ Anthony Lake quoted in Thomas L. Friedman, "U.S. Vision of Foreign Policy Reversed," *The New York Times*, September 22, 1993. This was not a merely partisan commitment. Ronald Reagan already had proclaimed to the British Parliament in June 1982, "a global campaign for democratic development" or "campaign for freedom," which he claimed would strengthen the prospects for a world at peace; *The New York Times*, June 9, 1982.
- ²⁵ An excellent example is the case of Argentina. See Peter H. Smith, "The Breakdown of Democracy in Argentina, 1916–30," in *The Breakdown of Democratic Regimes: Latin America*, ed. Juan Linz and Alfred Stepan (Baltimore: Johns Hopkins University Press, 1978), 19. Consider also the cases of Germany, Italy, Peru, Brazil, Colombia, and Venezuela; see Guillermo O'Donnell, "Permanent Crisis and the Failure to Create a Democratic Regime," in *ibid.*, 142.

- ²⁶ There is a vivid indictment in Osgood, *Ideals and Self-Interest in America's Foreign Relations*.
- ²⁷ A fuller essay would look at texts from Kant's "Religion," "The End of All Things," "Conflict of the Faculties," and "Toward Perpetual Peace (1795)."
- ²⁸ Kant, "Toward Perpetual Peace (1795)" [366].
- ²⁹ Seyla Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006). In a longer version of this essay, I would consider also the work of Kwame Anthony Appiah, and especially his *Cosmopolitanism: Ethics in a World of Strangers*.
- ³⁰ Jürgen Habermas, "The European Nation-State: On the Past and Future of Sovereignty and Citizenship," in *The Inclusion of the Other: Studies in Political Theory*, ed. Ciaran Cronin and Pablo De Greiff (Cambridge, Mass.: The MIT Press, 1998), 115.
- ³¹ Benhabib, *Another Cosmopolitanism*, 169–170.
- ³² *Ibid.*, 68.
- ³³ *Ibid.*, 72.
- ³⁴ *Ibid.*, 177.
- ³⁵ The term "unstable" is Kant's, from Volckmann's notes on Kant's "Natürliche Theologie," Berlin Academy Edition, vol. 28, 1151. Kant thought that perseverance in the moral life without belief in God was rationally unstable, though he knew people who lived with this instability and he thought of Spinoza as one such person.
- ³⁶ Kant, "Toward Perpetual Peace (1795)" [357] quoted in Benhabib, *Another Cosmopolitanism*, 21. See also Immanuel Kant, "The Metaphysics of Morals (1797)" [Berlin Academy Edition, vol. 6, 352], in *Practical Philosophy*, ed. Gregor.
- ³⁷ Benhabib, *Another Cosmopolitanism*, 149.
- ³⁸ *Ibid.*, 20.
- ³⁹ In a longer essay, I would add a third: her appeal to Hegel's notion of concrete universals. This is not the right place to discuss whether this notion is coherent, and a more modest point is that the Hegelian dialectic of particular and universal is a history of *Geist* or Spirit, ending in the Absolute Spirit as the all-in-all. We cannot appeal to this notion in a "post-metaphysical universe."
- ⁴⁰ Jeremy Waldron in the same volume bases his confidence about the emergence and internalization of cosmopolitan norms on the increasing interdependence of nations and the rising levels of international trade and commerce; Jeremy Waldron, "Cosmopolitan Norms," commentary in Benhabib, *Another Cosmopolitanism*, 94. But Benhabib is skeptical of this line of analysis. She thinks it sounds like nineteenth-century mercantilism; Benhabib, *Another Cosmopolitanism*, 153–154.
- ⁴¹ *Ibid.*, 48–49.
- ⁴² Immanuel Kant, "On the Common Saying: That May Be Correct in Theory, but It Is of No Use in Practice (1793)" [Berlin Academy Edition, vol. 8, 307–313], in *Practical Philosophy*, ed. Gregor, 273–309.
- ⁴³ Kant, "Religion within the Boundaries of Mere Reason" [98].
- ⁴⁴ Søren Kierkegaard, *Works of Love*, ed. and trans. Howard V. Hong and Edna H. Hong (Princeton, N.J.: Princeton University Press, 1988), 230.

- ⁴⁵ The case is discussed in Appiah, *Cosmopolitanism*, xvii–xviii. The quotation is from George Eliot, *Daniel Deronda* (London: Penguin, 1995), 745.
- ⁴⁶ For example, Wendell Berry, *Remembering* (New York: North Point Press, 1988). In my home village, the descendants of the families who came to build the church and almshouses and school in 1480 are still living in the village.
- ⁴⁷ See Miriam Jordan, “Big Jump in Rejections at the Border as Asylum Seekers Face New Hurdles,” *The New York Times*, August 8, 2018.
- ⁴⁸ See Kant, “On the Common Saying” [290].
- ⁴⁹ See Benhabib, *Another Cosmopolitanism*, 46 ff.
- ⁵⁰ See Immanuel Kant, “On the Miscarriage of All Philosophical Trials in Theodicy” [Berlin Academy Edition, vol. 8, 257].
- ⁵¹ See Immanuel Kant, “Critique of Practical Reason” [129]; Immanuel Kant, *Lectures on Ethics* (Collins) [Berlin Academy Edition, vol. 27, 274]; and Kant, “Religion within the Boundaries of Mere Reason” [154].
- ⁵² Jonathan Haidt, *The Righteous Mind* (New York: Vintage Books, 2012), 308. I have discussed this work in Hare, *God’s Command*, 267–272.
- ⁵³ I have discussed all of these in *ibid.*, 305 ff.
- ⁵⁴ Kant, “Religion within the Boundaries of Mere Reason,” 6.
- ⁵⁵ *Ibid.*, 98. See Hare, *God’s Command*, 50–53.
- ⁵⁶ Kant, “Toward Perpetual Peace (1795),” 362.
- ⁵⁷ Kant, “Critique of Practical Reason (1788),” 123.
- ⁵⁸ I have done some exploration of this theology in John Hare, *The Moral Gap: Kantian Ethics, Human Limits, and God’s Assistance* (Oxford: Clarendon Press, 1996), chap. 8 and 9.
- ⁵⁹ The question about Germany is Charles Lockwood’s, as is the following quotation from Merkel.
- ⁶⁰ Angela Merkel said, “I lived behind a fence for too long for me to now wish for those times to return”; Angela Merkel quoted in Isaac Stanley-Becker, “The Refugee Crises Once Threatened to Sink Angela Merkel’s Career. How Did the German Chancellor Weather the Storm?” *The Washington Post*, September 21, 2017.



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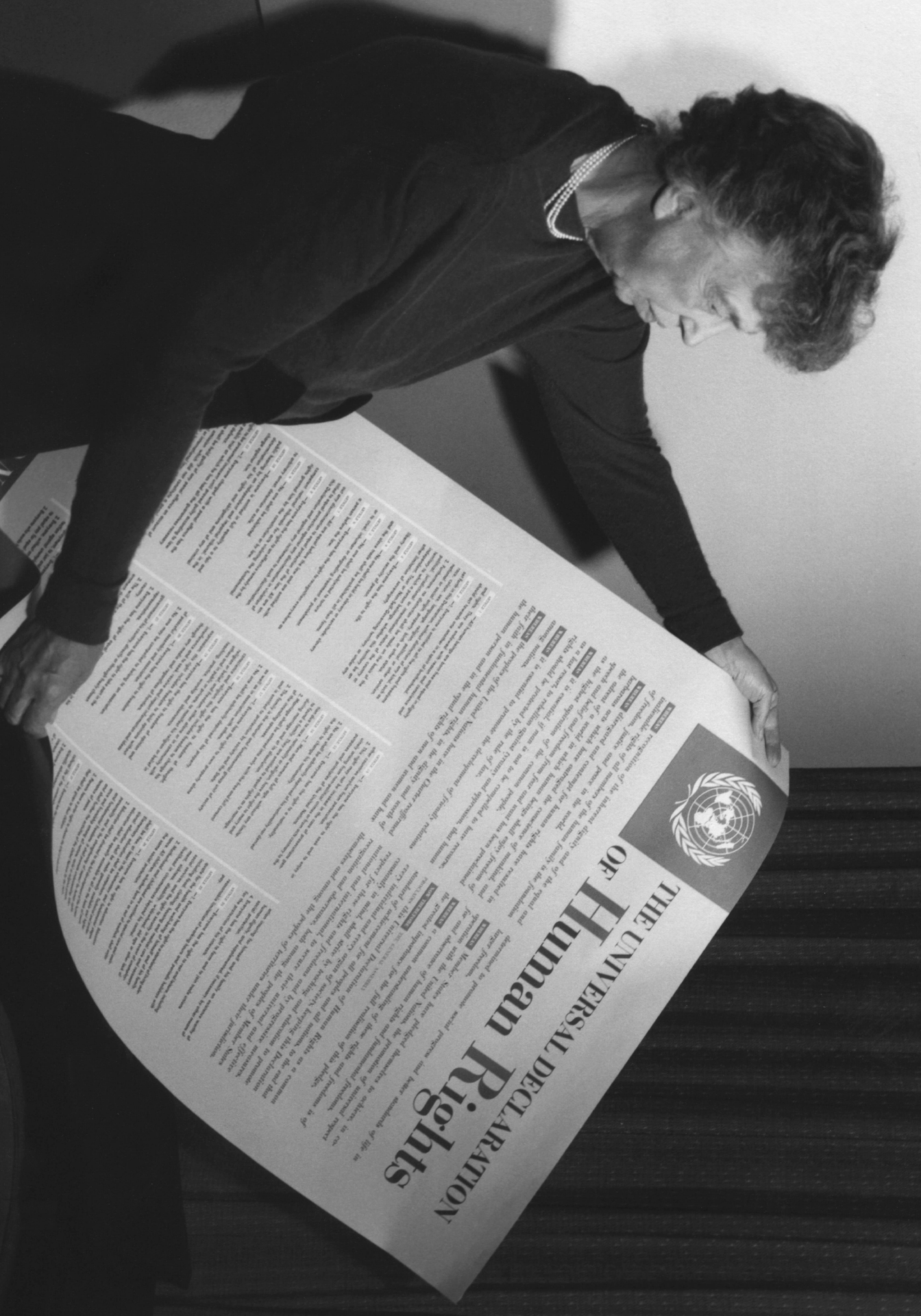
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Inside back cover: Eleanor Roosevelt, chair of the United Nations Human Rights Commission, holding a copy of the Universal Declaration of Human Rights (in English). Lake Success, New York, November 1949. Photo courtesy of the FDR Presidential Library and Museum.



THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

PREAMBLE Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. **ARTICLE 1** All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. **ARTICLE 2** Everyone has the right to recognition as a person before the law. **ARTICLE 3** Everyone has the right to life, liberty and security of person. **ARTICLE 4** No one shall be subjected to slavery or servitude; no one shall be a slave. **ARTICLE 5** No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. **ARTICLE 6** Everyone has the right to recognition as a person before the law. **ARTICLE 7** All are equal before the law and are entitled without any discrimination to equal protection of the law. **ARTICLE 8** Everyone has the right to an effective remedy by the competent national authorities for the violations of his fundamental rights and freedoms recognized by constitutional or statutory provisions. **ARTICLE 9** No one shall be subjected to arbitrary arrest, detention or exile. **ARTICLE 10** Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him. **ARTICLE 11** 1. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 2. In the determination of his criminal and civil rights and obligations and of any criminal charge against him, everyone shall be entitled to a fair and public hearing by an independent and impartial tribunal. **ARTICLE 12** No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. **ARTICLE 13** 1. Everyone has the right to freedom of movement and residence within the borders of each country. 2. Everyone has the right to leave any country, including his own, and to return to his country. **ARTICLE 14** 1. Everyone has the right to seek and to enjoy in other countries asylum from persecution. 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes and from acts contrary to the purposes and principles of the United Nations. **ARTICLE 15** 1. Everyone has the right to a nationality. 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality. **ARTICLE 16** 1. Everyone has the right to marry and to found a family, which is the natural basis of society. 2. Men and women of full age, without any limitation of race, nationality and religion, shall have equal rights in marriage, during marriage and at its dissolution. **ARTICLE 17** 1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property. **ARTICLE 18** Everyone has the right to freedom of thought, conscience and religion. **ARTICLE 19** Everyone has the right to freedom of opinion and expression. **ARTICLE 20** 1. Everyone has the right to peaceful assembly and to associate with others in the form of unions, associations or societies for the promotion of their interests. 2. No one shall be compelled to belong to an association. **ARTICLE 21** 1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right of equal access to public service in his country. 3. The will of the people shall be the basis of the authority of government; this will shall be expressed through periodic and genuine elections which shall be held by secret ballot and shall ensure the free expression of the will of the voters. **ARTICLE 22** Everyone has the right to social security. **ARTICLE 23** 1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. 2. Everyone, without any discrimination, has the right to equal pay for equal work. 3. Everyone has the right to just and favourable remuneration which shall include wages and benefits in kind. **ARTICLE 24** Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. **ARTICLE 25** 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care, and necessary social services, and the right to education. 2. The States Parties to this Declaration undertake to secure this right for themselves and for their subjects. **ARTICLE 26** 1. Education shall be free, at least in the elementary and fundamental stages. **ARTICLE 27** 1. Everyone has the right to take part in the cultural life of the community. **ARTICLE 28** The rights and freedoms set forth in this Declaration derive from the inherent dignity of the human person and shall be subject only to such limitations as are necessary in a democratic society in the interests of national security, public order, or the general welfare of the community. **ARTICLE 29** 1. Everyone has duties to the community in which alone the free and full development of his personality is possible. 2. No one shall be subjected to arbitrary interferences with his rights and freedoms as set forth in this Declaration. **ARTICLE 30** Nothing in this Declaration may be interpreted as authorizing any State, group or individual to engage in any activity aimed at the destruction of any of the rights and freedoms set forth herein, or at their limitation by any means whatsoever.

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