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THE QUESTION OF DEMOCRACY

Franklin I. Gamwell*

INTRODUCTION

During the past half-century, U.S. politics have been increasingly troubled by their proper relation to religion, in part because of the greater diversity among our nation's religions and the greater consequence of government in everyday life. In addition, attention to this relationship has been heightened by the effective emergence in national politics of conservative Christian communities, with their unabashed public appeal to religious teachings, and more recently by the religious allusions in talk of a "clash of civilizations," including a so-called "axis of evil."

Simultaneous with and connected to this long-standing public concern, the issue has focused a lively academic discussion. It has been prominent in religious studies at least since Sidney Mead published *The Lively Experiment: The Shaping of Christianity in America* in 1963 and, not long after, Robert Bellah introduced us to *Civil Religion in America*.¹ But these works initiated simply one thread in a fabric of discussion that, for some fifty years, has included scholars in history, sociology, law, philosophy, and theology—and, along the way, has aided the creation of several centers and programs designed to study, in one way or another, religion and public life. On my accounting, the persistent attempts to clarify how democracy treats religion testify that matters of fundamental and abiding importance in both politics and religion are involved. Although the points debated, both in the academy and the larger public, are protean, there is virtually unanimous agreement in both venues on the following: Democracy as a form of political community requires, at least in the United States, religious freedom. Precisely what religious freedom means and why it is essential are themselves matters of disagreement. Among other reasons, the answers may differ, because some thinkers focus, as I will

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1. SIDNEY E. MEAD, *THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA* (1963); Robert N. Bellah, *Civil Religion in America*, in *AMERICAN CIVIL RELIGION* 21 (Russell E. Richey & Donald G. Jones eds., 1974).

here, on democratic theory and others, as I will not, on constitutional jurisprudence in the United States.² Still, there is almost complete consensus that something like the initial clauses of the First Amendment to the U.S. Constitution must be coherently reaffirmed in any credible account of our democracy.³

Summarily speaking, the theoretical discussion has been dominated by accounts of two major kinds, which may be called *separationist* and *religionist*. Although representatives of each kind disagree in significant ways among themselves, these summary kinds are adequate for present purposes, because, I will argue, each in its general character is problematic; thus, the alternative to both, which I will subsequently present, is needed. An initial word about the term “religion” may be useful. Given that religious freedom is a *sine qua non* of democracy, any democratic theory requires some definition of what is protected by that constitutional provision. The discussion of politics and religion is the more complicated, because too little attention is given to this definition. Instead, thinkers often take some or other designation of the relevant beliefs and activities to be commonly accepted and sufficient to consider alternative accounts.⁴ The proper class of protected convictions is different than many other proposals assert or assume, and I will later seek to identify it. But the difference does not affect the critique of separationist and religionist accounts I will present, so that attention to how religion should be defined may be postponed.

Given religious freedom, some conclude that politics must be constitutionally separated from religious convictions, where “separated” requires that political principles be independent, explicitly or implicitly, of any such conviction. On this view, that separation is what constitutional disestablishment means. Thus, a citizen’s pledge of allegiance to the constitution is her commitment to refrain from or restrain reliance on religious beliefs when she deliberates about justice and engages in political activity. Although a given thinker may, in one way or another, qualify the assertion, religion is, at least in the last analysis or with respect to some central kind of governmental activities, properly left outside the political process or is nonpolitical. Rob-

2. For the difference between these two approaches, see generally STEVEN D. SMITH, *FORGOTTEN FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995).

3. U.S. CONST. amend. I.

4. See, e.g., CHRISTOPHER J. EBERLE, *RELIGIOUS CONVICTION IN LIBERAL POLITICS* (2002); Robert Audi, *Liberal Democracy and the Place of Religion in Politics*, in ROBERT AUDI & NICHOLAS WOLTERSTORFF, *RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE 1* (1997); Jürgen Habermas, *Religion in the Public Sphere*, 14 *EUR. J. PHIL.* 1 (2006).

ert Audi, for instance, defends a “principle of secular rationale,” which requires that citizens have “adequate secular reason” for advocating or supporting “any law or public policy that restricts human conduct”—that is, reason independent of “a religious proposition.”⁵

Another expression occurs in Ronald Dworkin’s endorsement of “a tolerant secular state,”⁶ in which two principles that “together define the basis and conditions of human dignity” are affirmed: “that every human life is of intrinsic potential value” and “that everyone has a responsibility for realizing that value in his own life.”⁷ The two principles are mirrored in Dworkin’s distinction, not often drawn in common speech, between ethics and morality: “Our ethical convictions define what we should count as a good life for *ourselves*; our moral principles define our obligations and responsibilities to *other people*.”⁸ “Religious values,” as he calls them, are one kind of ethical values; that is, a religion has to do with what counts as a good life for those who accept it. Hence, freedom of religion is, for Dworkin, “one case of a more general right not simply of religious but of ethical freedom.”⁹ But, if religious values are ethical in Dworkin’s sense, it follows that moral principles, by which decisions about justice are properly guided, are separated from religious convictions—as is confirmed when Dworkin argues for the two principles of human dignity independently of any given ethical values.¹⁰ He thereby implies that, in the end, citizens who are religious adherents should accept that political decisions require justification in terms of these two independent principles.

As this brief review indicates, the separationist position includes, on the one hand, what a properly democratic constitution stipulates and, on the other, the consequences for how citizens should pursue or understand justice as decided within the constituted political process. Democracy constitutionally separates politics from religion; therefore, citizens in pursuit of justice should not rely on their religious beliefs or, at least, should recognize that other reasons must be sufficient to warrant activities of the state. The restraint or recognition thereby prescribed has been widely criticized. In one way or another, thinkers such as Christopher Eberle and Nicholas Wolterstorff argue—again, sometimes with qualifications—that this prescription is inconsistent

5. Audi, *supra* note 4, at 25–26 (emphasis omitted).

6. RONALD DWORIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 57 (2006).

7. *Id.* at 10.

8. *Id.* at 21 (emphasis added).

9. *Id.* at 61.

10. *See id.* at 11–15.

with religious freedom.¹¹ On this critique, summarily restated, a religion defines for its adherents the ultimate ground on which the worth of human life in all of its expressions depends and, thereby, the encompassing context by which all moral and political judgments of those adherents should be informed. Hence, democratic participation separated from one's religious beliefs, or the affirmation that reasons independent of them can be sufficient to determine the goodness or rightness of political decisions, is inconsistent with those religious beliefs. As Wolterstorff made the point, "when we bring into the picture people for whom it is a matter of religious conviction that they ought to strive for a religiously integrated existence—then especially, though not only then, does the unfairness of the liberal [or, in my terms, separationist] position to religion come to light."¹² Any separationist requirement is, in truth, a denial of every such religious conviction and thus a delegitimation of what religious freedom legitimates.

This critique by religionists is convincing. Still, those who advance it typically focus on the kinds of deliberation and debate proper within the democratic process and do not ask about the moral authorization of democracy itself.¹³ Typically, they take institutions of democratic decision making and associated rights of citizens for granted and seem to imply that constitutional principles stipulating this form of politics, in distinction from activities of the state democratically determined, may or should be separated from any given religious belief. For instance, Eberle defended "the claim that a citizen is morally permitted to support (or oppose) a coercive law even if he has only a religious rationale for that law."¹⁴ But Eberle simply asserted that his "dispute with the justificatory liberal [or, in my terms, separationist] . . . has *nothing* to do with the sort of legal rights we should accord to citizens in a liberal democracy."¹⁵ On this point, he continued, "I believe . . . that a responsible citizen in a liberal democracy adheres to characteristic liberal institutions and practices. Of particular importance, I believe . . . that a responsible citizen will affirm the right to religious freedom."¹⁶ So far as I can see, Eberle never discussed the moral basis for those institutions and practices, and, in this regard, he appears

11. See EBERLE, *supra* note 4; Nicholas Wolterstorff, *The Role of Religion in Decision and Discussion of Political Issues*, in ROBERT AUDI & NICHOLAS WOLTERSTORFF, *RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE* 67 (1997).

12. Wolterstorff, *supra* note 11, at 116.

13. On my reading, this is the case with both Robert Audi and Nicholas Wolterstorff. See Audi, *supra* note 4; Wolterstorff, *supra* note 11.

14. EBERLE, *supra* note 4, at 10.

15. *Id.* at 59 (emphasis in original).

16. *Id.*

to have only two alternatives: Either the constitutive features of liberal democracy themselves depend on a particular religious rationale, or those constitutive features are independent of all religions. In the former case, it is not clear how, on his proposal, citizens who do not affirm that rationale can responsibly affirm religious freedom, because, for Eberle, religious beliefs do not admit of “independent confirmation.”¹⁷ Alternatively, if constitutive democratic features are independent of any religious rationale, then the moral authorization of democracy itself is separated from all religions.

In any event, the reach of the religionist critique includes a democratic constitution. As the affirmation of some or other encompassing context on which the worth of life depends, a religious belief concerns the worth of *all* human life. Hence, a religious believer cannot consistently allow that any moral or political principle can be independent of the god, transcendent reality, or whatever else defines the ultimate context of worth. She cannot pledge allegiance to democracy itself without believing that its very constitutional principles depend on the same ultimate ground. But, once this more radical consequence becomes apparent, one can appreciate why separationists find their critics implausible. Religionists, the countercharge contends, fail to explicate how politics can be constituted in a manner properly neutral to the religious diversity that religious freedom legitimates. Because democracy as a form of government is said to depend on an ultimate ground of worth, religionists imply the constitutive need for a common religion, that is, a religious establishment.¹⁸ Thus, both separationists and religionists indict each other for so understanding politics and religion that religious freedom is denied. This apparent standoff between them is at least one important reason why the issue continues to be a lively subject of debate, both in the larger public and in the academy. Each side commends itself by effectively disclosing the other’s problems, which also means that neither can command the field.

The preceding has been a cursory review of recent separationist and religionist positions and has not attended to the subtle ways in which representatives on either side purport to meet the other’s objections. Still, the more extended critical analysis many of these thinkers merit

17. *Id.* at 280.

18. This is, in effect, Dworkin’s argument. For him, the alternative to a “tolerant secular state” is a “tolerant religious state.” See DWORKIN, *supra* note 6, at 56–57. John Rawls has also famously argued that coercive imposition of a comprehensive doctrine can be avoided only by “freestanding” constitutional principles. See JOHN RAWLS, *POLITICAL LIBERALISM* 3–46 (1993) [hereinafter RAWLS, *POLITICAL LIBERALISM*].

would not, I am persuaded, revise the conclusion that another proposal, differing with both sides on whatever basic theoretical commitment or commitments lead to the standoff, is needed. This Article presents such a proposal and then identifies what I take to be the theoretical commitment shared by current separationists and religionists that prevents a coherent affirmation of religious freedom.

I will pursue the alternative by asking, on the one hand, about the moral ground for a democratic constitution and, on the other, about justice as the aim of politics so constituted and thus the kinds of deliberation and debate proper therein. As separationists assert and religionists at least imply, these are related questions, but they are, as I intend them, also distinct in the manner that a constitution is distinct from statutory law. Both questions are expressed in speaking of "the question of democracy," because this is an ambiguous phrase. On the one hand, it may be an objective genitive, so that it means *the question about democracy*, and may be formulated as follows: What, if anything, morally authorizes the form of political community a properly democratic constitution provides? On the other hand, the genitive may be subjective, in which case it means *democracy's question* and may be formulated as follows: What defines the justice of statutory laws and policies at which democratic deliberation aims?

I will not seek here to argue for the moral authorization of democratic politics or for a substantive principle of democratic justice. My thesis, rather, is this: If democracy itself is morally authorized, both a democratic constitution and the justice that democratic deliberation properly pursues depend on ultimate terms of political assessment, the kind of encompassing context for evaluation that religions typically purport to make explicit. The class of convictions protected by religious freedom is, I will argue, more inclusive than religion in the strict sense, and, given use of "religious" to designate this more extensive class, the thesis may be restated: If democracy is morally authorized, valid answers to both the question about democracy and democracy's question depend on valid religious grounds. In that respect, I agree with religionists. As democracy itself requires, however, I also intend to agree with separationists in the following respect: The constitution of a democratic state, and thus the laws and policies effected by the democratic process, should be neutral to all religious beliefs in the extended sense.

II. THE QUESTION ABOUT DEMOCRACY

I begin with the first way in which democracy is a question. Democratic politics is one among different possibilities for political rule—

including, to mention historical alternatives, monarchy and aristocracy—and one may properly ask for the moral ground of democratic rule and, in that sense, ask *about democracy* as a form of political community. Doing so transparently requires some fitting definition of democratic politics. At least on the reading of Samuel H. Beer, those who designed the American republic were acutely aware of relevant alternatives and acutely self-conscious about their distinctive choice. Whatever the failures or compromises institutionalized in the U.S. Constitution, Beer argued, architects like Jefferson, Madison, Franklin, and Wilson turned their backs on the long Western tradition of rule by the one or the few, who were supposedly gifted with superior wisdom, virtue, or divine appointment, and proclaimed instead that “we the people” are sovereign.¹⁹ Indeed, this insistence made the conflict between England and its American colonies finally intractable. Whatever the commonalities, England on the whole continued to assert that sovereignty belonged to parliament or the king-in-parliament.²⁰ In contrast, the “enormous claim” of American republicans “was that the many could act as this final judge and power.”²¹

The question about democracy, I will assume, asks for the moral ground of popular sovereignty or, in the phrase Abraham Lincoln impressed on our national memory, government “by the people.”²² I will understand the sovereignty of the people to mean at least the following: (1) Every member of the political community is sovereign over her evaluation or assessment of all actual or proposed activities of the state and thus all political claims, in the sense that the state may not legitimately stipulate that assessment,²³ and (2) the final political authority consists in the equal importance of every person’s sovereign assessment. Stated somewhat more briefly, then, popular sovereignty means that all members of the political community have a right to make or contest any political claim—that is, do so legitimately—and, together as equals, they are the final political authority.

This definition is appropriate, because, among other reasons, it allows an explication of why religious freedom is a *sine qua non* of democratic rule. To be sure, exactly what freedom religious freedom protects may seem so prone to divergent designations as to be incur-

19. SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 139–62 (1993).

20. *Id.* at 145–46.

21. *Id.* at 150.

22. ABRAHAM LINCOLN, *ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS* 734 (Roy P. Basler ed., 1946).

23. Here, “political claim” means a claim for the justice of any actual or proposed state activity or for the validity of any norm or principle of justice.

ably vague. Still, a formal clarification fitting to present purposes is possible. In its strict sense, a religion is a cultural system of concepts and symbols and associated communal practices in terms of which or through which adherents express a set of beliefs about the ultimate context of human worth and, thereby, seek to inform all of their lives, all they are and do, with a certain comprehensive commitment or orientation. In sum, a religion is a cultural system with which adherents cultivate or mediate a comprehensive self-understanding. I take so-called world religions to be paradigmatic examples thereof, and many participants in the discussion of politics and religion appear to use “religion” in something like this strict sense.²⁴ The freedom to adhere to any religion one finds convincing is, then, essential to democracy, because a comprehensive commitment includes a belief about the ultimate terms of political assessment, and each democratic citizen is sovereign over her assessment of all political claims.

But it now follows that religious freedom protects a far wider class of convictions than religious beliefs in the strict sense. Precisely because it may not violate the sovereignty of any citizen, the state must be prohibited from teaching for or against *any* conviction about the ultimate terms of political assessment, whether or not it belongs to the kind of cultural system of beliefs and associated communal practices of which the world religions are paradigmatic. For want of another term, I will call all such protected beliefs “comprehensive assessments,” recognizing that, in some cases, such assessments will be inseparable from other beliefs about the nature and destiny of human beings and the nature of reality. We might also make the point by using “religious” in a broad or extended rather than strict sense in order to designate the class of convictions protected by religious freedom. On this extended constitutional meaning, any comprehensive assessment is religious—and, in this sense, convictions are religious that might in other contexts of discussion properly be called philosophical beliefs, including secularistic worldviews, that define inclusive moral orientations, all of which are also protected or legitimated, because democracy requires the sovereignty of every citizen over her comprehensive assessment.

If these comments on democratic rule and religion give some precision to the question about democracy—that is, the question of what, if anything, morally authorizes government by the people—they also ap-

24. Often, the designation of “religion” is further limited, such that cultural systems of the kind I have described are religious only when the ultimate context of human worth is said to include a transcendent reality—that is, something other than the world of temporally and spatially located things and individuals.

pear to imply something about the answer. Whatever else that answer does or does not include, popular sovereignty can be morally permitted or prescribed only if democracy is authorized by the ultimate terms of political assessment and, thus, the ultimate source of worth in human life. The validation of popular sovereignty, in other words, depends on a valid comprehensive assessment—or, if “religious” is used in the extended sense, the validation of democracy depends on a valid religious conviction.

In order to avoid misunderstanding, let me note that I also use “comprehensive assessment” here in an extended sense, at least in contrast to what some other discussions of democratic theory may suggest. I have in mind theories in the Kantian tradition, for instance, the theory of Karl-Otto Apel or Alan Gewirth.²⁵ These accounts may seem to validate democracy independently of any comprehensive assessment, because they define universal moral principles independently of the ends or goals we pursue and, thus, of any comprehensive good. Typically, such theories ground democracy in a principle of universal or human rights, where the rights to be honored are not derived from or dependent on an inclusive telos but, rather, define nonteleological constraints or limits on the purposes each person may elect—in a manner roughly analogous to how grammatical norms constrain what a language can be used to communicate. Kant himself defended a categorical obligation to respect the freedom of every person to determine her purposes.²⁶ Gewirth, to cite one recent example, defends a “Principle of Generic Consistency,” which assumes that agents pursue some or other ends and constrain those pursuits with the obligation to “[a]ct in accord with the generic rights [to freedom and well-being] of your recipients as well as yourself,”²⁷ so that justice in the political sense is an application of this principle.

On my reasoning, the Kantian project is finally untenable, and valid political assessments depend on a comprehensive good.²⁸ Indeed, I further believe that valid political principles depend on a divine purpose. But neither of these beliefs circumscribes what I mean by the

25. See KARL-OTTO APEL, *SELECTED ESSAYS: VOLUME TWO: ETHICS AND THE THEORY OF RATIONALITY* (Eduardo Mendieta ed., 1996); ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* (1996).

26. See generally IMMANUEL KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS* (Thomas K. Abbott trans., 1949).

27. GEWIRTH, *supra* note 25, at 19 (emphasis omitted).

28. Briefly, my reasoning is as follows: Nonteleological principles imply that our purposes are morally indifferent except in the respect that they do or do not honor the prescribed constraints. But designating purposes as morally indifferent in some respects is itself a moral conclusion. Thus, such principles also imply, against themselves, a moral evaluation of purposes in all respects, and evaluating all purposes in all respects implies a comprehensive telos.

class of comprehensive assessments. Just as secularistic philosophies or worldviews provide for their adherents supreme moral orientations or principles, so Kantian conceptions of human rights are said to identify the ultimate terms of political evaluation, and thus the latter are also comprehensive evaluations in the politically relevant sense. Perhaps the point can be made by saying that “comprehensive assessment,” as I intend the term, has the extended range given to the term “comprehensive doctrine” by John Rawls, for whom Kantian liberalism is one such doctrine.²⁹

But the mention of Rawls also evokes a ready objection to saying that democracy depends on a comprehensive backing. That statement, the objection notes, makes democracy depend on a universal moral principle or context for evaluation, at the least a principle of human rights—and, in fact, moral universalism is a minority report in recent thought, widely criticized as a misguided legacy of the Enlightenment.³⁰ Many contemporary democratic theories are, as we may say, post-Enlightenment, because they deny that political principles require a universal backing and argue that democracy finds whatever authorization it needs within the specific historical location or tradition in which it emerged.

In the later formulation of Rawls’s own massively influential theory, political liberalism derives its conception of justice from the distinct political institutions and culture emergent within certain modern political communities, so that justice as fairness is “freestanding,” because it is independent of any comprehensive doctrine.³¹ But another illustration is found in the nuanced proposal recently offered by Jeffrey Stout’s widely discussed book, *Democracy and Tradition*.³² To be sure, Stout claims, and is generally understood to present, a decided alternative to Rawlsian liberalism.³³ Nonetheless, the two have this in common: Both hold that democracy itself neither has nor requires any moral ground beyond the principles or presuppositions located in its own historicity, whether these are called, with Rawls, the values latent within modern democratic culture or, with Stout, the democratic tradition and the norms of its distinctive discursive practices.³⁴ In either case, the question about democracy can be answered without

29. See generally RAWLS, *POLITICAL LIBERALISM*, *supra* note 18.

30. See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984).

31. RAWLS, *POLITICAL LIBERALISM*, *supra* note 18, at 12.

32. JEFFREY STOUT, *DEMOCRACY AND TRADITION* (2004).

33. *Id.* at 183–202.

34. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 18, at 11–15; STOUT, *supra* note 32, at 63–117.

explicating or implying any universal context of moral evaluation. The relevant point here is as follows: Unless all theories on which democracy can be morally authorized without universal principles are untenable, validation of this governmental form cannot depend, as I have asserted it does, on a comprehensive assessment.

To the best of my reasoning, however, theories of the kind exemplified by Rawls and Stout defeat themselves. While the post-Enlightenment persuasion in contemporary thought cannot be adequately addressed in these reflections, I nonetheless believe that a more thorough treatment would sustain the following critique: All accounts on which democracy as a form of political community requires no universal moral ground are self-refuting; against themselves, they imply a universal principle of evaluation. This follows because the absence of universal principles anywhere entails their absence everywhere. By the very nature of universality, in other words, the denial of such grounds for democracy implies that political authorization everywhere and always is solely historically specific. Hence, post-Enlightenment views imply, against themselves, something like the following universal principle: Political norms everywhere and always are authorized by conditions entirely peculiar to the given historical location or tradition. However odd this universal principle may appear, its affirmation is nonetheless a comprehensive assessment, and thus a post-Enlightenment account tacitly affirms what it expressly denies. At least by implication, so far as I can see, the question about democracy that differing theories address is never whether democracy has a comprehensive moral ground, but only what that backing is.

That democracy cannot be authorized solely by historically specific conditions is confirmed when every attempt to do so ends in a separationist meaning of religious freedom. Rawls's conception of justice as freestanding implies that a democratic constitution separates these political principles from any comprehensive doctrine, as he makes clear in his account of "public reason."³⁵ While Stout seeks so to define the practice of democratic discourse that it welcomes appeal to comprehensive visions, whether religious or secularistic, his insistence that democracy itself depends on nothing except itself as a historically specific tradition implies that constitutive norms of our democratic practice are freestanding— independent of any given religious or secularistic vision—and the constitutional principles are thereby separationist. But the religionist critique, reformulated for the theories we

35. See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997) [hereinafter Rawls, *Public Reason Revisited*].

are now considering, remains convincing. Any separation of political principles, constitutional or otherwise, from comprehensive assessments denies what all such convictions affirm—namely, that political principles as such depend on a comprehensive backing—so that these separationist accounts of the constitution in truth deny all comprehensive assessments or do not legitimate any.³⁶ Thus, the moral validation of democracy itself depends on some or other conviction of the kind protected by religious freedom.

III. DEMOCRACY'S QUESTION

But, if this point has been secured, we are again faced with the apparent problem in religionist accounts, which we may now recall by noting how it finds expression in the iconoclastic reading of Steven D. Smith.³⁷ Smith argued that every conception of government and its relation to religion implies a set of “basic background beliefs,” which we may take as his term for a comprehensive assessment.³⁸ On Smith's reading, however, this recognition means that a principle of religious freedom is impossible and the quest for it “foreordained to failure,” because, however the principle is defined, it will imply its own background assessment and, thereby, take sides among the diversity of religious and secularistic beliefs.³⁹

Reformulated in our present context, Smith's point concerns the political constitution. Whatever else politics involves, its distinctive task is to order or unify the political community, that is, to effect from its diversity of people and associations action “as one.”⁴⁰ A demo-

36. Although Stout welcomes appeals to religious and secularistic beliefs in democratic discourse, I have here called his proposal separationist, because it implies a democratic constitution independent of any such belief. In respects relevant to the present discussion, however, Stout's proposal may seem indistinguishable from Eberle's, and I earlier called Eberle a religionist. In my earlier comments, however, I noted that Eberle simply assumes the adherence of all responsible citizens “to characteristic liberal institutions and practices,” and one might take this to mean that he, too, separates constitutional principles from religious convictions. EBERLE, *supra* note 4, at 59. I am persuaded, although an extended argument is needed to defend the point, that we can confirm the standoff between recent separationists and religionists by showing how representatives of each side turn out to be, by implication, examples of the opposing position. In seeking neutrality through ultimate terms of political assessment independent of any religion, separationists imply the establishment of a comprehensive assessment. In seeking to affirm religious freedom even while asserting the political importance of religious convictions, religionists imply separationist constitutional principles.

37. See generally SMITH, *supra* note 2.

38. *Id.* at 63.

39. *Id.* at 15. Smith's discussion is principally critical, and he does not offer a sustained proposal about how a democratic state properly relates to the religious or philosophical convictions of its citizens.

40. BEER, *supra* note 19, at 151.

cratic constitution unifies by defining the form or process of governmental decision making that all citizens should observe, in a manner roughly analogous to how a meeting requires commonly accepted rules of order if pursuit of its business is to occur. Explicit adherence to constitutional principles defines, we can say, the ethics of democratic citizenship or proper participation in action as one. But these principles, Smith and I agree, imply some given comprehensive backing, and its affirmation thereby belongs, if Smith's argument is sound, to the ethics of citizenship. Hence, democracy cannot be coherently neutral to all disagreements among religious and secularistic beliefs.⁴¹

Vexing as this problem may appear to be, there is a solution, which can be approached by recalling the meaning of popular sovereignty; namely, all members of the political community may legitimately make or contest any political claim, and, together as equals, they are the final political authority. If government by the people is so understood, the meaning of "together as equals" and, thus, the way to action-as-one can be the practice of full and free political discourse. Political discourse, as I intend it, is the social practice of making and assessing political claims for the purpose of determining which understandings should inform or be expressed in governing decisions. When there are disagreements, the practice seeks to validate and invalidate contested claims so that the state's activities may be determined by valid understandings.⁴²

41. If Smith is right, we could speak of neutrality toward all comprehensive assessments only if the way to action as one represents a *modus vivendi*—that is, an accidental agreement expressing what each of several parties takes to be its strategic advantage. In that event, however, there are no constitutional principles in the sense that defines an ethics of citizenship.

42. My understanding of discourse is indebted to Jürgen Habermas, for whom discourse is a differentiated social practice in which we may engage when the coordination of action through common acceptance of validity claims breaks down because of disagreements that we cannot resolve routinely. In this practice, we suspend other purposes in order to assess by argument the validity of contested claims. "Argumentation serves to focus on and test validity claims that are initially raised implicitly in communicative action and are naively carried along with it." JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 158 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990). Habermas also explains the practice in the following way:

I shall speak of "discourse" only when the meaning of the problematic validity claim conceptually forces participants to suppose that a rationally motivated agreement could in principle be achieved, whereby the phrase "in principle" expresses the idealizing proviso: if only argumentation could be conducted openly enough and continued long enough.

JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: VOLUME ONE: REASON AND THE RATIONALIZATION OF SOCIETY* 42 (Thomas McCarthy trans., 1984). Given present purposes, I will speak only of political discourse, although I do not intend that political claims exhaust those whose meaning allows one to speak of discourse. Also, I will extend the meaning of political discourse among "we the people" to include all discussion and debate whose distinguishing purpose is to participate in determining activities of the state.

“Full” political discourse, then, means that no political claim, including any claim for a comprehensive assessment, is immune to contestation, and, when questioned, any political claim needs discursive or argumentative redemption. In turn, “argumentative redemption” of political claims means, summarily stated, the giving of reasons that command acceptance of the claim by any citizen who understands the argument; that is, acceptance is then required by the reason of any such citizen. Validation in this sense is distinguished from a defense that involves special pleading, because at least one of the considerations or premises advanced is merely assumed or posited, so that acceptance of the claim is not rationally required for citizens who do not grant the assumption. “Free” political discourse means that all have equal standing in the political process, and validation is the proper aim when disagreement occurs, precisely because the sovereignty of each citizen’s assessment is equal to that of any other in determining how all will be ruled. Naturally, argumentative redemption, through which at least a majority of citizens accept claims relevant to a given political decision, is an ideal at which discourse aims, and factual limitations, including difficulties of communication and the press of time within which political decisions often must be taken, dictate that actual political discussion and debate typically falls far short. Still, a belief or premise advanced as immune to argumentative assessment because it must be merely assumed or posited improperly claims a prior privilege in determining the state’s activities and, thereby, denies that the people rule together as equals.⁴³

It then follows that a properly democratic constitution should do no more and no less than provide the necessary conditions of common action through full and free political discourse—or, as we may also say, the necessary conditions of politics by the way of reason—and the ethics of citizenship involves nothing more and nothing less than adherence to this democratic way. I will not pause to argue for specific constitutional provisions, but they include equal rights to certain private liberties (for instance, the right to life, to control one’s own body, and to conscience) and to certain public liberties (for instance, the right to free speech and assembly, to the franchise, to due process, and

43. In the end, a full political discourse must also be a free political discourse. The former implies that the only relevant difference among claims is whether they can be validated by argument. But this is precisely what any constitutive limitation on the equality of all citizens denies. The stipulation that only certain citizens—for instance, males or persons of wealth or special circumstances of birth—may participate in the discourse, or that their assessments have greater importance, grants political privilege to certain claims because of who makes them. But even if “full and free political discourse” is redundant, clarity is served by making both characteristics explicit.

to equal protection of the laws). These rights define each citizen as always a potential, and sometimes an actual, participant in full and free political discourse.⁴⁴ Because the discourse is political or seeks to order the community as a whole, the constitution must also provide the institutions and offices of decision making through which discussion and debate determine activities of the state, and the basic criterion for this decision-making design is to maximize the measure in which political outcomes are informed by full and free discourse among “we the people.”

Perhaps this proposal hardly seems consistent with full religious freedom, because a constitution of the kind I have mentioned seems clearly to exclude some possible religious or philosophical beliefs as illegitimate. Given that democracy is only one possible form of government, this objection runs, provision of equal constitutional rights expressly denies some possible comprehensive assessments—for instance, those prescribing some form of aristocracy, patriarchy, or racist superiority. The ethics of democratic citizenship is, Smith might say, an alien imposition on adherents of such comprehensive assessments, and thus those beliefs are constitutionally delegitimated, and the sovereignty of their adherents is violated.⁴⁵ But this objection results from failure to take in full measure the distinctive character of full and free political discourse. Allegiance to argumentative adjudication is the one commitment that does not explicitly take sides in any political conflict. Whatever disagreements citizens may have about the civil order and its governance, common adherence to resolution through discussion and debate does not explicitly bias the outcome. Hence, adherence to full and free discourse is explicitly neutral even to disagreement about whether this is the proper way to determine the state’s activities, because this disagreement also defines something about which we can argue.

Discourse is distinguished by this neutrality to all political claims, because commitment to the practice is expressed simply in the making of any political claim, whatever its content. In this respect, making a political claim is similar to making a promise. The act of promising commits one to the conditions of this social practice, which include the rule that promises should be kept. Similarly, anyone who claims validity for a political assessment, whatever the content for which one’s

44. For a more extensive discussion of rights to private and public liberties, see FRANKLIN I. GAMWELL, *DEMOCRACY ON PURPOSE: JUSTICE AND THE REALITY OF GOD* 196–223 (2000).

45. Indeed, if the objection is sound, the sovereignty of all citizens is violated, because the sovereignty of any citizen includes her freedom to decide for the delegitimated comprehensive assessments.

claim is made, thereby commits herself to the conditions of political discourse, which include the principle that valid claims can be, if contested, validated by the giving of reasons. In sum, to make a political claim is to pledge that the claim can be validated by argument and, thereby, also to concede that one's claims can be invalidated in the same way.

Against the objection, then, the ethics of democratic citizenship do not explicitly deny any comprehensive assessment. To the contrary, every citizen is invited to adhere to any religious or philosophical belief she finds convincing and to advocate it by the way of reason. I will call a political constitution founding government through full and free discourse "formative" in character and, thereby, distinguish its provisions from "substantive" political norms, principles, and proposals, including claims for comprehensive assessments. The mark of a formative provision is precisely that adherence to it is explicitly neutral to all political conflicts, because this is nothing other than commitment to politics by the way of reason. In contrast, a substantive claim takes sides within one or more possible political disagreements.

But, whatever neutrality marks a formative constitution, some may now contend, even it cannot escape the incoherence Smith's criticism reveals. Even if full and free discourse does not explicitly deny religious or philosophical beliefs prescribing nondemocratic forms of government, it remains that democracy implies a comprehensive backing or a set of background beliefs in terms of which the way of reason is itself validated. Hence, the proposal offered here, as any theory of government, takes sides by implication among comprehensive assessments and, thereby, is inconsistent with full religious freedom.

Clearly, no form of government can be implicitly consistent with all comprehensive assessments, simply because some of these are inconsistent with each other. Similarly, no social practice, even the practice of discourse, can itself claim to be morally authorized without implying some ultimate substantive terms by appeal to which it can be validated. But what a democratic constitution explicitly asserts or stipulates is one thing, and what it implies is something else. However forceful Smith's analysis seems on first appearances to be, it depends on ignoring this distinction. The difference is all-important, because the entire purpose of a constitution explicitly neutral to all religious and philosophical convictions is to establish the framework in which activities of the state will be determined, insofar as possible, by principles of justice that argument can redeem. The entire purpose of a formative constitution, we can say, is that full and free discourse should discern and apply, insofar as possible, the substantive principle

or principles and thus the comprehensive backing implied by the constitution itself.

The point may also be marked in the following way: Because religious freedom prohibits an established comprehensive assessment, a democratic constitution can establish only the comprehensive question. Taking all implications into account, rule through full and free discourse is constituted by nothing other than the question of what comprehensive assessment is valid and how it should be applied in particular governmental laws and policies. If we use “religious” in the extended sense required by religious freedom, a democratic community is constituted as nothing other than the religious question in its pertinence to justice—and, in this sense, religious freedom is the very meaning of democracy.

This is the question of democracy in its second sense, that is, the question of democracy as *democracy's question*. Democracy's question is the comprehensive question in its pertinence to justice, answers to which are properly discussed and debated among “we the people” in order that government may be maximally determined by political assessments that argument can redeem. So, far from exile outside the democratic process, religious or comprehensive assessments are essential to it. We may also say, then, that valid answers to both the question about democracy and democracy's question depend on the valid comprehensive assessment and thus on whatever, in truth, ultimately grounds the worth of our common life. The comprehensive context authorizing a democratic constitution can only be the very thing full and free discourse is designed to make explicit and apply to activities of the state.

Those activities, then, must be confined to specific or noncomprehensive norms and purposes ordering our common life—for instance, laws and policies that define criminal activity and valid contracts, regulate the economy, institutionalize educational opportunity, control treatment of the natural environment, relate the nation to the larger community of nations, fund the government itself, and so forth. To be sure, such activities are themselves substantive political assessments; that is, they explicitly affirm certain norms and purposes as right or good and, thereby, explicitly take sides in specific political disagreements. Moreover, the state has both the right and the duty to teach its specific or noncomprehensive assessments, which means that citizens should act in accord with the governing order. But citizens as participants in political discourse are not thereby taught to accept specific laws and policies. While the people are bound to obey the law, they are not bound to endorse it as members of “we the people,” be-

cause whether it articulates justice or, rather, should be transformed is always subject to their sovereignty. Hence, the constitution should prohibit the state from teaching anything about what comprehensive assessment is valid, because the only distinct meaning any such teaching could have is that citizens as political participants are bound to deliberate in accord with it. In the political process, comprehensive assessments can be explicit solely as objects of full and free discourse. In other words, the difference between, on the one hand, specific or noncomprehensive assessments that the government may enact and pursue and, on the other, comprehensive assessments excluded from activities of the state is what religious freedom constitutes as government by the people.⁴⁶

IV. THE RELIGIOUS OBJECTION

If enough has been said to outline this alternative account of politics and religion, there remains what is the most fundamental objection to it. For all that has been said, some will still find politics by the way of reason inconsistent with religious freedom, because, on their reading, this form of government explicitly excludes religions for which the truth about our ultimate context is not open to rational validation. In fact, many religions involve a second-order belief that their first-order beliefs about reality and human worth cannot be argumentatively validated. The truth of these beliefs, it is said, transcends rational apprehension and is accessible only through submission to authority as inherent in some tradition or institution or event of special revelation. On the account offered above, therefore, the constitution does not legitimate those comprehensive assessments or, what comes to the same thing, the ethics of citizenship violates the sovereignty of citizens by denying certain religions.⁴⁷

Some who press this objection may insist on its importance, even if they are not themselves religious adherents claiming to express truths beyond rational validation. The relevant point, they may tell us, is simply that certain religions do in fact make this claim, so that these, too, must be legitimated if full religious freedom is endorsed. In the last analysis, this consideration was significant to Rawls as he formulated his later position. Political liberalism, he wrote, responds to the following question: "How is it possible for those affirming a comprehensive doctrine, religious or nonreligious, *and in particular doctrines*

46. This is how the requirement that state activities have a "secular purpose" should be understood, although use of the term "secular" with this designation runs a considerable risk of misunderstanding.

47. See GAMWELL, *supra* note 44.

based on religious authority, such as the Church or the Bible, also to hold a reasonable political conception of justice that supports a constitutional democratic society?"⁴⁸

But the objection has merit only if religions for which final appeal must be made to authority are in this respect right—that is, only if the truth about our ultimate context is beyond rational validation, and thus the comprehensive question is not a rational one. If, to the contrary, comprehensive assessments are open to discursive validation and invalidation, then all convictions about ultimate terms of evaluation are, whatever certain religions might say about their own beliefs, answers to a rational question. It follows that every religion, whenever it explicitly or implicitly claims validity for its comprehensive assessment in the political process, pledges in doing so that its claim can be, if contested, redeemed by argument.

Given that the question is rational, constitution of the political community by the way of reason imposes nothing on any religion it does not impose on itself in making a claim to validity—precisely as the rule of promise keeping imposes nothing on a person that is not self-imposed in making a promise. The act of promising is one's acceptance of an obligation to do what is promised, and this is so even if what one promises is a deed one has no power to perform—in which case, one engages in a practical self-contradiction, because the content of what one says is inconsistent with its expression as a promise. If the comprehensive question is rational, the act of making a political claim for one's answer pledges that it can be, if contested, argumentatively redeemed, and this is so even if what one asserts includes not only a comprehensive assessment but also a denial that it can be rationally validated—in which case the religious believer also engages in a practical self-contradiction. On this reading, then, a formative constitution legitimates every religion in the only sense it can legitimate any; namely, it invites each to argue for its terms of assessment within the political discourse.

I will not seek here to settle whether the comprehensive question is rational and, instead, will offer the following conclusion: Unless answers to this question are open to argumentative validation and invalidation, democracy constituted by religious freedom cannot be morally authorized, because it is an incoherent form of political community. Given the sovereignty of every citizen over every political claim, there can be no principle of political unity absent the possibility of discourse inclusive of comprehensive assessments. Unless the plurality of such

48. Rawls, *Public Reason Revisited*, *supra* note 35, at 807 (emphasis added).

beliefs can be embraced within public discussion and debate, political conflict based on differing religious or philosophical convictions cannot, in principle, be civilized, because there is nothing more basic to which common appeal might be made. The only alternative, then, is recourse to force, so that war is avoided only insofar as the distribution of strategic power yields a *modus vivendi* or, what is really a version of the same thing, some are coerced into submission.

A standoff has occurred in both the public and academic debates about politics and religion, because a common assumption, whether acknowledged or not, has circumscribed the available alternatives, namely, that religious grounds for political assessment cannot be argumentatively tested.⁴⁹ As a consequence, the meaning of religious freedom has been left with equally problematic options. One side insists that democracy is constituted as rule through public discussion and debate, and, because religious convictions cannot be publicly debated, concludes that finally they must be left outside the political process. But political principles can be separated from all religions only if no religion is true; thus, this separationist view of a democratic constitution is inconsistent with religious freedom, expressly denying what it also purports to legitimate. The other side insists that justice is dependent on a religious truth, and, because that truth cannot be rationally validated, implies that democratic commitment requires submission to authority. But this religionist view is inconsistent with religious freedom, because it implies the constitutional establishment of a religious conviction.

Democracy makes sense only as politics constituted by the comprehensive question in its pertinence to activities of the state. Thereby, the constitutional principle of religious freedom may be called separationist, but only because the state must be explicitly neutral to all religious and philosophical beliefs, and may also be called religionist, but only because the comprehensive backing on which both the constitution and the common good depend is the most basic concern of discourse among "we the people."

Although this Article does not argue for conclusions in U.S. constitutional law, it may be useful to recall that some principal architects of this country's constitution were children of the Enlightenment, for whom the people could be the final political authority, because the ultimate terms of political assessment are accessible to reason. To be sure, the 1787 Constitution profoundly compromised popular sovereignty, especially with respect to who counted as a sovereign citizen or

49. See *supra* notes 2-17 and accompanying text.

even a person.⁵⁰ At least in speech, if not in deed, however, the “rationalists,” according to Sidney E. Mead, “concluded that reform depended upon . . . opening all the channels of communication . . . so that every opinion could have a hearing. Errors, they believed, would cease ‘to be dangerous when it is permitted freely to contradict them.’”⁵¹ Thomas Jefferson, above all others, expressed the point with specific reference to religion. In his *Notes on the State of Virginia*, he wrote that “[r]eason and free inquiry are the only effectual agents against error. Give a loose to them, they will support the true religion by bringing every false one to their tribunal.”⁵² He gave the same point unsurpassed statement when his Bill for Establishing Religious Freedom in Virginia was criticized as an invitation to irreconcilable civil conflict: “[T]ruth is great and will prevail if left to herself; . . . she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate”⁵³

V. POLITICAL CONCERNS

My commendation of democracy as politics by the way of reason may evoke specifically political concerns, and brief concluding comments addressed to three of these may be useful. One involves the actual equality of citizens. Although it may protect full religious freedom, some might object, a formative constitution is, in effect, at odds with itself, because it stipulates too little. On this criticism, rights to equal standing in political discourse are hollow or worthless without access to certain substantive conditions. At the least, severe ignorance, illness, or poverty effectively prevent democratic participation. A constitution confined to so-called civil rights and exclusive of certain social and economic rights does not take responsibility for what it purports to provide and, thereby, is fraudulent, because it fails to recognize the basic needs that must be met if, indeed, all members of the political community are to be together as equals.

But affirming that all have substantive economic and social rights the state should secure is one thing, and stipulating those rights constitutionally is another. That democracy itself will fail without substantive justice does not entail that principles thereof should be

50. See, e.g., ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2001).

51. MEAD, *supra* note 1, at 46.

52. THOMAS JEFFERSON, *POLITICAL WRITINGS* 394 (Joyce Appleby & Terence Ball eds., 1999).

53. *Id.* at 391.

constitutionally determined. Those who find a formative constitution hollow are misled at least in part, I suspect, by equating the difference between constitutional and statutory law with the difference between the most important and less important legislation, whereby the basic importance of certain substantive rights implies their constitutional stipulation. With such stipulation, however, acceptance of the provided principles would belong to the ethics of citizenship, and they would thereby be immune to contestation; that is, all political assessments of all citizens should be consistent with them. In truth, therefore, substantive justice is too important to be constitutionally defined, because no such definition can be valid unless it can be contested and redeemed by argument. Hence, what popular sovereignty requires us to say is this: A democratic constitution *anticipates* that full and free political discourse will be, at least in tolerable measure, successful and thus will, through statutory law, provide or promote for all citizens the substantive conditions necessary to full political equality. Insofar as this anticipation is unmet, the political community is at odds with its constitution, not the constitution with itself. Success in the constituted political process cannot be constitutionally guaranteed, and this is simply to say that government by the people depends entirely on the people.

A second possible concern notes the difficulties in discussing or debating religious or philosophical convictions and thus the potential harm of introducing them into the political process. To be sure, uniting sovereign citizens through discourse does not imply that every political issue should be an occasion for explicit argument about comprehensive assessments. For one thing, all political conflict is not based on religious difference; disagreement may occur among citizens who agree or can discover agreement about more general terms of assessment but have divergent readings of the relevant facts or probable consequences of a given political decision. But, where conflict involves fundamental commitments, some have argued, recourse to them in politics can become an obstacle to salutary outcomes, precisely because they are so basic to the lives of adherents, so that debate about or inclusive of them will not easily yield widely accepted political solutions. On issues of public life, therefore, we are counseled to seek an "overlapping consensus" or "incompletely theorized agreement," whereby concurrence on specific political decisions is achieved among citizens who assent on differing fundamental grounds.⁵⁴ But full and free discourse is completely consistent with

54. "Overlapping consensus" is Rawls's term, although he uses it, at least in the first instance, to designate agreement on principles of justice independent of any comprehensive doctrine. *See*

the wisdom in this counsel, unless it is presented as a theory of democracy, that is, unless it asserts freestanding or incompletely theorized principles of justice as the meaning of religious freedom. Given popular sovereignty, in other words, there is no way in principle to exclude the possibility of conflict that cannot be civilized without discourse about the ultimate terms of political assessment. Finally, the people themselves must decide when engaging in such discourse is wise.

These citizens may also agree that discourse about comprehensive assessments best occurs outside more official institutions of political decision making, such as legislatures or political caucuses and campaigns. For the most part, the media, civic associations, educational institutions, and the like may, by virtue of their distance from immediate particular decisions, facilitate more readily common reflection on more inclusive beliefs about the public purpose.⁵⁵ In addition, formal institutions of political rule are, perhaps, more easily dominated by terms of assessment that become highly resistant to fundamental challenge, so that a vital informal realm of political discourse is typically indispensable.⁵⁶ Still, there is no way in principle to restrict the settings proper to religious or philosophical debate, because the judgment about which claims are relevant on what occasions is one that properly belongs to each democratic citizen as she participates in the political process.

For all that, however, the third concern finds Jefferson's defense of religious freedom romantic, because his vision—errors ceasing to be dangerous as truth prevails in public discourse—seems hopelessly idealistic or utopian. In fact, we will be told, politics in our republic is largely a conflict of interests strategically pursued, where results are consequences of bargaining in which disproportions of money and other strategic forms of power give state sanction to injustice, and what passes for discussion and debate is typically deceptive rhetoric or systematically distorted communication. In response to this political hermeneutics of suspicion, one may recall that architects of this country's governmental form were profoundly sensible of such political corruption and sought to control it insofar as possible by institutionalizing complicated decision-making procedures through which "we the people" determine activities of the state. Whatever the faults of the

RAWLS, POLITICAL LIBERALISM, *supra* note 18, at 133–72. "Incompletely theorized agreement" is a term used by Cass R. Sunstein. See CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35 (1996).

55. See DAVID HOLLENBACH, S.J., THE COMMON GOOD AND CHRISTIAN ETHICS 165 (2002).

56. See JOHN S. DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS 81–114 (2000).

U.S. Constitution, its detailed provisions regarding the selection of officials and the separation of powers are attempts to minimize the measure in which strategic pursuit of interest would debase political outcomes.

We might call this the realism of the U.S. Constitution, united with the idealism expressed above all in the principle of religious freedom. Still, the idealism cannot be hopeless. Unless the exercise of democratic rights includes some significant adherence to the way of reason, that is, pursuit of truth as distinct from strategic interest, no decision-making procedure, whatever its protections, can prevent its exploitation by strategic power. In a famous dictum, Reinhold Niebuhr wrote that our "inclination to injustice makes democracy necessary," but our "capacity for justice makes democracy possible."⁵⁷ Constitutional realism finds its warrant in the former half of this aphorism, and religious freedom assumes and calls us to exercise our capacity for justice. This is just to repeat in another context that government by the people depends entirely on the people, who are, on the democratic commitment, "the last best hope of earth."⁵⁸

57. REINHOLD NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS: A VINDICATION OF DEMOCRACY AND A CRITIQUE OF ITS TRADITIONAL DEFENCE* xiii (1944).

58. LINCOLN, *supra* note 21, at 688.