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Foreword: Voluntary Restraint and the Wormhole Effect

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I. OVERVIEW

In 1992, Patrick Buchanan ignited a firestorm of controversy when he exhorted the crowd at the Republican National Convention to join him in a holy war—a war of Christian values and a battle for the soul of America.[1] Critics of Buchanan's speech and other similar attempts to inject religion into politics raised questions of political morality: When, if ever, is it appropriate for a citizen in a liberal democracy to invoke the judgment of God in support of specific policy initiatives? Does such rhetoric threaten to polarize and divide the body politic along sectarian lines? Does it threaten to undermine the mutual deliberation, without which democracy cannot survive?

Those who defended the role of religious-political argument—if not Buchanan's particular speech—raised equally troubling questions regarding equal participation in the public square: When, if ever, is it appropriate to exclude the religious voice from secular politics? How can a theory of voluntary restraint be compatible with a religious commitment to a higher law? Are arguments in favor of voluntary restraint on the part of religious believers simply the first step down a road leading to coercive exclusion?

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* Associate Professor of Law, Loyola Law School, Los Angeles. The topic of this Symposium was also the subject of a program sponsored by the Section on Law & Religion at the 1996 Annual Convention of the Association of American Law Schools. Panelists for that program included Professors Kent Greenawalt, Michael McConnell, and Bruce Ackerman. Professor Greenawalt's Essay in this Symposium is a version of his remarks delivered at that program.

1. Pat Buchanan, Address at the Republican Party National Convention, Houston, Texas (Aug. 17, 1992), *available in* LEXIS, Nexis Library, CNN file ("There is a religious war going on in this country. It is a cultural war . . . for the soul of America.").

Political theorists have struggled mightily with these questions and continue to produce an expanding literature regarding voluntary restraint on the part of religious believers. Writers like John Rawls[2] and Bruce Ackerman[3] have articulated theories of self-restraint which call upon participants in a liberal democracy to argue in terms that are "accessible" to all citizens, regardless of religious belief. Although theories of self-restraint come in a variety of forms,[4] the general idea is that, to the extent that religious-based arguments are inaccessible to nonbelievers, these arguments should be voluntarily removed from public political debate.[5]

In response to arguments that appeared to place religious rhetoric in a special—and suspect—category, a number of political and legal philosophers more sympathetic to religious arguments in the public square forwarded theories of their own. The title of this Symposium, for example, echoes the language of Richard John Neuhaus and his 1984 book, *The Naked Public Square: Religion and Democracy in*

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2. In *A Theory of Justice*, John Rawls stated that his purpose was "to make vivid to ourselves the restrictions that it seems reasonable to impose on arguments for principles of justice, and therefore on these principles themselves." JOHN RAWLS, A THEORY OF JUSTICE 18 (1971). Because diversity of religious belief must be taken as a given in modern pluralistic democracies, the principles upon which society is based cannot be derived from any one religious perspective. *Id.* at 542. More recently, Rawls has urged the use of "public reason" in public political debate. JOHN RAWLS, POLITICAL LIBERALISM (1993). *See also* Lawrence B. Solum, *Novel Public Reasons*, 29 LOY. L.A. L. REV. 1459 (1996) (describing Rawls's idea of public reason).

3. In *Social Justice in the Liberal State*, Bruce Ackerman argues that government action should be judged against the "neutrality principle." BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11-12 (1980).

> *Neutrality*. No reason is a good reason if it requires the power holder to assert: (a) that his conception of the good is better than that asserted by any of his fellow citizens, *or* (b) that, regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens.

Id. at 111, 116. To the extent that religious arguments assert superior knowledge of God and His purposes, they violate Ackerman's neutrality principle.

4. This variety is reflected in the Essays in this Symposium. *See, e.g.*, Michael J. Perry, *Religious Arguments in Public Political Debate*, 29 LOY. L.A. L. REV. 1421 (1996) (containing Michael Perry's discussion of Rawls and Greenawalt).

5. *See* RONALD DWORKIN, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 113-43 (Stuart Hampshire ed., 1978); CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY (1987); THOMAS NAGEL, EQUALITY AND PARTIALITY (1991); Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677 (1993); Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259 (1989); Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747 (1993). For a general review of the "dark side of religious argument," see generally William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843 (1993) (defending cultural norms that discourage religious argument about public policy).

America.[6] Neuhaus criticized any secular theory which required the religious to "check their religious beliefs at the door" before entering the public square.[7] Religious constitutional scholars like Michael McConnell of the University of Chicago have pointed out that "Religion in public is at best a breach of etiquette, at worst a violation of the law. Religion is privatized and marginalized."[8] In fact a number of serious legal scholars and philosophers have criticized attempts to exclude the religious voice, in whole or in part.[9] The approaches are as varied as the authors.

One voice that has not been heard often enough, however, is the voice of the religious. Most of the articles cited in these footnotes articulate nonreligious theories of political discourse. Too often, the debate ignores the point of view of those whose voices are to be voluntarily restrained. This is a critical silence. After all, to the extent that voluntary restraint calls upon the religious to present arguments in a manner that is accessible to nonbelievers, so too must political theories be presented and critiqued in a manner reasonably

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6. RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984).

7. *Id.* at 103.

8. Michael W. McConnell, *"God Is Dead and We Have Killed Him!": Freedom of Religion in a Post-modern Age*, 1993 B.Y.U. L. REV. 163, 165.

9. *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993) (describing general attitudes of hostility to religion in public life); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988); MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991); Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977; Frederick M. Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671 (1992); Frederick M. Gedicks, *Some Political Implications of Religious Belief*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419, 423 (1990) ("American political culture seeks to exclude religion"). For Carter's assessment of developments since the publication of his book, see generally Stephen L. Carter, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118 (1993) (concluding that the position of religious liberty is improving but not healthy). *See also* THE WILLIAMSBURG CHARTER (1988), *reprinted in* 8 J.L. & RELIGION 5 (1990).

> The role of religion in American public life is too often devalued or dismissed in public debate, as though the American people's historically vital religious traditions were at best a purely private matter and at worst essentially sectarian and divisive.
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> Such a position betrays a failure of civil respect for the convictions of others. It also underestimates the degree to which the Framers relied on the American people's religious convictions to be what Tocqueville described as "the first of their political institutions." In America, this crucial public role has been played by diverse beliefs, not so much despite disestablishment as because of disestablishment.

Id. at 12.

acceptable to *the believer.* For this reason, this Symposium brings together not just political theorists but also voices from a position of religious belief: the Evangelical Christian, the Roman Catholic, the rabbi, the Muslim. After all, these are the voices that count; the voices who will or will not agree to tailor their political participation to the needs of political theory.

The Symposium begins with Kent Greenawalt. In an Essay drawn from his recent book *Private Consciences and Public Reasons,*[10] Greenawalt presents a middle position between "exclusive" theories that would ban religious arguments from the public square and "inclusive" theories rejecting any restrictions on religious-based political debate.[11] According to Greenawalt, theories of self-restraint are best limited to restrictions on public argument—as opposed to private judgement—and apply most forcefully in the case of public officials who are involved in the daily making and application of the law. Public officials, after all, are already in the habit of regulating their public statements. Moreover, to the extent that this would result in less-than-candid public statements regarding the true motivation for a particular government action, we generally do not expect full disclosure from politicians anyway.

Michael Perry, on the other hand, rejects Greenawalt's idea that political representatives should be less than candid about their religious convictions.[12] Taking the affirmative position, Perry argues that not only should religious rhetoric be tolerated, it should be *encouraged.* Given widespread agreement on fundamental moral premises common to religion, religious discourse can actually *lessen* sectarian divisions through its appeal to a common source of public ethics. According to Perry, even where religious discourse increases sectarian division, it nevertheless makes a valuable contribution to public debate about moral issues. Agreeing with theorists like Jeremy Waldron, Perry argues that reducing public debate to non-controversial arguments would seriously impoverish public discourse.[13]

As the final "secular theorist" in the symposium, Lawrence Solum addresses the "novelty objection" as articulated by Jeremy Waldron and echoed by Michael Perry.[14] According to the novelty

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10. KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995).

11. Kent Greenawalt, *Religious Expression in the Public Square—The Building Blocks for an Intermediate Position*, 29 LOY. L.A. L. REV. 1411 (1996).

12. Perry, *supra* note 4, at 1444.

13. *Id.* at 1436-37.

14. Solum, *supra* note 2, at 1468-77.

objection, a rigorous application of John Rawls's ideal of public reasons would impoverish public political discourse. As Solum presents the idea: "It is as if someone were to propose that cooking should be governed by an ideal that ruled out all the ingredients to which anyone might object. What would be left? There would be only a tiny number of ingredients, and hence a diet without spice or variety."[15] To meet this objection, Solum presents an interpretation of Rawls's ideal of public reason that would exclude religious arguments only in very limited circumstances. According to Solum, under Rawls's ideal, "[w]e can be civil to one another and at the same time say something new."[16]

In his Essay, *Cracks in the Mirrored Prison*, David Smolin presents the first overtly religious response in this Symposium.[17] Speaking as a theologically conservative—or traditionalist—Christian, Smolin argues that "sectarian religious statements in the political arena are necessary if people are going to be motivated to pay the cost of doing what is right."[18] Smolin also criticizes the marginalized role that religion plays in American law schools. Unlike other interdisciplinary areas represented in American law schools, "Law & Religion" is often no more than a small branch of constitutional First Amendment law or a discreet subject of legal philosophy. The better way, according to Smolin, would be to use the theological insights of major religions to understand our political and legal culture. Such a truly interdisciplinary approach would appropriately reflect American culture and vindicate the responsibility of the legal academy to include "normative perspectives . . . most meaningful to American society."[19]

Rabbi David Bleich begins his Essay, *Godtalk*, by recalling a Yiddish maxim of his grandmother: "If, when traveling in a coach and wagon, the coachman drives past the door of a church and fails to cross himself, get out immediately!"[20] His grandmother's point was that a religious person, regardless of creed, is more to be trusted than an atheist. Rabbi Bleich notes, however, that his bus driver

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15. *Id.* at 1468.
16. *Id.* at 1485
17. 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).
18. *Id.* at 1501.
19. *Id.* at 1512.
20. J. David Bleich, *Godtalk*, 29 LOY. L.A. L. REV. 1513, 1513 (1996).

never makes the sign of the cross when passing a church. This omission sparks an Essay haunted by the Sherlock Holmsian "bus driver who did not cross himself."

According to Bleich, the Supreme Court's interpretation of the Establishment Clause has cleared not only religion from the halls of government, it has also made religion suspect in the public square. In an effort to address this problem at its source, Bleich reviews the Supreme Court's interpretation of the religion clauses and concludes that the Court has wrongly interpreted the Establishment Clause to prevent nondiscriminatory encouragement of religious activity. Bleich concedes that his vision of religious accommodation might result in a return to the days when the Court regularly invoked the values of a "Christian nation." Nevertheless, the interests of both Jews and Christians would best be served by rejecting Jefferson's "wall of separation" in favor of a public norm more accommodating—and encouraging—of religious faith.

In the final Essay of this symposium, Professor Khaled Abou El Fadl addresses the difficult questions facing a Muslim in a non-Muslim society.[21] El Fadl notes that all Muslims are under the duty to live by the dictates of *Sharia*, Islamic law. Because the *Sharia* binds every Muslim wherever they may reside, the Muslim living in a non-Muslim society faces a dilemma: "If a Muslim decides to reside in or become the citizen of a secular-liberal democracy, what becomes of the obligation to live according to a *Sharia*-based comprehensive view? To put it more directly, what becomes of the obligation to obey God's divine law?"[22] On the other hand, to what extent can the obligations of the *Sharia* be reconciled with the political principles of a pluralistic liberal democracy?

El Fadl seeks a way out of the dilemma by invoking the ancient Islamic concept of *aman*. Traditionally, Muslims living in non-Muslim territories would do so under an agreement of "safe conduct"—the *aman*. Under such an agreement, a Muslim may not commit hostile acts against the host state and may not commit acts of treachery, deceit, fraud, betrayal, or usurpation. Thus, according to El Fadl, although a Muslim is ethically bound by *Sharia* law, that law itself obligates a Muslim to observe the terms of the *aman* agreement. El Fadl also explores the propriety of Muslim participation in politics,

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21. Khaled Abou El Fadl, *Muslim Minorities and Self-Restraint in Liberal Democracies*, 29 LOY. L.A. L. REV. 1525 (1996).

22. *Id.* at 1530.

and the duty of reciprocity: As Muslims would be offended by officials basing their decisions on Judeo-Christian values or traditions, so too Muslims should avoid basing their political stances on strictly sectarian grounds. Bringing the Symposium full circle, El Fadl notes that, "[i]f Muslims become involved in the political process, they should respect a rule of reciprocity which, in turn, requires self-restraint."[23]

II. THE WORMHOLE EFFECT

A standard ploy in science fiction is the "wormhole." The wormhole is a hidden door in the universe through which a traveler may purposefully—or accidentally—move from one side of the universe to the other. The idea is that two seemingly disconnected places are, in reality, connected by way of a kind of whirlpool that threatens to ensnare the unwary and leave them staring at a different sky. So too, when it comes to the issue of "voluntary restraint," there seems to be a wormhole effect: One begins by discussing voluntary discourse, but, somewhere along the line, ends up discussing the subject of legal coercion. Those arguing in favor of voluntary restraint, of course, endeavor to distinguish their argument from the issue of legal constraint. For example, Kent Greenawalt carefully distinguishes his theory from constitutional law.[24] Similarly, Lawrence Solum presents a theory of public reason which relies on moral, not legal, obligation.[25] Nevertheless, issues of constitutional interpretation lurk in the shadows of these Essays: Greenawalt's distinction between private speech and government speech tracks the same distinction in constitutional law.[26] Similarly, Michael Perry's critique of Greenawalt's "excluded non-believer"[27] echoes a debate between Supreme Court justices regarding "reasonable observers" and the meaning of "government endorsement of religion."[28]

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23. *Id.* at 1539.

24. GREENAWALT, *supra* note 10, at 1417.

25. Solum, *supra* note 2, at 1466.

26. *Compare* Lee v. Weisman, 112 S. Ct. 2649 (1992) (striking down government sponsored prayers at public school graduation ceremonies) *with* Rosenberger v. Rector, 115 S. Ct. 2510 (1995) (requiring public university to equally fund religious and nonreligious student publications).

27. Perry, *supra* note 4, at 1438-45

28. For example, Justice O'Connor in a concurring opinion has recommended replacing the three-pronged "*Lemon* test" with an "endorsement test." According to O'Connor, "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that

Most religious inclusionists, on the other hand, are quick to point out the inextricable relationship between law and standards of public morality. David Bleich, for example, argues that the relationship between law and moral obligation is unavoidable: In America, restrictions on government action are translated by popular culture into standards of public morality.[29] As if demonstrating the link between the moral and the legal, Professor Smolin moves from arguing that religious discourse is essential to political debate to arguing in favor of allowing communities to "religiously legitimate" their public actions through the use of public prayer—a legal issue.[30] Finally, Khaled Abou El Fadl discusses whether it is morally appropriate for a Muslim to live in a land which does *not* impose Islamic law.[31]

The subtle link between moral forms of political discourse and the constraints of law is also reflected in the case law of the Supreme Court. For years, a number of justices on the Supreme Court employed the third prong of the *Lemon* test, the "Entanglement Prong," in an explicit attempt to diminish religious-based political discourse—or, as the Court put it, "political division along religious lines."[32] According to a number of opinions written in the 1970s and

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they are insiders, favored members of the political community." Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

29. *See* Bleich, *supra* note 20, at 1514 ("The elementary distinction between governmental influence in personal freedoms and societal promotion of moral values has, in the minds of many, become blurred beyond recognition.").

30. *See* Smolin, *supra* note 17, at 1505-06.

31. El Fadl, *supra* note 21, at 1534.

32. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 414 (1985) ("The numerous judgments that must be made by agents of the city concern matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations. As government agents must make these judgments, the dangers of political divisiveness along religious lines increase."); School Dist. of the City of Grand Rapids v. Ball, 473 U.S. 373, 383 (1985) ("The government's activities in this area can have a magnified impact on impressionable young minds, and the occasional rivalry of parallel public and private school systems offers an all-too-ready opportunity for divisive rifts along religious lines in the body politic."); Meek v. Pittenger, 421 U.S. 349, 372 (1975) ("The Act thus provides successive opportunities for political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect."); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 797-98 (1973); Lemon v. Kurtzman, 403 U.S. 602, 622 (1971). The Court in *Nyquist* quoted *Lemon* by stating:

> In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration. And while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the

early 1980s, religiously motivated political discourse was such a danger that it justified—*required*—unequal treatment of religious organizations which would otherwise be eligible to receive government funding.

Perhaps because the distinction between moral obligations and legal restraint is not always clear, there is a temptation for exclusionists and inclusionists to view the arguments of their opponents with deep mistrust. It is tempting for exclusionists to view accommodation of religious discourse as a step in the direction of legally sanctioned religious imposition. Likewise, it is tempting for inclusionists to view every argument in support of voluntary restraint as a step in the direction of legally sanctioned discrimination against religion and religious believers.

Perhaps both sides are right. Perhaps there is a link from one world to the next; careful if you stand too close, you may cross over.

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careful scrutiny required by the decisions of this Court, it is certainly a "warning signal" not to be ignored.

Nyquist, 413 U.S. at 797-98 (quoting *Lemon*, 403 U.S. at 625). The Court in *Lemon* stated:

> Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.
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> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.

Lemon, 403 U.S. at 622; *see also* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 851 (3d ed. 1986) (The authors infer a fourth requirement that the governmental action must not create an excessive degree of political division along religious lines. According to the authors, this fourth condition seems to be simply an aspect of the requirement of no "excessive entanglement."); Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969) ("While political debate and division is normally a wholesome process for reaching viable accommodations, political division on religious lines is one of the principal evils that the first amendment sought to forestall."). *But see* Bowen v. Kendrick, 487 U.S. 589, 617 n.14 (1988) ("It may well be that because of the importance of the issues relating to adolescent sexuality there may be a division of opinion along religious lines as well as other lines. But the same may be said of a great number of other public issues of our day. In addition, as we said in *Mueller v. Allen*, 463 U.S. 388, 404, n.11 (1983), the question of 'political divisiveness' should be 'regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.' "); Edward McGlynn Gaffney, Jr., *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L.J. 205 (1980).

If so, then the stakes behind this Symposium are very high. All the more reason to present it.