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Civilizing Religion

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Book Review

Civilizing Religion

A REVIEW OF RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES *by Michael J. Perry.** New York, NY: Oxford University Press 1997. Pp.168.

*Kurt T. Lash***

Is it appropriate to restrict abortion at any stage in pregnancy on the ground that human life is sacred? Should the public square be open to biblical arguments against homosexuality? Or, to frame the issue in a more scholarly fashion: What role may religious arguments play, if any, either in public debate about what political choices to make or as the private basis of a political choice? In his recent book, *Religion in Politics: Constitutional and Moral Perspectives*,[1] Michael Perry addresses these questions as a matter of constitutional law and political morality. Perry has been down this road before, most notably in his 1991 book, *Love and Power*.[2] This new effort represents both a response to scholarly criticism of *Love and Power* and a reflection of Perry's "rethinking" the problem of religion in politics.[3] Ultimately, Perry

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1 MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES (1997)

2 MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991).

3 *See* PERRY, *supra* note 1. In his forward to *Religion in Politics*, Perry writes:

In the years since *Love and Power* was published, and partly in response to critical

concludes that religious-based political advocacy is always constitutional, and usually moral as well. This distinguishes Perry from the more exclusionary theories of scholars like Robert Audi[4] and Richard Rorty[5] who would severely restrict the religious voice in political debate, or remove it altogether.[6] Perry draws the line, however, when it comes to relying on religious arguments regarding human well-being (what must—or must not—be done in order for humans to flourish): these religious arguments (for example, arguments against homosexual sexual conduct) are not an appropriate basis for making a political choice unless that choice is also supported by a persuasive secular rationale.[7] Thus, Perry stakes out a position somewhere between unfettered inclusion and complete exclusion of religious arguments from political debate and decisionmaking.[8] In the process, Perry provides the reader with a nuanced and reasonable approach to a rather complicated set of issues. In fact, Perry's approach may be too nuanced and too reasonable: his constitutional and moral theories contain important caveats that are difficult to reconcile with his overarching principles. Also, Perry's vision of reasonable religious dialogue seems but a shadow of the impassioned rhetoric that characterized the historic speeches of the religious abolitionists and currently pervades the debates over abortion and homosexuality—Perry's paradigmatic instances of moral debates. In his attempt to civilize religion, Perry may have excised those arguments that are distinctively religious on subjects

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> commentary on *Love and Power*, I have continued to think about the difficult problem of religion in politics. As it happens, my thinking has been a rethinking. Among the inquiries I pursue in this book are two that I neglected to pursue in *Love and Power*: first, the question of the constitutionality, under the nonestablishment norm, of religious argument in politics; second, the question of the relationship between religiously based moral arguments and secular moral arguments.

Id. at 5; *see also* Michael J. Perry, *Religious Morality and Political Choice: Further Thoughts—And Second Thoughts—On Love and Power*, 30 SAN DIEGO L. REV. 703 (1993) (addressing the role of religious morality in political choice).

4 *See* Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259, 284 (1989) ("One should not advocate or promote any legal or public policy restrictions on human conduct unless one not only has and is willing to offer, but is *also motivated by*, adequate secular reason.").

5 *See* Richard Rorty, *Religion as a Conversation Stopper*, 3 COMMON KNOWLEDGE 1, 2 (1994) (arguing that we should make it seem "bad taste to bring religion into discussions of public policy"); *see also* BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 10-11 (1980) (arguing that political decisions should not rest on claims that one conception of the good is better than others).

6 Other recent and important works in this area include KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995), and JOHN RAWLS, POLITICAL LIBERALISM (1993). Law review articles on this subject are voluminous. *See, e.g.*, Symposium, *The Religious Voice in the Public Square*, 29 LOY. L. REV. 1401 (1996); Symposium, *The Role of Religion in Public Debate in a Liberal Society*, 30 SAN DIEGO L. REV. 643 (1993).

7 Perry distinguishes religious arguments regarding human worth (for example, "are all human beings equal?") from religious arguments regarding human well-being (for example, laws regulating homosexual sexual activity). Perry restricts reliance on the latter, not the former, as a basis for making a political choice. *See* discussion *infra* Parts II.A., II.B.

8 In fact, Perry describes himself as standing between two worlds: He writes as a Catholic Christian "thoroughly imbued with the spirit of the Second Vatican Council," yet sees himself as "one who stands between all religious nonbelievers on the one side and many religious believers—especially theologically conservative believers—on the other." PERRY, *supra* note 1, at 7.

of critical concern to many religious believers. These, however, are but minor criticisms. *Religion in Politics* is a thoughtful and important addition to Perry's previous work on the religious voice in the public square and it deserves a careful reading by anyone interested in the subject.

I. Religious Arguments and the Constitution

In the first half of his book, Perry addresses the Constitution of the United States and presents what he believes the Free Exercise and Establishment Clauses "correctly understood, forbid government to do."[9] Essentially, Perry believes the First Amendment requires the government to remain neutral on the subject of religion.[10] For example, the Free Exercise Clause forbids government from discriminating against religious practice disfavoring religious practice as such.[11] On the other hand, the Establishment Clause forbids government from favoring one or more religions as such.[12] Under this interpretation, the religion clauses function as two sides of the same coin; one side forbidding intentional government *suppression* of religion, the other side forbidding intentional government *support* of religion.[13] To this general principle, however, Perry adds an important exception it is likely that the Free Exercise Clause, correctly understood, requires accommodation of religion where doing so does not seriously threaten an important governmental interest.[14] Thus, Perry's general theory of the religion clauses includes a proviso; government may not benefit religion as religion,[15] "*unless* (a) the benefit is in the form of an exemption from an otherwise applicable ban or other regulatory restraint that would substantially burden the practice and (b) the exemption does not seriously compromise an important public interest."[16]

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9 *Id.* at 20.

10 *See id.* at 9 ("The heart of my account of the free exercise and nonestablishment norms is that government may not make judgments about the value or disvalue—the truth value, the moral value, the social value, any kind of value—of religions or religious practices or religious (theological) tenets.").

11 *See id.* at 13.

12 *See id.* at 14.

13 Professor Douglas Laycock calls this approach formal neutrality: incidental aid or interference with religion is permissible as long as the government refrains from intentionally supporting or suppressing religion. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999 (1990).

14 *See* PERRY, *supra* note 1, at 14 (arguing that the nondiscrimination position outlined above is only the *least* controversial interpretation of the Free Exercise Clause). For historical evidence in support of the accommodation position, see generally Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994) (arguing that the framers of the Fourteenth Amendment anticipated mandated accommodation), and Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (arguing that the framers of the original Constitution anticipated mandated accommodation of religion).

15 Or, as Perry puts it, "government may not confer on persons because they engage in a particular religious practice, a benefit it would otherwise deny to them, if doing so is based on the view that the practice, is, as religious practice, better than one or more other religious or nonreligious practices or than no religious practice at all." PERRY, *supra* note 1, at 30.

16 *Id.* at 30.

Perry claims that his interpretation of the religion clauses generally tracks the Supreme Court's current approach to free exercise and "substantially represents the position of the Court today" on the Establishment Clause.[17] Here, Perry may be indulging in a bit of wishful thinking. Although adoption of Perry's nonestablishment norm would (in my opinion) improve and clarify much of the Supreme Court's establishment jurisprudence, the result would be a substantial departure from the Court's current approach to a number of church-state controversies. For example, in his discussion of government displays of religious symbols, Perry distinguishes between the government's use of religious symbols and private religious displays in otherwise open public forums.[18] Under Perry's theory, truly private displays would be per se constitutional because they do not involve a government decision to favor or value one religion over other religions or nonreligion.[19] Even government sponsored religious displays are unconstitutional "only if, the display is based on the view that one or more religions (or religious practices or tenets) are, as such, better than one or more other religions or than no religion at all."[20] This kind of formal government neutrality approach to the equal protection clause has been rejected by at least five members of the current court: Justices O'Connor, Stevens, Souter, Ginsburg, and Breyer have each authored or joined opinions that interpret the Establishment Clause to apply in situations involving private religious speech that conveys—intentionally or not—a message of government endorsement of religion.[21] However preferable Perry's neutrality standard might be as a test for public religious displays (and I believe it is), that standard has not yet been adopted by a majority of the current Court.

Adoption of Perry's nonestablishment norm would have the greatest impact on the convoluted line of cases involving government aid to religiously affiliated schools. According to Perry, "the government may give financial

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17 *Id.* at 20.

18 *See id.* at 21 & n.40.

19 *See id.* (citing Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2450 (1995)). Indeed, treating private speech differently would violate Perry's free exercise norm. *See id.* at 13 ("[T]he free exercise norm is an antidiscrimination provision: It forbids government to take prohibitory action discriminating against religious practice (i.e., disfavoring religious practice as such)."); *see also Pinette*, 115 S. Ct. at 2450 (finding that the Establishment Clause does not apply in cases involving truly private speech in truly public forums).

20 PERRY, *supra* note 1, at 21 (arguing that when the government includes secular symbols of the season alongside religious symbols like a Christmas tree or a menorah, "it seems likely that such a scene would be displayed on the basis of the view that *all* the major symbols of the season . . . should brighten the town square and contribute . . . to the festive, generous spirit of the holiday" and not on the basis that Christianity or Judaism are, as religions, better than other religions).

21 *See Pinette*, 115 S. Ct. at 2453 (O'Connor, J., concurring) ("Our prior cases do not imply that the endorsement test has no place where private religious speech in a public forum is at issue."); *see also* Rosenberger v. Rector of the Univ., 115 S. Ct. 2510, 2528 (1995) (O'Connor, J., concurring) (declining to limit the restrictions of the Establishment Clause to no more than a requirement that the government neutrally fund both religious and nonreligious speech); *id.* 115 S. Ct. 2541 (Souter, J., dissenting) (opinion joined by Justices Stevens, Ginsburg and Breyer) ("Evenhandedness is therefore a prerequisite to further enquiry into the constitutionality of a doubtful law, but evenhandedness goes no further. It does not guarantee success under Establishment Clause scrutiny.").

aid to religiously affiliated schools—including elementary and secondary schools . . . if, and only if, first, the criteria for such aid are religiously neutral and, second, the aid program is not a subterfuge for affirming one or more religions as such."[22] This approach tracks recent decisions by the Supreme Court involving indirect aid to religious organizations.[23] As of this writing,[24] however, *direct* aid to religious elementary and secondary schools continues to be analyzed under the so-called *Lemon* test,[25] which forbids government from granting religious educational institutions equal opportunity with secular organizations to participate in government funding programs.[26] I believe that adoption of Perry's nondiscrimination principle would be a vast improvement over the test formulated in *Lemon v. Kurtzman*, and that it is the most plausible reading of the incorporated Establishment Clause.[27] Nevertheless, adoption of the nonestablishment norm would do far more than merely reverse *Lemon*;[28] it would make the *Lemon* test itself unconstitutional. Excluding otherwise eligible religious groups from participation in government benefits programs would violate "the free exercise side" of Perry's nondiscrimination principle.[29] Perry comes close to acknowledging this, but seems reluctant to concede the full implications of his theory.[30] Nev-

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22 PERRY, *supra* note 1, at 23.

23 *See, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8-14 (1993) (holding that a school district did not violate the Establishment Clause by furnishing a deaf student attending Catholic high school with a sign language interpreter because the government program was generally applicable and attending parochial school was the result of a purely private choice); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 485-90 (1986) (upholding government vocational assistance to an individual attending a religious college).

24 Recently, the U.S. Supreme Court ruled that states may implement remedial and supplementary educational programs by placing teachers in private religious schools without violating the Establishment Clause. *See* Agostini v. Felton, 117 S. Ct. 1997 (1997). *Agostini* reversed *Aguilar v. Felton*, 473 U.S. 402 (1985), which had barred such aid under the test developed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

25 *See Lemon*, 403 U.S. at 612-13 (1971) (holding that under the Establishment Clause, government action must have a secular purpose, a primary effect that neither advances nor inhibits religious exercise, and must not create impermissible entanglements between government and religion).

26 Perry describes *Lemon*'s progeny, with some reason, as an "unholy mess." *See* PERRY, *supra* note 1, at 23; *see also* JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 174-76 (1995).

27 I believe that it is unlikely that the framers of the First or Fourteenth Amendments considered neutrally provided government aid to be an establishment of religion. *See* Lash, *supra* note 14, at 1151.

28 *See supra* note 26.

29 In other words, not only is *Lemon* wrong, it is itself unconstitutional in the sense that it requires something Perry believes the Free Exercise Clause forbids.

30 *See* PERRY, *supra* note 1, at 24 ("That government may not discriminate *in favor of* religious activities does not entail that government must discriminate *against* them. I cannot imagine why, as a matter of political morality, one would want to require government to discriminate against religious activities—or, therefore, why one would want to construe the nonestablishment norm to require such discrimination. (Indeed, I cannot imagine why one would want to permit government to discriminate against religious activities.)"). Perry also notes that "[g]iven the extent to which the citizenry of the United States is religious, it seems perverse to suggest that the nonestablishment norm should be construed not only to forbid government to discriminate in favor of religious activities, but also to require government to discriminate against such activities." *Id.*

ertheless, the conclusion seems inescapable: adoption of the nondiscrimination norm would not only flip *Lemon* on its head (shifting the rule from mandated exclusion to forbidden exclusion), it would also require striking down a number of state constitutional provisions that forbid the use of state funds by religious or "sectarian" institutions, even as part of a general government benefits program.[31]

A. Accommodation of Religion

Having set up the nondiscrimination principle as the core value of the religion clauses, Perry then adds an important caveat. Although the Free Exercise Clause *at least* prohibits discrimination, the clause conceivably also requires affirmative accommodation of religion. As Perry puts it, the free exercise norm might require "government to maximize the space for religious practice by exempting religious practice from an otherwise applicable ban or other regulatory restraint that would interfere substantially with a person's ability to engage in the practice, unless the exemption would seriously compromise an important public interest."[32] Perry thus disagrees with the Supreme Court's interpretation of the Free Exercise Clause set forth in *Employment Division v. Smith*,[33] in which the Court held that, although accommodation of religion might be permitted, it is not constitutionally required. Perry also supports Congress's effort to restore pre-*Smith* protection of religion from generally applicable laws through the enactment of the Religious Freedom Restoration Act ("RFRA").[34]

Accommodation mandates special treatment for religiously motivated conduct—conduct that would not be accommodated if motivated by secular beliefs. Perry acknowledges that special accommodation of religion is in tension with what he earlier referred to as the core establishment (and free exercise) principle of nondiscrimination.[35] Nevertheless, Perry argues that the

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31 *See, e.g.*, WASH. CONST. art. I, § 11 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."). For the anti-Roman Catholic history behind many such clauses see Lash, *supra* note 14, at 1122-25.

32 PERRY, *supra* note 1, at 25. For example, a general ban on the consumption of alcohol would have to exempt consumption of wine in the Christian sacrament of the Eucharist. *See id.*

33 494 U.S. 872, 890 (1990).

34 42 U.S.C. § 2000bb (1994). When this review was written, the Supreme Court had just granted certiorari to address the constitutionality of the RFRA. *See* Flores v. City of Boerne, 73 F.3d 1352 (5th Cir.), *cert. granted*, 117 S. Ct. 293 (1996). The Supreme Court recently struck down that aspect of the RFRA that applied against the state. *See* City of Boerne v. Flores, 117 S. Ct. 2157 (1997). Although presumably, RFRA remains in effect as applied against the federal government, the Supreme Court may soon address this issue as well. *See* Christians v. Crystal Evangelical Free Church, 117 S. Ct. 2502 (1997) (mem.), *vacating and remanding In re* Young, 82 F.3d 1407 (8th Cir. 1996) (holding that RFRA precludes bankruptcy court from requiring a church to turn over contributions made by a debtor).

35 *See* PERRY, *supra* note 1, at 28-29 ("The principle argument against the accommodation position is that for government to do what the accommodation position requires—favor, by accommodating, religious practice *as such*—is for government, in violation of the nonestablishment norm, to take action based on the view that, at least as a general matter, religious practices are, as such, better or more valuable than nonreligious practices."). Perry implies that the more

nonestablishment norm is not violated by limiting accommodation to religious exercise:[36]

> [B]ecause the free exercise norm (as a bedrock part of the existing constitutional law of the United States) operates as a practical limit on what we can reasonably construe the nonestablishment norm to forbid, it is not inconsistent with the nonestablishment norm for constitutional law to protect only acts of religious conscience from discrimination against them.[37]

By referring to the free exercise norm as a "bedrock part"[38] of constitutional law, Perry means that "'We the People of the United States' now living"[39] support the application of the Free Exercise Clause against both the states and the federal government, whatever the original intent of the framers of the Fourteenth Amendment.[40] Although Perry seems correct that the incorporated Free Exercise Clause acts as a "practical limit" on our understanding of the incorporated Establishment Clause, it is not altogether clear how incorporation leads to the principle of accommodation. Perry might be arguing that once we accept the principle of an incorporated Free Exercise Clause, then because that clause itself favors religious (and not secular) exercise, it is not inconsistent to accommodate only the religious (but not the secular) conscience. This is true, however, only if the best reading of the incorporated Free Exercise Clause is one that *requires* favoring religion over nonreligion. But this is not the only way to read the clause. As Perry himself points out, the *least* controversial interpretation of free exercise is "freedom from discrimination": neither one nor all religions may be treated worse than some religions or nonreligion.[41] Even though religious exercise as a class is singled out for special protection, this might mean nothing more than that the government (state or federal) must not discriminate against *this particular class*. True, this approach would provide religion "special treatment" (as suspect classes are provided "special treatment" under the Equal Protection Clause), but it would not necessarily require providing religiously motivated conduct an "accommodation" from otherwise generally applicable law (any more than "special treatment" of suspect classes under the Equal Protection Clause *necessarily* implies affirmative action).[42]

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just approach might be to accommodate both the secular and the religious conscience wherever possible. *See id.* at 29-30.

36 Perry does not distinguish between permissive and mandated accommodation, though he apparently believes that permissive accommodation—accommodation not mandated by the Free Exercise Clause—does not violate the nonestablishment norm. *See id.* at 27-28 & n.63. For example, Perry is persuaded that the RFRA—a nonmandated government accommodation of religion—is constitutional. Even if accommodation of religion mandated by the Free Exercise Clause can be reconciled with Perry's fundamental principle of nondiscrimination (something I am not persuaded of), it seems especially difficult to reconcile *nonmandated* accommodation of religion with the principle that, generally, religion may not be granted favored status in law.

37 *Id.*

38 *Id.* at 29.

39 *Id.* at 27.

40 *See id.* at 29.

41 *See id.* at 14.

42 Obviously, the best reading of the Equal Protection Clause may allow—and even, in

My point is not that I think Perry is incorrect about accommodation. In fact, I agree with him that the best reading of the incorporated Free Exercise Clause includes the possibility of mandated accommodation of religion.[43] Such a reading, however, is not required by the text of the original clause, or by its incorporation into the Fourteenth Amendment. Accommodation must be derived from a principle that *informs* the meaning of the text: either its original meaning, or its meaning at the time of the adoption of the Fourteenth Amendment. Moreover, accepting accommodation as an aspect of free exercise implies that this clause is informed by a very different norm than that of the Establishment Clause.[44] In fact, if Perry is right about the best reading of the Free Exercise and Establishment Clauses (and I believe he is), then we would expect the jurisprudence that flows from each of the two clauses to be "asymmetrical"—for example, courts might require nothing more than government neutrality when it comes to the advancement of religion, but occasionally require (or at least permit) special accommodation of religion when it comes to lifting government-imposed burdens on religious exercise. In other words, accommodation of religion is not an exception from a general principle, it is a separate and distinct principle of religious liberty.

Perry's discussion of religious accommodation, of course, is somewhat removed from his main point regarding religious participation in politics. Nevertheless, by opening the door to accommodation, especially *permissive* accommodation,[45] Perry undermines a point essential to his theory regarding the morality of religious arguments in support of public policy choices; that religious based policy choices regarding human well-being are fundamentally at odds with both the Constitution and political morality unless supported by a plausible secular rationale. Perry believes that accommodation of religion violates neither the Constitution nor any principle of political morality.[46] But, if this is so—if it is permissible for government to enact a law that grants religion *as religion* a special and preferred status in law—then it is hard to understand why it is *less moral* to grant religious based reasons equal status with secular rationales in making policy choices.

B. *Applying Constitutional Principles to the Use of, and Reliance on, Religious Arguments in Politics*

Perry next applies his constitutional theory to the role of religious arguments in public debate and political decisionmaking.[47] In terms of public de-

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some circumstances, mandate—affirmative action. My point is that to arrive at this conclusion, however, one must do more than simply assert that the text demands such a reading.

43 *See* Lash, *supra* note 14, at 1149-52.

44 Perry rejects an interpretation of the Establishment Clause that would require discrimination against religion. *See* PERRY, *supra* note 1, at 24.

45 *See id.* at 28 n.63 (arguing that RFRA is constitutional).

46 *See id.* at 30 (arguing that even if it would be morally preferable that both religious and secular consciences be accommodated where possible, accommodation of religion alone cannot be considered morally obnoxious).

47 By "religious" argument, Perry means:

> [A]n argument that relies on (among other things) a religious belief: an argument that presupposes the truth of a religious belief and includes that belief as one of its essential premises. A "religious" belief is, for present purposes, either the belief

bate, disfavoring private religious arguments—even religious arguments that could not themselves serve as a basis for political choice[48]—would violate the antidiscrimination norm of the Free Exercise Clause.[49] Therefore, according to Perry, the only "serious question . . . is whether government would violate the nonestablishment norm by basing a political choice—for example, a law banning abortion—on a religious argument."[50]

Perry argues that if government wants to make a political choice, including one about the morality of human conduct, it may do so only on the basis of a secular argument—"an argument that relies neither on any religious belief nor on the belief that God does not exist."[51] The nonestablishment norm forbids government from acting on the basis that one or more religious tenets are closer to the truth or more valuable than competing religious or nonreligious tenets. Making a coercive political choice unsupportable on any but religious grounds would amount to coerced compliance with God's will—solely *because* it is God's will.[52] Although requiring a secular rationale favors policy choices based on "secular morality" over those based on religious morality, Perry believes that the rule in operation will have little effect on public policy choices.[53] Most often, there are plausible religious and secular reasons for any political choice that government might want to make, and judicial review would be limited to determining only whether the secular rationale is plausible.[54]

There is evidence that, by the time of the Fourteenth Amendment, most state courts embraced the idea that, generally, the exercise of coercive state power required a secular rationale, and that this requirement was likely considered to be one of the privileges or immunities of United States citizens.[55]

> that God exists—"God" in the sense of a transcendent reality that is the source, the ground, and the end of everything else—or a belief about the nature, the activity, or the will of God.

Id. at 31.

48 For example, persons of nonwhite ancestry are not truly or fully human.

49 According to Perry, "[e]very citizen, without regard to whether she is a legislator or other public official, is constitutionally free to present in public political debate whatever arguments about morality, including whatever religious arguments, she wants to present." PERRY, *supra* note 1, at 32. Perry notes that different rules apply when dealing with the speech of government employees. *See id.* at 32 n.84.

50 *Id.* at 33.

51 *Id.*

52 *See id.* at 36.

53 *See id.*

54 *See id.* at 36-37. Theoretically, Perry's approach would require religious believers to make all their political choices on the basis of a sufficient secular rationale—a requirement difficult to police. Perry concedes that it is difficult to discern whether a legislator would have made a political choice in the absence of a religious belief—indeed, sometimes the legislator herself might not know. *See id.* at 34. Nevertheless, Perry insists that the religious legislator should only vote in favor of the law if she is convinced the secular rationale is independently persuasive. *See id.* at 37. "That she cannot reach a judgment about the soundness of the relevant secular argument or arguments on her own is not disabling, because she can seek the help of those whose judgment she respects and trusts." *Id.*

55 *See* Lash, *supra* note 14, at 1100-18 (discussing the shift from religious to secular rationales for blasphemy laws, Sunday closing laws, and judicial resolution of church property disputes).

Perry also seems correct to suggest that, as a general matter, there are plausible secular and religious grounds for most policy initiatives. If judicial review were truly limited to a deferential consideration of whether there is a "plausible secular rationale" in addition to a religious rationale, the requirement would affect few policy initiatives. Courts, however, have not always been so deferential towards secular rationales offered in support of policy choices vigorously advocated by religious groups; for example, secular rationales advanced for requiring "equal time" for the teaching of both evolution and creation science.[56] Indeed, Perry himself rejects as implausible secular arguments against homosexual sexual conduct[57]—a matter of particular concern to conservative religious groups. The potential for discounting plausible secular arguments looms especially large when one considers some of the most divisive "morality" issues facing courts today (e.g., abortion, assisted suicide) and likely to face courts tomorrow (genetic engineering, cloning, etc.). To the extent that religious organizations engage in public advocacy on these matters, they increase the risk that courts will discount plausible secular justifications for regulation and hold that one or another political choice is "really" a religious-based policy choice.

But even if we could guarantee that courts would invalidate only those actions based *solely* on a religious premise, does the Constitution require invalidation of *all* laws lacking a persuasive secular rationale? Perhaps surprisingly, Perry does not think so. The general rule, once again, has a caveat: the constitutional requirement that religious arguments be supportable by plausible secular rationales does not apply to religious arguments regarding human worth (for example, the claim that each and every human being is sacred).[58] Although Perry develops this exception further in the next section of his book,[59] he never explains why *this* religious belief, but not others, *constitutionally* may be imposed on nonbelievèrs.[60] Also, although Perry will argue that the sacred nature of every human is almost universally acknowledged as a core aspect of human rights, he never spells out why political choices based

56 *See* Perry, *supra* note 1, at 22 (discussing regulation of the teaching of evolution and creation science). Perry notes that the dissent in *Edwards v. Aguilard*, 482 U.S. 578, 631 (1987), raised a serious question whether the equal-time statute in that case was based not on religious beliefs, but was intended to protect students' freedom to decide the matter for themselves. *See* Perry, *supra* note 1, at 22.

57 *See* Perry, *supra* note 1, at 37 (indicating that state denial of gay marriage "probably violates the antidiscrimination part of the Fourteenth Amendment"); *see also id.* at 85-96 (discussing John Finnis's secular arguments against the morality of homosexual sexual conduct). Perry ultimately rejects Finnis's arguments as unconvincing and concludes that "[i]n the wake of Finnis's failure, one can fairly doubt that any secular argument that all homosexual sexual conduct is immoral is sound." *Id.* at 96. If there is no plausible secular argument, then, according to Perry's theory, there is no longer a justification for relying on any religious argument reaching the same conclusion.

58 *See id.* at 35.

59 *See infra* Part II.B.

60 In the second half of his book, Perry discusses the morality of religious arguments regarding human worth, focusing in particular on the near universal acceptance of the principle of equal human worth. *See infra* Part II.B. This argument, of course, does not make the imposition of that belief constitutional any more than near universal belief in some form of deity would make imposition of that belief constitutional.

on a "universally accepted religious principle" escape the restrictions of the Establishment Clause. It is possible, of course, to argue that the proposition that "all human life is sacred" is not a religious proposition at all,[61] and thus evades the restrictions of the Establishment Clause. Perry, however, believes that this is a religious proposition—and once again the reader is left grappling with a fundamental principle undermined by a "caveat" to the general rule.

II. Religious Arguments in Public Political Debate

In the second half of his book, Perry moves from issues of constitutional law to considerations of political morality. Because it is inevitable that both religious citizens and religious legislators will place some weight on religious arguments in voting for political choices on the morality of human conduct, he believes that it is better to bring such arguments out into the open "so that they may be tested in public political debate."[62] Religious arguments should be encouraged to participate in a kind of ecumenical political dialogue in which all sides benefit from hearing the perspective of the other.[63] Perry thus rejects the view that religious believers are unable to engage meaningfully in deliberative debate.[64] Although he concedes that *some* religious believers are unable to gain the critical distance from their fundamental religious beliefs necessary for such deliberation, Perry points out that this is just as true for some advocates of *secular* fundamental beliefs.[65] Moreover, even sectarian

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61 *See, e.g.*, RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 25 (1993) (arguing that "sacred" can be used in a secular as well as a theistic sense).

62 PERRY, *supra* note 1, at 45. Perry disagrees with Kent Greenawalt who has argued that religious arguments by private citizens should be distinguished from those made by legislators. *See id.* at 49-54. According to Greenawalt, legislators should not present religious arguments in public political debate. *See* GREENAWALT, *supra* note 6, at 156-58. Greenawalt believes that to do so would cause some of those the legislator represents to "feel imposed upon in the sense of being excluded" and, by asserting privileged knowledge unavailable to the nonbeliever, imply an "inequality of status that is in serious tension with the fundamental idea of equality of citizens within liberal democracies." *Id.* at 157. Perry's response is that any resulting feelings of exclusion are no different than the feelings of exclusion that arise when one disagrees with one's representative on secular matters. *See* PERRY, *supra* note 1, at 50-53. Similarly, the assertion of "privileged knowledge" is also true for many speakers on secular subjects, and, in any event, assertion of privileged knowledge is not "inconsistent with the fundamental idea of the equality of all citizens." *Id.* at 51. According to Perry, fundamental equality does not require that all citizens share the same religious or secular views, nor does it imply that all citizens' ideas are equally correct. Representing all constituents does not mean acting on grounds all of them agree with, but acting according to what the legislator believes is in *everyone's* best interests—including controversial ideas that the legislator believes are "truly good for every member of the community." *Id.* at 51. Perry's fundamental point is that, in a liberal democratic society, truthful disclosure of why the representative voted the way she did "is an overriding, if infrequently honored, value." *Id.* at 52. The best approach, to Perry, is for all reasons to be considered, acted upon, and disclosed. Even if this creates some risk of political division along religious lines, Perry believes there is little risk of reproducing on American soil the religious wars of earlier centuries. *See id.* at 52-53.

63 PERRY, *supra* note 1, at 46-47.

64 *Id.*

65 "[A]t its best, religious discourse in public culture is not less dialogic—not less open-minded, not less deliberative—than, at its best, secular discourse in public culture." *Id.* at 46-47

discourse can make a worthwhile contribution to public deliberation about difficult moral issues.[66] As Jeremy Waldron has argued, there is no good reason to reduce political discourse to its least controversial components:

> Even if people are exposed in argument to ideas over which they are bound to disagree—and how could *any* doctrine of public deliberation preclude *that?*—it does not follow that such exposure is pointless or oppressive. For one thing, it is important for people to be acquainted with the views that others hold. Even more important however, is the possibility that my own view may be improved, in its subtlety and depth, by exposure to a religion or a metaphysics that I am initially inclined to reject.[67]

If a citizen is *able* to justify a political choice on grounds that she believes other citizens reasonably could accept—and she is prepared to defend those choices on those grounds—obviously, she should do so.[68] Morally (and strategically[69]) she is better off using reasons that unite, rather than divide. This alternative, however, may not always be possible. The relevant premises that she believes other citizens might reasonably accept may be indeterminate or "underdetermined" in the sense that they might be inconclusive with regard to the political choice at hand. For example, Perry believes that "publicly accessible" rationales are particularly underdeterminate with respect to the abortion controversy.[70] Caught between the two goals of protecting "the great worth of human life and the full and therefore equal humanity of women," in order to reach a conclusion it becomes necessary to proceed on the basis of some nonpublic reason.[71]

In addition to the problem of "underdeterminate" secular rationales, there is also the problem of *insufficient* secular rationales: What if the secular premises other persons might reasonably accept are insufficient to justify the choice the believer is convinced is in the best interest of all? John Rawls argues that, under the "liberal principle of legitimacy," the use of coercive power must be justifiable to others if they are to be treated as "free and equal citizens."[72] Perry, however, calls this restriction question begging:

(citing David Hollenbach's work regarding "ecumenical or inter-religious dialogue" among communities of faith).

66 *See id.* at 48.

67 Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 San Diego L. Rev. 817, 841-42 (1993); *cf.* Lawrence B. Solum, *Novel Public Reasons*, 29 Loy. L.A. L. Rev. 1459 (critiquing Waldron's critique of Rawls's ideal of public reason).

68 Perry, *supra* note 1, at 57.

69 *See id.* In other words, Perry's argument has to do with political morality, not political strategy. *See id.* at 44.

70 *See id.* at 60.

71 *Id.* Perry goes on to state that "[r]eliance partly on a nonpublic reason or reasons, whether religious or secular, is necessary for those on the 'pro-choice' side of the debate no less than for those on the 'pro-life' side: for example, 'A human fetus is not a "person" and therefore does not have the rights that persons have.'" *Id.* at 61.

72 *Id.* at 59. Rawls limits this reasoning to debates regarding "constitutional essentials," and applies the restriction only to religious arguments unaccompanied by public reasons given in due course. *See* Rawls, Political Liberalism at li-liii (1993).

> It remains obscure why we do not show others the respect that is their due as human beings—or, at least, as "free and equal citizens"—when we offer them, in explanation, what we take to be our true and best reasons for acting as we do (so long as our reasons do not themselves assert, imply, or presuppose the inferior humanity of those to whom the explanation is offered).[73]

Perry points out that one of the historical roles of the religious voice in political debate has been to challenge fundamental cultural assumptions.[74] Accordingly, it makes no sense to require religious believers to balance "social unity" against, say, the cost of destroying innocent human life.[75] Instead, Perry proposes a "middle position":

> [I]n the interest of promoting social unity, of cultivating rather than subverting the bonds of political community, we try to justify political choices we want to make, as much as possible, on the basis of political "ideals, principles and values that we may reasonably suppose all citizens could accept"—but according to which we do not *invariably* let the inability of a political choice to be justified on such a basis preclude us from making the choice, or from publicly supporting it, on the basis of what we take to be our best reasons, even if, alas, they are what Rawls terms "nonpublic". . . .[76]

In the end, Perry believes that the risk of serious social consequences posed by public religious arguments are "exaggerated," and outweighed by the value of public airing (and testing) of religious views, and also by the value to both the individual and the community of hearing the true and best reason for the policy choice advocated by the individual. For Perry, "[i]t is not *that* religious convictions are brought to bear in public political debate that should worry us, but *how* they are sometimes brought to bear."[77]

A. *Religious Arguments as a Basis for Political Choice*

Having established the morality of public religious arguments in favor of particular public policies, Perry next explores rules that he believes should govern reliance on such arguments in making a political decision. He begins

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73 PERRY, *supra* note 1, at 58; *see also* Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729, 750 (1993) (arguing that even if full respect for citizens as "free and equal" requires giving only public reasons for a political choice, "given the fact of pluralism we cannot attain completely the ideal of full respect" and should, instead, include the nonpublic reasons for our choices). Perry appears to reject this reasoning, however, when it comes to religious arguments regarding human well-being that are not also supported by plausible secular reasons. *See infra* Part II.C.

74 *See* PERRY, *supra* note 1, at 59 ("'[I]t is . . . important for [religious groups in a pluralist society] to retain a certain transcendence in relation to any specific constitutional system, a transcendence which will enable them to protest the atrocities and idolatries of which states have always been capable.'") (quoting John Langan, SJ, *Overcoming the Divisiveness of Religion: A Response to Paul J. Weithman*, 22 J. RELIGIOUS ETHICS 47, 51 (1994)).

75 *See id.* at 59-60.

76 *See id.* at 60.

77 *Id.* at 49. Perry adds that we should be "no less worried about how fundamental secular convictions are sometimes brought to bear in public political debate." *Id.*

by distinguishing religious arguments regarding human worth from religious arguments regarding human well-being. Arguments regarding human worth fall along the lines of "are all human beings sacred, or only some? Who is truly and fully human? Women? Nonwhites? Jews?"[78] Arguments regarding human well-being, on the other hand, are those most often associated with debates over public morals—for example, whether homosexual sexual conduct should be criminalized. The distinction for Perry is crucial: "[N]either legislators nor other public officials should rely on a religious argument about the requirements of human well-being unless an independent secular argument reaches the same conclusion about the requirements of human well-being."[79] On the other hand, citizens and legislators may rely on a religious argument that every human being is sacred (a human worth argument) "whether or not any intelligible or persuasive or even plausible secular argument supports the claim about the sacredness of every human being."[80]

B. Religious Arguments Regarding Human Worth

Human worth arguments are those based on the belief that "each and every human being is sacred,"[81] or, put less theologically, that "every person [has] some sort of equal status."[82] Perry claims that the proposition "all human life is sacred" is essentially a religious claim—as are all arguments based upon that proposition.[83] Nevertheless, because of the near universal acceptance of this norm,[84] and because this norm plays a role in foundational American political documents like the Declaration of Independence ("all men are created equal"), it would be "silly" to insist that such arguments be excluded unless accompanied by plausible secular rationales.[85]

At the risk of being silly, however, it remains obscure to me why near universal acceptance of an argument removes that argument from a general requirement of political morality.[86] No doubt, Perry is correct that the argument regarding the sacred nature of human life is reflected in many of our legal institutions and that, today, relying on such a principle "do[es] not . . .

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78 *Id.* at 66.

79 *Id.*

80 *Id.* at 69; *cf.* Kent Greenawalt, *Religious Expression in the Public Square—The Building Blocks for an Intermediate Position*, 29 LOY. L.A. L. REV. 1411, 1414 (expressing skepticism for arguments based on a distinction between "deep fundamental religious assumptions, such as that God loves all human beings equally" and arguments based on "narrower, more specific religious grounds" on the grounds that it is difficult to come up with a satisfactory division, and questioning whether "such a division is appropriate in our society").

81 PERRY, *supra* note 1, at 68.

82 *Id.* (quoting JAMES GRIFFIN, WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE 239 (1987)).

83 *See id.* at 69. Perry rejects Ronald Dworkin's claim that the proposition "all human life is sacred" is meaningful in secular as well as religious terms. *See* Michael J. Perry, *The Gospel According to Dworkin*, 11 CONST. COMMENTARY 163, 176 (1994).

84 Perry points out that arguments regarding the sacred nature of all humans are common in international human rights declarations, and almost universally considered a fundamental aspect of any moral system. PERRY, *supra* note 1, at 66-67.

85 *Id.* at 69.

86 The near universal acceptance of human slavery at various points in world history would not, one presumes, make that practice moral, either then or now.

privilege either one religion (as such) over another or even religion over nonreligion."[87] In 1860, however, the principle was impliedly rejected by the United States Constitution,[88] and expressly rejected by legal regimes in the southern states. In fact, relying on such a principle as a basis for a political choice at that time *would have* favored one religion (Christian abolitionists and their interpretation of the bible) over other religions (pro-slavery Christians in the south and their interpretation of the bible).[89] Is Perry saying that it is permissible to rely on such arguments today, but it would not have been moral to do so in 1860? In 1960?[90]

Even today, some people might be troubled by policy choices made on the basis of religious arguments regarding the sacred nature of human life. For example, Perry acknowledges that his position supports the inclusion of religious arguments made by religious anti-abortionists, and justifies, as a matter of constitutional and political morality, reliance on such arguments in passing laws outlawing abortion.[91] Waiting in the wings are other "human worth" controversies involving infanticide, euthanasia, physician assisted suicide, and human genetic research (some, in fact, have already taken the stage). It seems rather thin to suggest that reliance on religious arguments seeking to prohibit any one of these activities is both constitutional and moral because it is based on a "universal and noncontroversial" religious proposition regarding the sacred nature of human life. In fact, it is not clear to me how these controversies are distinguishable in any relevant way from the debate over the morality of abortion. It is not that I disagree with Perry here; I do think he underestimates the controversial nature of his proposition.

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87 PERRY, *supra* note 1, at 69.

88 *See* U.S. CONST. art. I, § 2, cl. 3 (counting slaves as three-fifths of a person), *amended by* U.S. CONST. amends. XIV & XVI; U.S. CONST. art. I, § 9, cl. 1 (protecting the import of slaves), *amended by* U.S. CONST. amend. XVI; U.S. CONST. art. I, § 9, cl. 4 (counting slaves as three-fifths of a person), *amended by* U.S. CONST. amend. XVI; *see also* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

89 For a discussion of pro-slavery Christianity and its role in the antebellum South, see Lash, *supra* note 14, at 1136-41.

90 It may be that principles of political morality should apply only in those societies that have committed themselves to the political requirements of a liberal democracy. *See, e.g.*, RAWLS, *supra* note 6, at 249 (arguing that, given the historical conditions, it was not unreasonable for abolitionists to rely on nonpublic reasons in order to bring about a well-ordered and just society). This position would explain why arguments appropriate in one society or period of history are impermissible in another. On the other hand, this approach seems to create a situation in which purely religious arguments are permitted in order to bring about a just society—but thereafter are only conditionally allowed in political debate (if allowed at all). Not only is this position disingenuous, at the very least, this argument leaves obscure how we know when purely religious arguments are (once again) necessary to bring about a more just society.

91 Perry argues that, should the government choose to outlaw abortion, "it would not have to rely on a religious argument about the requirements of human well-being." Perry, *supra* note 1, at 70. Such laws would require reliance on the religious argument regarding the sacredness of all human beings. *See id.* at 70-71.

C. *Religious Arguments Regarding Human Well-being*

Arguments regarding human well-being address "what must not be done to, or what must be done for, a human being (including oneself) if she is to flourish."[92] According to Perry, no religious argument about requirements of human well-being is sufficiently strong to ground a political choice, unless a persuasive secular argument reaches the same conclusion about the requirements of human well-being.[93] Unbelievers would not be persuaded by such arguments. Even religious believers, according to Perry, should doubt the validity of religious arguments that cannot be supported by a persuasive secular argument: Most religious arguments about human well-being rely, at least in part, "on a claim about what God has revealed,"[94] and revelation is both unreliable and subject to self-deception.[95] Along these lines, Perry asserts that:

> Given the demonstrated, ubiquitous human propensity to be mistaken and even to deceive oneself about what God has revealed, the absence of a persuasive secular argument in support of a claim about the requirements of human well-being fairly supports a presumption that the claim is probably false, that it is probably the defective yield of that demonstrated human propensity.[96]

Thus, requiring religious believers to rely on religious arguments regarding human well-being only when there also exists a persuasive secular rationale acts as a check on inherently unreliable religious revelation.[97]

In fact, Perry argues that religious believers should enter political debates regarding human well-being only if they are willing to accept the possibility that they themselves may be wrong in their interpretation of God's

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92 *Id.* at 72.

93 *See id.* at 73. Perry's approach to the morality of relying on religious arguments regarding human well-being tracks his general test for determining whether a political choice violates the nonestablishment norm. *See supra* note 17 and accompanying text. Perry, however, distinguishes religious arguments regarding human well-being from religious arguments regarding *who is* a human being, in particular whether a fetus is a human being in the relevant sense. *See* PERRY, *supra* note 1, at 79. Because plausible secular arguments regarding abortion can be made, Perry does not believe it is necessary to separately analyze this third type of religious argument. *See id.* ("As a practical matter, the question seems unimportant."). I am not so sure the question can be avoided in an age confronting serious policy questions involving both the end of life (euthanasia, physician assisted suicide, etc.), and the beginning of life (genetic engineering, cloning, growing and harvesting organs, etc.).

94 PERRY, *supra* note 1, at 73.

95 *See id.* at 74.

96 *Id.* at 75. Perry asserts that his argument follows traditional Roman Catholic reliance on Natural Reason—the idea that no fundamental truth about human well-being is unavailable to religious nonbelievers. *See id.* at 74-75. Perry also cites with approval Robert Audi, who argues that secular arguments regarding moral principles may be *better* because religious arguments are "more subject than [secular arguments regarding human well-being] to extraneous cultural influences, most vulnerable to misinterpretation of texts or their sheer corruption across time and translation, and more liable to bias stemming from political or other nonreligious aims." *Id.* at 75 (citing Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 667, 699 n.5 (1993)).

97 With the exception of religious arguments regarding human worth. *See supra* Part II.B.

will.[98] Notions of infallibility, Perry argues, are antithetical to moral political debate.[99] Although this may result in the exclusion of some religious arguments from public policy debates, Perry argues the effect will be minimal: It does not affect purely religious arguments regarding human worth,[100] and the restriction does not apply to religious arguments that are based on moral insights gained by religious traditions over time—at least to the extent that such arguments are not presented as divine revelation or infallible doctrine.[101]

It is significant, though understandable, that, by the end of his discussion, Perry has moved away from the narrower point regarding *private reliance* on religious arguments in making a political choice, and back to a discussion regarding the morality of *public expression* of sectarian religious arguments. This "leakage" between Perry's categories seems unavoidable. In the earlier section, Perry argues that it is morally permissible (if not always advisable) to present any and all religious arguments in public debate.[102] Only some religious arguments regarding human well-being (those accompanied by a persuasive secular rationale), however, may morally and constitutionally be the basis for political decisionmaking.[103] But, if a persuasive secular rationale exists, surely it is immoral to withhold that rationale in public debate. Thus, Perry's conclusion regarding private decisionmaking seems to imply that public religious arguments regarding human well-being should be accompanied (perhaps in due course) by a persuasive secular rationale.[104]

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98 *See* PERRY, *supra* note 1, at 76. Although Perry believes it might be best for legislators and others *to rely only* on persuasive secular arguments, he concedes that such a requirement would be unrealistic; trying to determine what choice a religious believer would make absent her religious faith is "perilous at best and would probably be, as often as not, self-deceiving and self serving." *Id.* at 77. Instead, "[t]he question she should ask herself is whether, in addition to the religious argument she accepts, she finds persuasive a secular argument that reaches the same conclusion about the requirements of human well-being." *Id.*

99 Assuming a privileged or infallible position in political debate is likely to strike nonbelievers—and even some members of that faith—as "little more than hubristic and self-serving stratagems." *Id.* at 76.

100 *See supra* Part II.B.

101 *See* PERRY, *supra* note 1, at 80. Moral insight regarding the requirements of human well-being "as the yield of the lived experience of an historically extended human community, might well have a resonance and indeed an authority that extends far beyond just those who accept the tradition's religious claims." *Id.* (emphasis omitted). Here, Perry cites theologian James Burtchaell for the proposition that religious moral insight need not be revelational or even theological. *See id.* at 81-82 (citing James Tunstead Burtchaell, *The Sources of Conscience*, 13 NOTRE DAME MAG. 20, 20-21 (Winter 1984-85)). For example, one need not be Hindu to be impressed by Mohatma Gandhi's moral vision, nor need one be Jewish to appreciate the moral insights of the Jewish Bible, nor Christian to find compelling the Gospel vision of what it means to be human. *See id.* at 81. Thus, according to Perry, as long as religious moral insights are presented as doing no more than deepening "our understanding of man as he essentially is," there is no reason to place restrictions on the use of such arguments in public debate. *See id.* at 82 (citing Basil Mitchell, *Should Law be Christian*, LAW & JUST., No. 96/97 1988, at 21).

102 *See supra* note 62 and accompanying text.

103 *See supra* note 93 and accompanying text.

104 When Perry states that religious arguments regarding human well-being must be supportable by persuasive secular arguments that reach the same conclusion, it is not clear whether he believes that both arguments should be presented at or near the same time. John Rawls, for example, believes that publicly accessible arguments should follow in "due course." *See* RAWLS,

In the end, despite his claims to the contrary, Perry advocates a position that seems substantially *less* inclusive of religious arguments than the most recent theories of John Rawls. Rawls applies his ideal of public reason to all comprehensive beliefs—both secular and religious;[105] Perry's restriction bears upon only religious arguments. Rawls further limits his theory to debates involving fundamental issues of justice, or what he calls "constitutional essentials."[106] Perry's theory, on the other hand, includes any religious argument involving an issue of human well-being—a category, one imagines, that embraces much more than mere "constitutional essentials." Finally, Rawls appears to permit purely religious arguments regarding constitutional essentials, even in the absence of a sufficient secular rationale, as long as the religious believer seriously weighs the value of making such an argument against its social costs.[107] Perry, however, concludes that some purely religious arguments are *never* justified—those regarding human well-being—if unsupported by sufficient secular rationales.

III. Summary and Conclusion

Although religiously conservative evangelicals may find encouragement in Perry's rejection of the exclusionary arguments of scholars like Robert Audi,[108] Richard Rorty,[109] and Bruce Ackerman,[110] they may have a hard time understanding why, under Perry's own theory, they should accept his limits on religious arguments regarding human well-being. Certainly, even religious believers can agree that religious arguments are often driven by mistaken or self-serving reasoning. But, as Perry himself recognizes at an earlier point in his book, the same may likely be true about secular reasoning.[111] In a century that has seen secular political purges, gulags, nationalistic ethnic cleansing, and the terrifying logic of eugenics, it is not clear to me why a religious believer would (or should) agree to give secular moral reasoning privileged status.[112] Nor would all religious believers agree with Perry that

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supra note 6, at li. Perry might require nothing more than that the religious person arrive at the conclusion that a persuasive secular argument exists before proceeding to offer (and only offer) a religious argument. However, once the believer has concluded that an argument exists supporting their position in terms accessible to the nonbeliever, there would seem to be no good reason to withhold that argument and present only the religious one—which, by definition, the nonbeliever cannot accept.

105 *See* Rawls, *supra* note 6, at xviii.

106 *Id.* at 227. Constitutional essentials include: 1) questions involving fundamental principles specifying the general structure of government and the political process; and 2) the equal basic rights and liberties of citizens. *See id.*

107 *See id.* at 250 (discussing the situation facing the abolitionists).

108 *See, e.g.*, Audi, *supra* note 4, at 284.

109 *See, e.g.*, Rorty, *supra* note 5, at 2.

110 *See, e.g.*, Ackerman, *supra* note 5, at 10-11.

111 *See* Perry, *supra* note 1, at 46, 47-48, 53-54 ("[R]eligiously based moral discourse is not necessarily more sectarian than secular moral discourse.").

112 According to David Smolin, such an approach is an "irrational attempt to elevate the human mind above the divine mind." David Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 Iowa L. Rev. 1067, 1086 (1991) [hereinafter, Smolin, *Regulating Religious and Cultural Conflict*]. Smolin has argued that "even our intellectual capacities have been distorted by the effects of sin. The pervasive effects of sin

arguments based on revelation are necessarily "inaccessible" to nonbelievers. According to evangelical scholar David Smolin, "[t]he very nature of scriptural religions like Christianity, Judaism and Islam is that they posit an extremely public and accessible revelation of God."[113]

In fact, Perry's defense of placing restrictions on religious arguments regarding human well-being highlights the gap between religious liberals like Perry and religious conservatives like Smolin. Perry maintains that his argument is in line with the Christian evangelical doctrine of the Fall of Man; because the Fall affects man's secular and religious reasoning, there is no reason to give religious reasoning priority.[114] Conservative Christians, of course, would respond that either Scripture or Church tradition corrects for each individual's fallen nature and tilts the scales in favor of revelation or *magisterium* over secular moral investigation. Perry, however, rejects both Scripture and tradition as adequate sources of information regarding God's will for humanity. In fact, Perry argues that reasoning from secular premises is *more* likely to arrive at correct conclusions regarding the will of God than religious reasoning because of the corrupt nature of church tradition and sacred texts like the Bible.[115] Such arguments, to put it mildly, are unlikely to persuade religious conservatives.

The "ecumenical dialogue" envisioned by Perry is far removed from the most inflammatory—and probably the most effective—form of religious-political rhetoric. This may be intentional, but whatever is gained in terms of social unity comes at the cost of religiously inspired moral urgency. After all, we are not just talking about religious opposition to abortion or homosexual sexual conduct, we are also talking about religious opposition to slavery—opposition that Perry concedes is inherently religious.[116] Perry justifies only noncontroversial forms of religious argument (those based on universally accepted ideas regarding the sacred nature of human life) or religious arguments regarding human well-being essentially scrubbed clean of clearly

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suggest that creation, human nature, and human reason are often unreliable means for knowing the law of God. . . . Thus, scripture and Christian tradition have come to have a priority among the sources of . . . God's will." David M. Smolin, *The Enforcement of Natural Law By the State: A Response to Professor Calhoun*, 16 U. DAYTON L. REV. 381, 391-92 (1991).

113 Smolin, *Regulating Religious and Cultural Conflict*, *supra* note 112, at 1085-86. As Kent Greenawalt has pointed out, "from this Christian perspective, the main barrier to acceptance of Christianity is not insufficient understanding but a failure of will stemming from sinful human nature." GREENAWALT, *supra* note 6, at 97.

114 *See* PERRY, *supra* note 1, at 99-101.

115 *See id.* at 99-100. According to John Robinson, the writers of the Gospel epistles did not "adequately distinguish" their own culture

> from the Gospel message they handed down to us. The result is that as we moderns come to doubt the moral propriety of patriarchalism, for example, we find that we cannot resolve that doubt by reference to scripture and tradition. They are both influenced by the same patriarchalism that we are questioning, and yet the mode of that influence is such that we would be supremely unwise to regard either Scripture or tradition as validating it for us.

Id. at 100 (quoting John H. Robinson, *Church, State, and Sex*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 5 (1995)).

116 *See supra* notes 75-85 and accompanying text ("sacred human life" as a religious argument).

identifiable *religious* content, and phrased in terms identifiably human, not divine. But to remove, or "civilize," the religious voice whenever it is based on controversial religious assumptions seems to me to remove what is simultaneously most valuable and most dangerous about religious rhetoric. "Dogmatic" religious arguments may, of course, lead to holy wars, crusades, and the burning of heretics. But they may also lead to the abolition of slavery,[117] prod a national conscience into passing civil rights legislation, or shame us into consideration of the poor, the infirm, and the untouchable.[118] In other words, religious rhetoric is capable of radical evil and radical good. For every William Lloyd Garrison[119] there is a John Brown.[120] Nor is there any a priori method to distinguish a modern day Garrison from a modern day Brown. How do we know ahead of time what our conclusions one hundred years from now will be regarding justice (or, for that matter, regarding the relationship between sex and procreation) one hundred years from now? How can we determine who, years from now, will be revered as a prophet ahead of her time and who derided as a dangerous lunatic? We cannot know.

In the end, the critical and irreplaceable role of the religious voice in politics is to disrupt our smug assumption that "'We the People of the United States' now living" are the beginning and end of all things. No doubt, the costs of tolerating the voice of the prophet are substantial. It makes sense to explore both legal and moral restraints on any rhetoric that threatens so much division, so much violence. But to favor silencing that voice altogether on any particular matter is to flatter ourselves that we have reached the ideal society—that on *this* subject there is no legitimate transcendent critique of who we are and what we do. Such flattery, however, will get us nowhere.[121]

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117 *See* RAWLS, *supra* note 6, at 250.

118 *See* David M. Smolin, *Cracks in the Mirrored Prison: An Evangelical Critique of Secularist Academic and Judicial Myths Regarding the Relationship of Religion and American Politics*, 29 LOY. L.A. L. REV. 1487, 1501 (1996) (arguing that sectarian religious arguments in the public square are necessary if people are going to be motivated to "pay the costs of doing what is right").

119 On July 4th, 1854, radical abolitionist William Lloyd Garrison publicly burned a copy of the United States Constitution while denouncing it as "a covenant with death, and an agreement with hell." DOCUMENTS OF UPHEAVAL: SELECTIONS FROM WILLIAM LLOYD GARRISON'S THE LIBERATOR, 1831-1865, at 216 (Truman Nelson ed., 1966).

120 At his trial, John Brown stated:

> This Court acknowledges, too, as I suppose, the validity of the law of God. I see a book kissed, which I suppose to be the Bible, or at least the New Testament, which teaches me that all things whatsoever I would that men should do to me, I should do even so to them. It teaches me further to remember them that are in bonds as bound with them. I endeavored to act up to that instruction. I say I am yet too young to understand that God is any respecter of persons. I believe that to have interfered as I have done, as I have always freely admitted I have done in behalf of His despised poor, is no wrong, but right. Now, if it is deemed necessary that I should forfeit my life for the furtherance of the ends of justice, and mingle my blood further with the blood of my children and with the blood of millions in this slave country whose rights are disregarded by wicked, cruel, and unjust enactments, I say let it be done.

Statement of John Brown, *reprinted in* Robert A. Ferguson, *Story and Transcription in the Trial of John Brown*, 6 YALE J.L. & HUMAN. 37, 68-69 (1994).

121 Mark Tushnet writes:

> When faced with an issue of transcendent importance—slavery in the nineteenth century, or abortion (for some) in the twentieth—, people can reasonably say, "Getting the right answer to this question is more important than preserving a stable social order in which injustice prevails." Or, as Lincoln put it in his Second Inaugural Address, "Both parties deprecated war; but one of them would *make* war rather than let the nation survive; and the other would *accept* war rather than let it perish. And the war came."

Mark Tushnet, *The Constitutional Law of Religion Outside the Courts* (unpublished manuscript, on file with author).