

6-1-1996

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Recommended Citation

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 (1996).

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CRACKS IN THE MIRRORED PRISON: AN EVANGELICAL CRITIQUE OF SECULARIST ACADEMIC AND JUDICIAL MYTHS REGARDING THE RELATIONSHIP OF RELIGION AND AMERICAN POLITICS

*David M. Smolin**

I. INTRODUCTION

By God's providence, my own forthrightness, and the dialogic virtues of Professors Perry and Greenawalt, my work has entered the stream of debate among law professors writing political philosophy on the relationship of politics and religion. The role I have claimed within this debate has been as a kind of spokesperson for evangelical Christianity, or sometimes more broadly, for theologically conservative or traditionalist Christianity. One advantage of this role is the lack of competition. There are a number of evangelical scholars in the legal academy, and their work sometimes reflects their faith. It remains rare, however, for an evangelical Christian to write explicitly as an evangelical Christian within the legal academy.

One difficulty of writing explicitly as an evangelical is that the readers will implicitly identify the author with every theologically conservative participant in politics and current events, from Pat Robertson to Paul Hill. These are, after all, people whom most in the legal academy love to hate. Recent events are only likely to have intensified this tendency. It was bad enough when, in 1992, the Republicans clumsily attempted to seek support through references to God and "family values"; at least they had the good grace to lose. However, when the Republicans, significantly assisted by the organized "religious right," gained majority control of Congress in 1994, the worst fears of many seemed to have been realized.

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My own position, writing in 1991, was that our political system was capable of absorbing, regulating, and channelling religious conflicts, and further, that it was unfair, dangerous, and counterproductive to attempt to make theologically conservative Christianity, or theism, an illegitimate participant in the political process. This position was based in part on my claim that the vast majority of conservative Christians accept and approve of the institutional separation of church and state and America's system of civil liberties, but merely seek the right, along with other citizens, to act politically according to their fundamental beliefs.¹

This Essay is based on several additional theses. First, I will argue that religion, and specifically Christianity, has been an important part of political motivation and rhetoric from Jimmy Carter's time through the Reagan-Bush era, and into the Clinton-Gore administration. Further, we can expect that religion in general, and Christianity in particular, will be appropriated and employed by both Democrats and Republicans during the 1996 campaign. The consistent use of religious motivation and rhetoric by both parties suggests that academic fascination with the religious right, and its supposed unique breaches of allegedly "secular" politics, is distorted. Academic discourse on the role of religion in politics, particularly within the legal academy, needs to take account of the consistent presence of religion in American politics, rather than treating religion as an occasional interloper. Part II furthers that process by proposing two ways in which religious rhetoric is irreplaceable in American politics, both historically, and at present. First, such rhetoric motivates the core constituents of a stated candidate, party, or position to move beyond agreement to action. Second, such rhetoric is necessary to overcome the pragmatic tendency of Americans to accept social evils based on the costs associated with their removal.

Part III of this Essay will briefly address the official use of religion to legitimate American political institutions, particularly in the form of inauguration ceremonies. It will be suggested that the specter of Supreme Court Justices and presidents participating in such rituals makes a mockery of the pretensions of modern Establishment Clause jurisprudence. Those who use religion to legitimize their own

1. See David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067 (1991) (reviewing MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991)).

authority lack credibility and legitimacy when they seek to limit religion's role in government, education, and society.

Part IV will further address the current dismal state of law and religion scholarship in the legal academy. Religion always has been, and for the foreseeable future will continue to be, an important force in American politics and law. The legal academy needs to move beyond its instinctive aversion to traditionalist theism and even beyond the use of political philosophy which pretends to be generous when it "allows" religion a limited place in American political life. The field of law and religion is indispensable to understanding the historical and contemporary realities of American life. Further, religion and legal scholarship should more faithfully reflect the religious normative perspectives with a significant following in the broader society.

II. "EVERYBODY DOES IT": THE UBIQUITY OF RELIGION IN CONTEMPORARY AMERICAN POLITICS AND SOME REASONS FOR IT

In 1993 Professor Stephen Carter published his well-received book *The Culture of Disbelief*,² which highlighted the historical use of religion by African-Americans and political liberals and made the obvious point: if we did it, why can't they—the religious right—do it?³ Carter seemed to be suggesting that the left should restore its historical connection, in the abolitionist and civil-rights movements, to religion.⁴

President Bill Clinton reportedly praised Carter's book. Historically, it seems significant that the presidents preceding and following the Reagan-Bush era were both Southern Democrats with significant Southern Baptist religious roots. President Clinton is clearly comfortable with religious rhetoric and justification, and to a large degree, has tended to heed Professor Carter's words. Labeling the religious right as extremist and intolerant, Clinton nonetheless has refused to concede the high ground of religious justification to the right. Although favoring a greater "wall of separation" than many conservative Republicans, Clinton nonetheless has concurred with Professor Carter's argument that progressive causes can be supported

2. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

3. *Id.* at 58.

4. *See id.*

by public religious references.

Indeed, President Clinton has used religious and even Biblical language throughout his presidency. His acceptance speech for the Democratic nomination invoked his grandfather's lesson about "equality in the eyes of the Lord" as the basis of his views on racial issues;⁵ his brief speech upon his election ended with the traditional presidential blessing, "God bless America,"⁶ and his inaugural address ended on the following religious note:

And so, my fellow Americans, as we stand at the edge of the 21st century, let us begin anew with energy and hope, with faith and discipline. And let us work until our work is done. The Scripture says, "And let us not be weary in well doing: for in due season we shall reap, if we faint not." From this joyful mountaintop of celebration we hear a call to service in the valley. We have heard the trumpets. We have changed the guard. And now, each in our own way and with God's help, we must answer the call.

Thank you, and God bless you all.⁷

Americans are so accustomed to this sort of religious political speech that we do not even notice its "Christian America" implications. The Scripture Clinton quoted was from Paul's letter to the church at Galatia.⁸ By invoking this New Testament letter as "[t]he Scripture," and addressing it to "my fellow Americans," Clinton transformed all Americans into New Testament Christians and the American people into a congregation of the Christian Church.

Since his inauguration President Clinton has spoken to both the mainstream and the evangelical press about his prayer life and his personal faith in Jesus Christ. He has also used religious language in discussing gun control, crime, and race relations.⁹ Indeed, Clinton's

5. *CNN Convention Coverage '92* (CNN television broadcast, July 16, 1992) (transcript on file with the *Loyola of Los Angeles Law Review*).

6. *Clinton Looks for a Spirit of Community*, *IRISH TIMES*, Nov. 5, 1992, at 8.

7. William J. Clinton, Inaugural Address, 1 *PUB. PAPERS* 1, 2-3 (Jan. 20, 1993).

8. See *Galatians* 6:9 (King James). The letter states that it is from Paul "unto the churches of Galatia." *Galatians* 1:2. Subsequent references to the Bible are to the New International Version (NIV).

9. See, e.g., William J. Clinton, Remarks at the Full Gospel A.M.E. Zion Church in Temple Hills, Maryland, 30 *WEEKLY COMP. PRES. DOC.* 1672, 1672-75 (Aug. 14, 1994) (stating that our ministry is to do the work of God here on Earth, which starts with giving our children and our families a place where they can at least be safe and secure) [hereinafter Clinton, Remarks at the Full Gospel A.M.E. Zion Church]; William J. Clinton, Remarks to the Community in Memphis, 2 *PUB. PAPERS* 1986, 1988 (Nov. 13, 1993)

familiarity with the Scripture appears to far exceed that of either Reagan or Bush, and he is certainly far more comfortable than the latter in using religious and Biblical language in public life.

Al Gore's acceptance speech for the Democratic nomination made perhaps the most overtly "Christian America" statement of the campaign. After repeatedly describing the role of prayer in the healing of his injured son, and thanking God for that healing, Gore turned to America's need for healing and renewal. "In the words of the Bible, 'Do not lose heart.[?]' This nation will be renewed," declared the future Vice President.¹⁰ Thus, Gore directly took a Scripture apparently addressing the theocratic Old Testament nation of Israel, and applied it to America.

One can therefore anticipate that the 1996 election will not present a choice between religious and secular rhetoric, but in many respects will present diverse *religious* visions of America. One could posit a 1996 political debate in Biblical terms as follows:

Democrats

Republicans

WELFARE / MEDICAID

"If a man shuts his ears to the cry of the poor, he too will cry out and not be answered."¹²

"If a man will not work, he shall not eat."¹¹

"He who oppresses the poor to increase his wealth and he who gives gifts to the rich—both

"Food gained by fraud tastes sweet to a man, but he ends up with a mouth full of gravel."¹³

(stating, in a reference to crime, that we must be honest children of God, and honest Americans and try to analyze causes of and solutions to crime); Fred Barnes, *The New Covenant*, NEW REPUBLIC, Nov. 9, 1992, at 32; Gustav Niebuhr, *Clinton Talks About Religion As his Anchor*, N.Y. TIMES, Oct. 3, 1994, at A1; Philip Yancey, *The Riddle of Bill Clinton's Faith*, CHRISTIANITY TODAY, Apr. 25, 1994, at 24; *ABC World News Tonight* (ABC television broadcast, Mar. 23, 1994) (containing an interview with Bill Clinton in which he states that Christ is his savior and his God, and discussing his prayer life) (transcript on file with *Loyola of Los Angeles Law Review*).

10. See Prepared Text of Al Gore's speech accepting Democratic Vice Presidential Nomination, July 17, 1992 (text on file with *Loyola of Los Angeles Law Review*).

11. *2 Thessalonians* 3:10.

12. *Proverbs* 21:13.

13. *Id.* at 20:17.

come to poverty.”¹⁴

President Clinton and the Democratic Party can argue that the Republican Party is abandoning and oppressing the poor in order to give to the wealthy. The Republican response could be that only those truly unable to work should receive help and that incentives must be provided for work and the avoidance of unwed pregnancy. Republicans also could invoke the specter of welfare fraud. Implicit in this debate, but not addressed by these Scriptures, is the question of whether, and to what degree, government is the most appropriate means of assisting the poor.

MEDICARE

“Honor your father and your
mother”¹⁵

“The Lord detests differing
weights, and dishonest scales
do not please him.”¹⁶

President Clinton and the Democratic Party could invoke the Biblical responsibility to honor your father and mother, and more generally the “elders,” in this instance through the dignity of guaranteed medical care. The Republicans could respond by arguing that their greater proposed cuts in Medicare are necessary to the survival of the program and to balancing the budget; they could buttress this argument by accusing the Democrats of using “differing weights, and dishonest scales” in their budget proposals. Implicit in the debate, but unlikely to be raised directly, is the question of whether and to what degree government, rather than the individual, has the responsibility to provide financially for parents and the elderly.

ABORTION

“And the Lord God formed man
from the dust of the ground and
breathed into his nostrils the
breath of life, and man became

“For you created my inmost
being; you knit me
together in my mother’s
womb. My frame was not

14. *Id.* at 22:16.

15. *Exodus* 20:12.

16. *Proverbs* 20:23.

a living being.”¹⁷

hidden from you when I was made in the secret place. When I was woven together in the depths of the earth, your eyes saw my unformed body.”¹⁸

President Clinton and abortion rights Democrats could argue that *Genesis 2:7* demonstrates that human life, religiously speaking, begins when a baby is born and first breathes; at a minimum, they could argue that there is uncertainty as to when the soul enters the body. Indeed, one of Clinton’s biographers indicates that Clinton sought his Baptist pastor’s opinion on abortion and was informed that the Biblical definition of human life “would be that it began at birth, with the first intake of breath.”¹⁹ Pro-life Republicans could argue that the Scriptures plainly teach that God creates human life within the womb, and that any uncertainty should be resolved in favor of protecting the unborn, rather than risking a possibility that governmental policy will permit the killing of innocent human life.

ENVIRONMENT

“A righteous man cares for the needs of his animal”²⁰

“[T]he mountains and hills will burst into song before you, and all the trees of the field will clap their hands.”²¹

“[F]or every animal of the forest is mine, and the cattle on a thousand hills. I know every

God blessed them and said to them, “Be fruitful and increase in number; fill the earth and subdue it. Rule over the fish of the sea and the birds of the air and over every living creature that moves on the ground.”²²

“Cursed is the ground because of you; through

17. *Genesis 2:7.*

18. *Psalms 139:13, :15-16.*

19. DAVID MARANISS, *FIRST IN HIS CLASS* 435 (1995).

20. *Proverbs 12:10.*

21. *Isaiah 55:12.*

22. *Genesis 1:28.*

bird in the mountains, and the creatures of the forest are mine."²³

Then the Lord opened the donkey's mouth, and she said to Balaam, "What have I done to you to make you beat me these three times?"²⁴

painful toil you will eat of it all the days of your life. It will produce thorns and thistles for you, and you will eat the plants of the field. By the sweat of your brow you will eat your food until you return to the ground, since from it you were taken; for dust you are and to dust you will return.[']²⁵

Vice President Al Gore, in his book *Earth in the Balance*, invoked his Christian faith as an important source of his political efforts on behalf of the environment.²⁶ Indeed, Gore suggests that science and rationality must be reconciled with religion and spirituality in order to heal humankind's relationship to the environment. According to Gore, conceiving the intellect as separate from religion, spirituality, morality, and nature, created the mindset which made possible both an environmental crisis and the mechanized atrocities of Hitler and Stalin. Gore's book suggests that a religious and spiritual quest which heals the human rift with nature is essential to the success of the environmental movement.²⁷ Vice President Gore presumably is pleased by recent organized political lobbying efforts by some evangelicals in favor of preserving the Endangered Species Act, which they view as a modern "Noah's Ark."²⁸

The Scriptures I have selected for the more protectionist environmental position emphasize that all creatures belong to God and that human beings are judged in Scripture by how they treat animals, and generally support the "aliveness," and even personality, of animals and the earth. The Republican "response" Scriptures emphasize that humankind is envisioned not merely as a part of

23. *Psalms* 50:10-11.

24. *Numbers* 22:28.

25. *Genesis* 3:17-19.

26. See AL GORE, *EARTH IN THE BALANCE* 367-68 (1992).

27. *Id.* at 238-65, 366-68.

28. See Peter Steinfels, *Evangelical Group Defends Laws Protecting Endangered Species as a Modern "Noah's Ark"*, N.Y. TIMES, Jan. 31, 1996, at A12; D'Jamila Salem, *Coalition of Evangelical Christians Opens Campaign to Keep Congress From Weakening Statute*, L.A. TIMES, Feb. 1, 1996, at A12.

nature, but is given the authority over the natural world on earth. The task of "subduing" the earth suggests that merely leaving nature alone is insufficient. The second Republican Scripture counters the attempt to envision undisturbed nature as a kind of paradise, and man as the virtual serpent destroyer, by the Biblical view that the curse has affected even nature.

* * *

The purpose of the above review of Scriptures is not to specifically predict the content of the 1996 political debate, nor to imply that Scripture can legitimately be read to support any position. I would argue, however, that much American political debate revolves around the duality of morality and pragmatism in the American character, and that this duality makes religious rhetoric ubiquitous and essentially irreplaceable in American political life.

First, most Americans remain intensely moralistic in their attitudes, even if not necessarily moral in their behavior. Most of these moralisms are historically, and even self-consciously, linked to monotheistic religion, and specifically to the Bible. In this sense, religiously-based moralisms are consistently a foundation of political debate, regardless of whether they are explicitly invoked. Moreover, they *are* invoked in pulpits, churches, and political campaigns all across America. How many thousands of times during the 1996 campaign will the Biblical call to aid the poor be invoked from African-American pulpits or by American Roman Catholic bishops or priests? How many times will Roman Catholic clergy or evangelical leaders make religious arguments against abortion and link these arguments to the 1996 elections?

Thus, when political candidates in American elections state moral principles, the public, and even the candidates themselves, generally and intuitively connect those principles to religious tenets. Candidates do not need to recite chapter and verse of the Bible or of official church documents in order to make their constituents understand the religious bases of their positions because that work has already been done by the churches themselves. Candidates often will stick to rhetorical statements of broad themes and principles, and thus will not engage in detailed religious debates any more than they engage in detailed scientific or economic debates. Nonetheless, candidates and their surrogates will target particular religious constituencies with carefully crafted religious and political rhetoric. Democrats will not let African-American Protestants, Roman Catholics, and Jews forget that *they* are the party following the scriptural injunction to help the

poor and oppressed, and pro-life Republicans will not let Roman Catholics and White Evangelicals forget who is following the religious imperative to protect unborn life. Where possible, attempts will be made to minimize differences, as when President Clinton emphasizes his support of the Religious Freedom Restoration Act of 1993²⁹ to conservative Christians, or tries to explain to Catholic audiences that while he is pro-choice, he seeks to make abortion "rare."

President Clinton evidenced his straightforward understanding of religious politics when he told the Memphis Convocation of the Church of God in Christ: "I thank your faith, and I thank your works, for without you I would not be here today as your President."³⁰ He noted, somewhat jokingly, that "if you haven't heard Bishop Walker attack one of my opponents, you have never heard a political speech."³¹ Clinton told a Full Gospel A.M.E. Church that it was the ministry of the President and Congress to "do the work of God here on Earth," and chided the Congress for turning away from that ministry by failing to support his crime bill and assault-weapons ban.³² Thanking an African-American Christian denomination for putting you in the White House and accusing those who oppose your programs of abandoning their duty to God does not constitute "secular" politics.

It is helpful to remember that political rhetoric is not merely about "dialogue" or "reasoned debate." The point of much political rhetoric is to motivate those who already support a position, premise, or candidate to overcome inertia and *do something* about it, whether that something be voting, contributing funds, or volunteering at campaign headquarters. Ending Jim Crow required far more than a large number of people being persuaded that it was wrong. To overcome it, significant numbers of people had to be motivated to act, even at the risk of loss of life. The necessity for this sort of motivation is why it was natural that the Reverend Martin Luther King, Jr., rather than a secular academic, lead the civil rights movement.

To illustrate this point it is helpful to contrast the rhetoric and personality of Erasmus, the great Christian humanist, with that of his

29. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified in scattered sections of 5 and 42 U.S.C.).

30. William J. Clinton, Remarks to the Convocation of the Church of God in Christ in Memphis, 2 PUB. PAPERS 1981, 1981 (Nov. 13, 1993).

31. *Id.* According to the Editor's Note, Bishop L.T. Walker is a jurisdictional bishop of the Church of God in Christ in Arkansas. *Id.* at 1986.

32. Clinton, Remarks at the Full Gospel A.M.E. Zion Church, *supra* note 9, at 1674.

contemporary, Martin Luther, the great Protestant reformer. Erasmus was erudite, reasoned, witty, clever, and apparently even pious; however, he clung to the comforts and pleasures of a scholarly life and shrank from the revolutionary implications of his own work. It took Luther with his impassioned rhetoric and willingness to follow his beliefs even unto death to ignite the Reformation. The Erasmuses of this world will always wince at the harsh, "unreasonable" rhetoric of the Luthers, but not everyone can or should be restricted to the rhetorical standards of an Erasmus.

Paradoxically related to the religious moralism of Americans is an intense pragmatism, a habit of evaluating actions and programs according to whether they "work." Americans salt their intense moralism with an intense concern for consequences. They feel most comfortable when someone can show that their moral principles work, and hence that immoral behavior does not. Americans want to believe the proverb that crime or sin does not pay. However, if someone can demonstrate that it does not work to enforce a particular moral principle by legal means, or even that a particular immoral act gives the best results, Americans are apt to choose pragmatism over moralism.

The saddest historical example of American pragmatism concerns slavery.³³ The revolutionary period produced moral unease over slavery in the North and the South. Americans understood the inconsistency of slavery and the liberationist rhetoric of the war for independence. Many of the northern states successfully adopted gradual emancipation schemes that spread and cushioned the cost of abolition, but these schemes were insufficient to overcome the southern states' greater financial commitment to slavery. The hope that slavery would die a natural economic death was destroyed by the invention of the cotton gin in 1793, and thus the South's dependence upon slave labor was deepened. Subsequently, the American Colonization Society suggested sending the slaves back to Africa, but

33. I am not referring herein to the later development of an American philosophy generally called "pragmatism," but rather to the more commonsense notion, as defined above, of "evaluating actions and programs according to whether they 'work.'" The relationship of the pragmatism of Pierce, Dewey, and James to this cruder, more commonsense notion, and the relationship of pragmatism in either form to the virtues of "wisdom" or "prudence" as understood in a Christian, Jewish, or Greek sense, are complex topics beyond the scope of this Essay. For a positive view of the pragmatist tradition, see Tom Berg, "Religious Pragmatism and Legal Thought," (unpublished draft 1996).

this “pragmatic” solution had far too little money behind it to have much impact. Abolitionism was unpopular in both the North and the South because its demand for immediate abolition appeared to be too drastic and entirely impractical. Indeed, the Southern response to abolitionism was the creation of a religious pro-slavery position. In the end, abolition was accomplished only through a war, and was only made an aim of that war when the casualties were so high that they seemed to require some greater moral gain than mere reunion. Thus, Lincoln would finally conclude that the losses of the Civil War were the price that God had extracted from the nation for its collective sin of slavery. God, in effect, was showing America that the “crime” of slavery did not pay.

America’s experience with slavery demonstrates that it is not enough in American politics to persuade others that a particular situation or institution is evil. To be successful politically one must persuade Americans that one’s plan for abolishing evil will work without inordinate cost. Most anti-slavery Americans were never persuaded that abolishing slavery was worth the cost until the cost had been unwittingly paid through a war which both sides had believed would be quick and easy.

The religious morality and pragmatic dualism in relation to contemporary issues could be illustrated as follows:

Democrats

Republicans

WELFARE / MEDICAID

Religious Moralism:

Pragmatic Reply:

Thou shalt help the poor.

Welfare is a failure; instead of reducing or ending poverty, it produces a permanent underclass. It doesn’t work because it violates the moral principle against rewarding laziness and immorality.

Response: We agree that it hasn’t worked, but we still cannot abandon the poor. We intend to make

You can’t trust the Democrats to make it work. They are the ones who created and defended the broken system.

welfare work.

MEDICARE

Religious Moralism:

Thou shalt help the poor
and honor thy parents.

Response: Medicare works.
It helps people like us—
regular, middle-class
Americans. Republicans
are always against programs
that help people, even when
they work. They never think
those kinds of programs will
work.

Pragmatic Reply:

The system does not work; it
is about to go broke.

Democrats do not know how
to live within a budget.

ABORTION

Pragmatic Argument:

Prohibiting abortion will not
work because women will again
have back-alley abortions, and
thus prohibitions will do more
harm than good.

Abortion is a necessary evil.
Women in difficult circumstances
need it. You or your daughter
may need one someday.

Religious Moralism:

It is wrong to kill unborn,
human life.

Response: Women and society
are hurt by abortions,
because it is unnatural—
physically and emotionally—
to rip a child from the
mother's womb.

ENVIRONMENT

Religious Moralism:

It is wrong to rape the earth; we should protect the environment and preserve it for future generations.

Pragmatic Response:

Government regulation of the environment is too onerous; it interferes with jobs and property rights, and follows extremist views which value trees over people.

American pragmatism is deeply implicated in issues regarding the size and role of government in general and of the federal government in particular. Most Americans appear not to hold dogmatic positions on questions of whether or to what degree government should or should not perform a certain task, whether it is protecting the unborn or the environment or aiding the poor. Instead, Americans want to know in each instance whether a particular government action or program will or has actually succeeded. This is why I have included *ad hominem* arguments in the above descriptions of pragmatic arguments. It is logical—even if sometimes a logical fallacy—to evaluate the person making an argument when the argument relates to what that person can accomplish. You would not hire a doctor to build a house. Some people similarly may feel it is illogical to expect a Democrat to shrink the size of government or a Republican to maintain a reliable safety net for the poor. Americans, moreover, are constantly in search of that hard-headed John Wayne-type who will use “common sense,” go beyond ideology, and simply get the job done—and ideology be damned. The initial popularity of Ross Perot and Colin Powell can be attributed to this American ideal of the can-do pragmatist.

The American dialectic between moralism and pragmatism explains, in part, the importance of religious rhetoric in American politics. It is not merely that religiously-based moralism is instinctively an explicit or implicit part of political debate. In addition, these moralisms are in constant conflict with pragmatic counterarguments which suggest, in essence, that the cost of adhering to these moralisms in a particular context is simply too high. One response to such pragmatisms is simply to underscore the imperative nature of the religious moralism. The ultimate subtext is thus something like Jesus’s statement, “[w]hat good will it be for a man if he gains the

whole world, yet forfeits his soul?"³⁴ It is very nice for academics to talk about the dangers of making absolutist, divisive, sectarian religious statements in the political arena, but in fact those sorts of statements are necessary if people are going to be motivated to pay the cost of doing what is right, whether the subject is race, the poor, the environment, or abortion. The problem is not merely determining or debating the "right" course of action, but more broadly one of fighting the constant temptation to avoid paying the costs associated with doing what is right.

III. INAUGURAL HYPOCRISY: WHY NO ONE SHOULD TAKE ESTABLISHMENT CLAUSE JURISPRUDENCE SERIOUSLY

In January 1997 a hundred million Americans—adults and children—will watch a United States Supreme Court Justice once again ask a President-elect to place a hand upon a Christian Bible and swear an oath of allegiance to the Constitution of the United States. The candidate will end the oath with "so help me God" and mention God somewhere in the inaugural address; prominent clergy will lead the nation in prayer. Then that Supreme Court Justice, along with the others in attendance, will return to the jobs of considering whether allowing graduation prayers, prayers at football games, or government assistance at religious schools is unconstitutional because of the danger of "confusion" by young people, the "imposition" of religious practice, or a message of "endorsement" of religion.

One response to this incongruity is laughter. Another appropriate response, however, is a deep cynicism about both modern Establishment Clause jurisprudence and those governmental officials who claim to support it. Consistency should require such officials to forbear any hint of religious legitimation of their official duties. Their inaugurations and other ceremonies should be as bereft of Bibles, official prayers, and clergy as they would wish to make our public schools.

There are several possible reasons why elected officials do not insist on strictly secular inaugurations and public events. One cynical possibility is that public officials who participate in these ceremonies, including presidents-elect and Supreme Court Justices, believe such ceremonies are inconsistent with the Constitution, but they continue these traditions for fear of alienating the unwashed American public.

34. *Matthew* 16:26.

This possibility would present the unhappy consequence of governmental officials being willing to violate the Constitution in the very act of swearing allegiance to it.

Less cynically, it seems likely that even strict separationist government officials seek the legitimation and acknowledgment of their authority by organized religion. However, it is deeply inconsistent for such officials to grant themselves the right to such public religious legitimation and blessing while denying the right to the rest of the population, who seek such legitimation at public occasions meaningful to their own lives. Elected officials who grant themselves the personal comfort and public legitimation that come from public prayers and religious oaths should grant the same kind of personal comfort and public legitimation to graduating students and their parents.

Indeed, it is far more problematic, in terms of theories of a "secular" or religiously "neutral" government, to allow religious adornment of inaugurations than to permit prayers at graduation. An inauguration is indelibly a *political* event designed to secure an orderly transfer of power and the political allegiance of a people. By contrast, a graduation ceremony is predominately a personal and communal rite of transition rather than a political event. Thus, the inaugural religious oaths administered upon holy Scripture, and the accompanying prayers and blessings of clergy, send a message not profoundly different from the famous coronation of Emperor Charlemagne by the Pope in Rome in 800 A.D. The message, quite simply, is that God and God's voice in organized religion are authoritatively blessing and legitimating the endowment of an individual with political office and power. Of course, Billy Graham, unlike some medieval Popes, has never claimed the jurisdiction to select the civil ruler. Nonetheless, the role of blessing and legitimating the office, the transition of power, and the endowment of the individual with political authority remains the same. This message is simultaneously religious and political. It represents, if anything does, both state endorsement of religion and religious endorsement of the state.

The religious history of oaths and inaugural prayers underscores the intertwining of religion and government. During the Reformation the radical reformers, termed "Anabaptists," insisted on literally following Jesus's command not to swear any oath, while the Calvinists and Lutherans adhered to the traditional Roman Catholic use of religious oaths as an important expression of the religious foundations

of political obligations. The Anabaptist rejection of oaths was not merely an interpretative quarrel over a few of Jesus's words, but was understood more deeply as a part of the Anabaptist rejection of Christian involvement in political and military affairs. Anabaptists rejected the medieval enterprise of creating an entire civilization or empire, commonly called "Christendom," based upon Christianity. Anabaptists instead equated Christendom with the evil "world" from which the church must be completely separate. The refusal of religious oaths was therefore a specific denial of the Christian nature of the political order.³⁵

Coronations of monarchs were important religious ceremonies throughout Christendom because their religious legitimization of particular political rulers expressed Christendom's fundamental claim that the empire's or nation's authority and unity were ordained by God. This emphasis survived the Reformation; in England it was the Archbishop of Canterbury who crowned King George III in 1761, just as the Pope had crowned Charlemagne in 800. When it came time to inaugurate George Washington as America's first president, this English background formed the context. The new nation did not want to consider its "President" a monarch; yet, they needed a proper ceremony. Amidst the uncertainties over the proper mode of granting office to a president, President Washington improvised by using the English coronation as a guide. He placed his hand on a Bible, swore to execute the duties of his office and defend the Constitution, then spontaneously added words used in the English coronation service: "I swear, so help me God." Washington then kissed the Bible, as had King George III in 1761.³⁶ And so, from the very outset, American's inaugurations were, in important religious respects, modeled after Christendom's coronations. America might be a republic, but it was a Christian republic and hence a part of Christendom.

It is noteworthy in this era of academic condemnation of the

35. See *The Schleithem Confession of 1527, reprinted and translated in CREEDS OF THE CHURCHES* 282-92 (John H. Leith ed., rev. ed. 1973); cf. *The Augsburg Confession of 1530*, art. XVI, reprinted and translated in *CREEDS OF THE CHURCHES, supra*, at 73-74 (arguing that governments were "instituted and ordained by God for the sake of good order, and that Christians may without sin occupy civil offices or . . . take required oaths."); JOHN CALVIN, I CALVIN: *INSTITUTES OF THE CHRISTIAN RELIGION* ch. viii, §§ 22-27, at 388-94 (John T. McNeill ed., Ford Lewis Battles trans. 1960) ("[T]he eternal God not only permits oaths as a legitimate thing under the law . . . , but commands their use in case of necessity.").

36. See Martin J. Medhurst, *From Duché to Provoost: The Birth of Inaugural Prayer*, 24 *J. CHURCH & STATE* 573, 585-87 (1982).

“religious right” to remember that the practice of inaugural prayer was reinstated after a lapse of 144 years by Franklin Delano Roosevelt.³⁷ In the last quarter century, from the Republican Richard Nixon to the Democratic Bill Clinton, the evangelist Billy Graham has often played a prominent role at inauguration services.³⁸ Clinton’s inauguration was no less religious than that of his immediate predecessors. He began the day at an early morning prayer service at an A.M.E. Church, laid his hand on the Bible as he took the oath, quoted scripture in his inaugural address, and invited Graham to deliver the invocation and benediction. The American religious-political symbols of the Christian Bible, oath, prayer, benediction, and evangelist—which together suggest the theme of America as a holy Judeo-Christian nation—were present.³⁹

The political usefulness of these religious trappings are the same as they have been throughout the history of Christendom. Presidents and Supreme Court Justices, like kings and emperors, want to be obeyed. They want the people to pay their taxes and obey their laws and fight their wars without resistance, even if the people support a different leader or disagree with the policy in question. American politicians know that they need something more than secular contract theory or utilitarianism or Rawlsianism to persuade Americans to perform willingly these remarkable feats of political loyalty. They know that most Americans believe in God, and they want those citizens to believe that God has in some way legitimated, recognized, or blessed their office and authority.

I suppose that Justice O’Connor might say that such use of the Bible and prayer are merely “solemnizations” bereft of religious or sectarian content.⁴⁰ If she really were to believe such a thing it

37. See *id.* at 573.

38. See *Inauguration Amid Religious Trappings*, CHRISTIANITY TODAY, Feb. 14, 1969, at 30-31; *Graham will pray at inauguration*, Dec. 23-30, 1992 THE CHRISTIAN CENTURY 1184.

39. See Suzan D. Johnson Cook, *The Inaugural: Making a Difference*, 53 CHRISTIANITY & CRISIS 30, 30 (1993); Harvey Cox, *The Inaugural: Symbols and Images*, 53 CHRISTIANITY & CRISIS 29, 29 (1993).

40. See *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (1984) (O’Connor, J., concurring). Justice O’Connor stated:

[T]he government’s display of the crèche in this particular physical setting [is] no more an endorsement of religion than such governmental “acknowledgments” of religion as legislative prayers of the type approved in *Marsh v. Chambers*, . . . government declaration of Thanksgiving as a public holiday, printing of “In God We Trust” on coins, and opening court sessions with “God save the United States and this honorable court.” Those government acknowledgments of

would evidence a remarkable capacity for self-delusion akin to the capacity of tobacco companies to somehow avoid knowing that smoking causes lung cancer. In a country where the vast majority of citizens pray and believe in God, it surely matters for purposes of legitimation of power and authority whether or not God and the Bible—the highest authorities and sources of ideals known to those citizens—are invoked to legitimate political authority. It is also impossible for an inauguration to invoke divinity in a religiously neutral way, for the very act of naming divinity as Allah, Father, Mother, Christ, One, or Many is itself sectarian.

Indeed the very suggestion that an inauguration filled with prayers and religious oaths is nonreligious would evidence an extreme cynicism toward those who stand in front of a hundred million people and deliberately give every appearance of solemnly engaging in these religious acts. Are we to presume that these presidents and Justices are engaged in a fraud and a sham? Does an individual lose the capacity for prayer or religious oath upon taking office? Why is it religious and sectarian when an elementary school teacher prays in front of a classroom of children, but a mere nonreligious solemnization when a president stands in front of a nation and swears on a Bible, so help him God, to carry out the office to which he or she has been entrusted?

I am not arguing for daily Bible reading and prayer in the public schools. I am arguing that all of the “governmental neutrality” tests employed by the Justices, based on the second prong of the test articulated in *Lemon v. Kurtzman*,⁴¹ wink at reality. A government which systematically and publicly seeks to buttress its political legitimacy from Christian Bibles, oaths, clergy, and prayer, in continuum with more than a millennium of political leaders within Christendom, is not acting “neutrally” among religions or between religion and nonreligion.

It is deeply unjust to use religion to legitimate your own authority, an authority which extends to commanding others to kill or

religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs. . . . It cannot fairly be understood to convey a message of government endorsement of religion.

Id.

41. 403 U.S. 602, 612-13 (1971).

risk death, and then when it suits you, limit appeals to that source of authority from which you sought recognition and blessing. If we are going to allow religion to be used to legitimate governmental authority, we had better allow religion to be a part of the process of selecting, restraining, and judging those who use that authority.

I am not arguing for the abolition of the Establishment Clause. However, interpretations of the Clause need to be grounded in the realization that America is historically a part of Christendom, and that American government has never successfully carried out a policy of acting neutrally among religions or between religion and nonreligion. Institutional separation of church and state, religious freedom, and toleration are values that grew up in America within Christendom's fundamental religious and political commitments and not generally in opposition to them. Recent attempts to use the Establishment Clause as an engine of secularity to divorce America from her religious roots have had some effect, but such attempts rely on distortions of both the past and present and in themselves are no more "religiously neutral" than the generalized acceptance of Christian dominance that preceded them.

Ironically, the Court's interpretations of the Establishment Clause have probably contributed more to religious divisiveness in America than the practices that were the subjects of the Court's cases. The Court has sent the message that it is unconstitutional for government to offend the religious sensibilities of any American; creating a right not to be offended makes being thin-skinned a civic and constitutional virtue and thus undermines the virtues necessary to social and religious harmony.

The judicial myth of governmental neutrality toward religion promises the impossible and thus invites misunderstanding, religious division, and frustration. Ultimately the Court needs to explain that the Constitution promises neither a Christian nor a secular America and thus is not a prize in the continuing struggle to define the meaning of America. The contemporary meaning of America's historical foundations in Western Christendom and the Christian faith cannot be determined by nine Justices, but rather will be determined as the people express themselves politically and culturally. In the meantime, "God save the United States and [that] honorable

[C]ourt."⁴²

IV. LAW AND RELIGION IN THE LEGAL ACADEMY

The field of law and religion has a marginal existence in the legal academy apparently primarily due to a lack of interest and competency by law professors. This is made clearer by comparing law and religion to other interdisciplinary or multisubject areas, such as legal history, law and economics, and jurisprudence.⁴³ These areas apply a discipline or methodology—such as history, economics, or philosophy—to the subject of law. The field of law and religion should logically use a religion-related discipline—such as theology or sociology of religion—to analyze the subject of law. Instead, law and religion within the legal academy overwhelmingly consists of two subject areas. First and most prominently, law and religion is no more than a study of the Free Exercise and Establishment Clauses of the First Amendment and thus is simply a subject area within the field of constitutional law. It is not denigrating the important work done in this area to note that the study of one sentence of the Constitution does not rise to the level of a genuine interdisciplinary area of study.

Second, law and religion involves, as in Professor Greenawalt's work, the application of a secular philosophy or ideology to the question of the proper relationship of religion to politics and law. Thus, Professor Greenawalt's work is actually a work of political philosophy which simply takes religion and politics as a subject of investigation. Moreover, while Professor Greenawalt's work evidences intelligence and thoughtfulness it does not evidence

42. See *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) (claiming that the Supreme Court practice of opening Court sessions with "God save the United States and this honorable court" is a mere solemnization that does not convey government endorsement of religion). I will leave it to those who claim to understand such things to determine whether (1) my use of this phrase was a heartfelt prayer or a mere "solemnization" and (2) if it is the former, whether its publication in a law review article violates the broadly accepted ground rules for public political discourse in a liberal democracy.

43. A January 1996 American Association of Law Schools (AALS) Mini-Workshop on developments in scholarship and law over the last ten years had a session on "Perspectives on Law" with presentations on thirteen perspectives: critical legal studies, critical race theory, feminist theory, game theory, gay & lesbian theory, law & economics, law & literature, law & society, organizational theory, pragmatism, public choice, republicanism, and storytelling. The failure to include law and religion as a distinct perspective on law, amidst such a long and varied list of perspectives, illustrates the failure of the legal academy to perceive religion as a significant and legitimate perspective from which to view (Mini-Workshop brochure on file with *Loyola of Los Angeles Law Review*).

particular expertise in the subject of religion or even of religion in contemporary America.⁴⁴

If America were an overwhelmingly secular society it would perhaps not be odd that there was so little interest in law and religion as a genuine field of interdisciplinary study. However, America remains a land where the vast majority of citizens have a personal interest and involvement in religion, and particularly in one of the three great monotheistic faiths of Christianity, Judaism, and Islam. Indeed, over eighty-five percent of Americans identify themselves as "Christian."⁴⁵ Moreover, there is clearly a great deal of contemporary interest in America in the question of the interaction of religion and politics due to the political and social activism of various religious groups, from the Christian Coalition, to African-American churches and religiously ordained political leaders, to the Nation of Islam. The relationship of law to religion is a question of contemporary urgency, and one would hope that the legal academy would be prepared to shed some light upon it.

The dominant approach of the legal academy, however, asks religious believers to first master an intricate secular philosophy and then engage in a detailed and often indeterminate debate within this philosophy upon the proper role of religion. It may then be admitted that the results, if any, of this secular philosophical enterprise are not binding on the religious believer if they contradict his or her own faith. But no attempt will be made to explore what the widely-held religious faiths in America teach about the relationship of religion to law. This seems to me a bit like using Confucian philosophy to discuss the proper role of science in contemporary Iran; it could be done, but one wonders why it should be done.

A more logical and useful approach to the study of law and religion would involve an exploration of the history, theology, and contemporary practices of the significant American religions in regard to politics and law. This is a large field and allows much room for

44. See generally KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995) (commenting on the various arguments for a broad political use of religious premises); KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988) (analyzing the use of religious and other broad philosophical positions to resolve political controversies in liberal democracies).

45. See Ari L. Goldman, *Portrait of Religion in U.S. Holds Dozens of Surprises*, N.Y. TIMES, Apr. 10, 1991, at A1 (commenting that the largest and most comprehensive religious poll of Americans ever conducted finds that 86.4% of Americans identify themselves as Christians).

specialization. Certainly Christianity, Judaism, and Islam possess rich and diverse histories, theologies, and contemporary practices relevant to the relationship of religion to politics and law. Moreover, it is clear that the Christian historical experiences with politics and power are a major influence on the political and legal development of the United States. To put the matter bluntly, America historically is a product of Western European civilization, and the history and development of that civilization, including its political and legal development, is inexplicable without an understanding of the Christian religion.

I imagine that my own reaction to reading Greenawalt's political philosophy is like that of many legal academicians when, and if, they attempt to read theology. I am irritated by the discussion of what is possible in a "liberal democracy," because I know—as does every decent law student—that one can define a term virtually any way one wants, and I don't know why I should be particularly bound by someone's embrace of and definition of that term. My reaction, in short, is something close to "who cares?" Moreover, the discussion seems both intellectually arbitrary and yet strangely dogmatic; like discussing how many angels can dance on the head of a pin. "How many graduation prayers can a high school valedictorian recite in a liberal democracy?" asks the schoolman. I picture the typically secularized legal academic struggling to read Calvin, Aquinas, or Edwards, or perhaps a portion of Scripture, and pausing to wonder how anyone could believe this stuff or think it had any value. I can sympathize.

I also realize that my own reaction may be somewhat extreme. After all, there is a great and important Western philosophical tradition which has had an important impact on the development of American culture, law, politics, and religion. There is certainly plenty of room in the legal academy for the application of secular legal philosophies to questions of law, including law and religion. Why, however, in a nation and world teeming with religious believers is there so little room for scholars and scholarship that take religion and theology seriously?

One answer that might be given is that legal scholarship must be objective and based on reason, criteria which rule out scholarship based on religion. Everyone knows, however, that the legal academy is today filled with postmodern scholars who do not believe in "objectivity," but instead in "commitments," usually to some politically-left ideology. Indeed, it sometimes seems that the surviving

Thomists in the legal academy are the only ones who really believe in "reason" anymore. The problem is not that religious scholars have commitments, but rather that they have the "wrong" commitments.

I should note that much of the law-and-religion scholarship of the kind I am advocating does not require religious commitment. Indeed, many religious believers in the academy know far less about theology and religious history than some nonbelieving historians. Thus, an agnostic could competently explore the historical and contemporary significance of varying religions for politics and law, just as a non-Marxist historian could presumably study the impact of that ideology on Russian politics. Of course, *normative* religious scholarship would primarily be open to adherents of the various religions. It should be remembered, however, that nonreligious *normative* scholarship on a wide variety of topics is already commonplace within the legal academy. For example, Professor Greenawalt's work on the relationship of religion and politics is *normative* rather than descriptive, and thus implies the acceptance of a certain body of norms. Ultimately, having a believing Roman Catholic write normative scholarship on the Roman Catholic perspective on religion and law makes just as much or little sense as having a neo-Kantian or feminist write normative scholarship from those particular perspectives.

Some of the kind of scholarship I advocate already exists. Professor Michael Perry's law-and-religion writings are self-consciously written from his liberal Roman Catholic perspective. The writings of Harold Berman and John Noonan, to select two from an older generation of scholars, evidence extensive historical knowledge concerning religion as well as the underlying religious commitments of these scholars. The law and religion programs at Emory and Hamline—hopefully along with the law and religion colloquium at my own school—are currently centers for a serious study of the relationship of religion and law.

Ultimately, however, the field of active scholars is far too thin for the subject matter. Moreover, within the legal academy there is a certain stigma associated with scholarship written from an explicit theologically conservative Christian perspective. I understand the instinctive disparagement of conservative religion because growing up as a liberal Jew in the midwest, it was second-nature to me. I remember as a child reading that Baptists in the South were having some kind of fight over the Bible and being puzzled; it seemed absurd that such a thing could still be occurring in the modern world. Studying predecessors to *homo sapiens* like *homo habilis* and

neanderthal had been an early fascination of mine as a child. I recall a similar sense, contemplating those Baptists, of something primitive and prehistoric. My (Reform) Jewish Sunday school had been diligent in teaching me about Christian persecution of Jews, particularly in the Inquisition and Crusades. It seems likely, though I do not recall it, that I also vaguely associated these Baptists who could still fight over the Bible with the historic persecutions of Jews. It was not that I specifically disparaged the Bible; indeed, I had even been Bar Mitzvahed and had read from the Torah in Hebrew and English to the congregation. It was not that I hated those Baptists, I just couldn't comprehend their mindset.

Ironically, I now teach at a Southern Baptist University caught in the midst of the schism within Southern Baptist life. Even worse, I am one of the most theologically conservative members of the faculty—although I am still not a Baptist. I note these personal ironies primarily to say that I know and understand, from attitudes I have held in my own life, the difficulty of many academics, both Jewish and Gentile, in giving true respect to the conservative religious mindset. Yet, understanding it as I do, I still must insist on asking, even on the basis of academic freedom and secular liberal theory, for the respect which traditionalist religious believers deserve.

The field of law and religion, as a true interdisciplinary field, can convey this respect in two basic ways. First, taking this field seriously is an acknowledgement of the truth, as a matter of intellectual history, that our American political and legal system is built on Christian roots.⁴⁶ Thus, analysis of the relationship between Christianity and the varied fields of law, such as constitutional law, criminal law, property law, family law, and so on, remains one of the most powerful ways available for understanding American law and its development. Second, normative scholarship in the field of law and religion should frequently draw its norms directly from the varied religious perspectives that are, or have been, culturally or demographically significant in America. It should be just as important to have law professors writing from traditionalist and liberal Roman Catholic, Jewish, Protestant, and Muslim perspectives as it now is to ensure the presence of law and economics, feminist, neo-Kantian, and critical-race perspectives. I realize that this is a large claim, as it would

46. I use the term "Christian" because some Jews do not like the term "Judeo-Christian." In using it, I understand that Christianity is itself built upon Judaism, regardless of whether it is a correct or distorted interpretation of Judaism.

require a partial transformation of the legal academy. I can refer perhaps to some broadly accepted norms—theoretically accepted beyond the confines of my own faith tradition—to support this claim. American legal education should be relevant to and of service to the society and profession that supports it. Relevance and service require that legal scholars use both the scholarly tools and the normative perspectives that will be most meaningful to American society. Religion, as a shaping worldview, and as a motivating force, is at least as important in understanding and critiquing American law and politics, as any other shaping worldview, philosophy, or ideology.

It is hard to live in a world that is different from one's own values and expectations. Those who, like myself, were raised to believe that conservative religion was a primitive soon-to-be extinguished phenomenon have to live somehow with the reality of the worldwide resurgence of conservative, and even, fundamentalist, religions as well as with a broader renewed interest in spirituality. Conservative Christians, of course, have to live in a society that is as much shaped by the cultural and sexual revolution as by conservative Christian values. Faced with these sorts of discomfiting realities it is natural and sometimes right to build for ourselves smaller worlds, cocoons where we can nourish and practice our chosen ways of life. Families and religious and ideological communities can be those sorts of cocoons. The entire world of legal education—or even worse the entire academy—cannot and should not serve as a giant cocoon for those who disdain the religious faiths important in the larger society. Maintaining the legal academy as a little world of people just like ourselves gives the illusion of power but is ultimately no more meaningful than devoting an entire artistic career to self-portraits. My hope for the legal academy is that it somehow shatters the mirrored walls of its self-imposed, secularist imprisonment, opens itself to the varied religious currents of American society, and thus comes to have greater service and relevance.