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PLURALISM AND PUBLIC LEGAL REASON*

Lawrence B. Solum**

INTRODUCTION: DIVISION, RELIGION, AND THE CONSTITUTION

What role does and should religion play in the legal sphere of a modern liberal democracy? Does religion threaten to create divisions that would undermine the stability of the constitutional order? Or is religious disagreement itself a force that works to create consensus on some of the core commitments of constitutionalism—liberty of conscience, toleration, limited government, and the rule of law? This Article explores these questions from the perspective of contemporary political philosophy and constitutional theory. The thesis of the Article is that pluralism—the diversity of religious and secular conceptions of the good—can and should work as a force for constitutional consensus and that such a consensus is best realized through commitment to an ideal of public legal reason instantiated by the practice of legal formalism.

The case for these claims is made in five parts. After this introduction, Part I, “The Fact of Pluralism in the Context of Contemporary Religious Division,” explores the idea of religious division in light of an important notion in political philosophy—the idea that John Rawls calls “the fact of reasonable pluralism.” Part II, “Public Legal Reason,” argues that the fact of pluralism has important normative consequences for the foundations of normative legal theory and argues for an ideal of “public legal reason.” Part III, “Legal Formalism,” contends that this idea is best realized in constitutional practice through a formalist approach to constitutional interpretation—one that deliberately eschews direct reliance on religious and secular comprehensive conceptions of the good. Part IV, “Feasibility and Positive Theory,” discusses the question of whether this ideal of public legal reason and the corresponding conception of constitutional formalism are realistic, given the constraints imposed by democratic politics under contemporary conditions. Finally, Part V, “Religious Division Revisited: From Pluralism to Formalism,” brings the discussion to a close.

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I. THE FACT OF PLURALISM IN THE CONTEXT OF CONTEMPORARY
RELIGIOUS DIVISION

The idea that religion may play a divisive role is a familiar one. Looking outward, we see violent conflicts between Sunni and Shia, Moslem and Jew, Protestant and Catholic. Looking inward, the idea of culture wars is associated with the division between liberal and conservative religious traditions and between theist and secular conceptions of the good.¹ Looking backward in our own tradition, there is a long history of division along religious lines. There are many different routes by which the phenomenon of religious division can be approached. One route is via the idea that John Rawls, the eminent political philosopher, called “the fact of pluralism”—the fact that there is a “plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life.”²

The fact of pluralism has been an enduring feature of Western culture since the wars of religion of the sixteenth century.³ During the modern period, no society that permits liberty of conscience and freedom of expression has unified on a single comprehensive conception of the good.⁴ Instead, modernity is characterized by disagreements about ultimate questions of value—and hence by religious division. Thus, the United States in the early twenty-first century includes adherents of a variety of doctrines—Catholics, Protestants, Jews, Moslems, Buddhists, and many others—and there are further divisions between theists and atheists and among a variety of secular concepts of the good and the right.

This fact of pluralism is not just a bare fact, not just an accident of history. It is, Rawls argues, the likely (or even perhaps inevitable) result of freedom of conscience and expression in an open society.⁵ The reason for its inevitability is that even fully reasonable and rational persons are subject to what Rawls calls “the burdens of judgment.” As Rawls explains the concept: “The idea of reasonable disagreement

¹ See David E. Campbell, *A House Divided? What Social Science Has to Say About the Culture War*, 15 WM. & MARY BILL RTS. J. 59 (2006). Campbell argues that the divide is best understood as between traditionalism and nontraditionalism rather than as a division among a plurality of traditions (understood as denominations or sects): “Americans increasingly coalesce around religious *traditionalism* rather than religious *tradition* (or denomination).” *Id.* at 62. This argument is ambiguous—because of the different senses of the term “tradition.” Conservative Protestants and Catholics are not the only representatives of traditionalism in religious thinking—a variety of denominations, paradigmatically Unitarianism, have traditions that would be associated with “liberal” values and some forms of conservative religiosity are contemporary rather than traditional. Moreover, both liberalism and conservatism are “traditions” in western political and moral thought.

² John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4 (1987); see also Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083, 1087–89 (1990).

³ Solum, *supra* note 2, at 1088.

⁴ *Id.*

⁵ Rawls, *supra* note 2, at 4.

[between reasonable persons] involves an account of the sources, or causes, of disagreement between reasonable persons so defined. These sources I refer to as the burdens of judgment.”⁶ What are the sources of reasonable disagreement? Rawls provides a partial list that includes: (1) conflicting and complex scientific and empirical evidence; (2) disagreement about the weight to be assigned to relevant factors; (3) the vagueness of moral concepts, making them subject to hard cases upon which reasonable persons can differ; (4) the shaping influence of life experiences on the evaluation of evidence and the weighing of values; (5) the difficulty of factoring different types of normative considerations that bear on an issue; (6) the problem of determining which of a range of relevant moral and political values is most salient to a particular context, and correspondingly, which values must give way.⁷ Because the burdens of judgment entail that reasonable persons can and will disagree about matters of ultimate value, pluralism itself is reasonable, and we might call its existence the “fact of reasonable pluralism.”⁸

Rawls’s formulation of the fact of reasonable pluralism provides a distinctive interpretation of the phenomenon of religious division. On this interpretation, division among religions and between religions and secular world views is the normal condition of a free and democratic society. Religious division is not an accident of history; it results from the conjunction of freedom of conscience and expression with the “burdens of judgment.”⁹

II. PUBLIC LEGAL REASON

The fact of reasonable pluralism provides the background for our next topic—public legal reason—the justificatory practices that are appropriate in the context of law and legal institutions.¹⁰ Exploration of “public *legal* reason” can begin with the more basic idea of “public reason” in general.

We can define “public reason” as the common reason of citizens in a political society. A normative “ideal of public reason” defines the limits that political morality imposes on public political debate and discussion by the citizens of a particular society. In the context of the contemporary United States, ideals of public reason are contested and debated, both in the public culture and in academic discussions among political philosophers, legal theorists,¹¹ and theologians. And religious division

⁶ JOHN RAWLS, *POLITICAL LIBERALISM* 55 (expanded ed. 2005).

⁷ *Id.* at 56–57.

⁸ *See id.* at 36 (elaborating on the differences between the fact of pluralism and the fact of reasonable pluralism).

⁹ *Id.* at 61.

¹⁰ This article draws on a forthcoming article. Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. (forthcoming Nov. 2006). Some of the discussion that follows is a compressed, edited, and revised version of arguments that will appear there.

¹¹ *See, e.g.*, KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* 4 (1995).

has played a particularly important role in that debate. For example, some theorists have argued that religious reasons should be excluded from public debate.¹² Others argue that the best ideal of public reason is a reflection of the freedom of expression: all viewpoints should contend in a marketplace of ideas.¹³

What is the best ideal of public reason? That is a large question, but one way to quickly summarize the issues is to lay out three principles of public reason: (1) a “principle of *laissez-faire*”; (2) a “principle of exclusion”; and (3) a “principle of inclusion”:¹⁴

- *A principle of laissez-faire* is based on the notion that for reason to be public, it must not be restricted, with the corollary that all reasons are public reasons.¹⁵
- *A principle of exclusion* rules out the use of at least some sorts of non-public reasons in at least some situations. For example, an ideal of public reason that excluded all nonpublic reasons from all political discourse would employ a simple principle of exclusion.¹⁶
- *A principle of inclusion* requires that at least some public reasons be included in at least some contexts. For example, an ideal of public reason that required participants in public political debates to offer a sincerely held public reason for each position advanced would deploy a principle of inclusion.¹⁷

The three basic principles can be mixed and matched—applied to various contexts in order to structure an ideal of public reason. In the context of legal institutions, for example, we could apply a principle of exclusion. In the context of political debate and discussion by ordinary citizens, we might apply a principle of *laissez-faire*. Similarly, one set of principles might apply to public political debate and a different set to private deliberations and discussions among friends and family or within a voluntary association such as a church or university.

¹² See, e.g., ROBERT AUDI, *RELIGIOUS COMMITMENT AND SECULAR REASON* 169 (Cambridge Univ. Press 2000). For other recent discussions of this question, see Posting of Rick Garnett to Mirror of Justice, http://www.mirrorofjustice.com/mirrorofjustice/2004/12/more_on_justice.html (Dec. 16, 2004, 13:46 EST); Legal Theory Blog, http://lsolum.blogspot.com/archives/2004_12_01_lsolum_archive.html (Dec. 16, 2004, 11:24 EST); Legal Theory Blog, http://lsolum.blogspot.com/archives/2004_12_01_lsolum_archive.html (Dec. 15, 2004, 10:32 EST).

¹³ See, e.g., Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 SAN DIEGO L. REV. 817, 835–37 (1993) (comparing Aristotle’s and John Stuart Mill’s approaches to freedom of expression within public deliberation).

¹⁴ Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729, 741–42 (1993).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

A full account of the debate over the content of public reason is a very large topic—far beyond the scope of this Article. That account would include the arguments relevant to a comparison of various principles of laissez-faire, inclusion, and exclusion in the full range of political and legal thought.¹⁸ Nonetheless, we can illustrate the kinds of considerations that are relevant to the debate by considering the question whether citizens refrain from the giving of religious reasons in public political debate. One might argue that religious reasons are not public reasons because religion draws on values and beliefs that are rooted in comprehensive theological and moral doctrines which are not shared by all reasonable citizens. It might even be argued that public reasons must be “secular” in nature.

There are, however, very powerful reasons for the rejection of a principle of exclusion that isolates religious reasons for special treatment. Most obviously, this principle is subject to the objection that it is unfair to religious believers. How can religious believers accept the legitimacy of a principle of public reason that allows adherents of secular moral views to advance their comprehensive moral doctrines, even when they are not part of the public political culture, but prohibits believers from doing so? At a minimum, the principle of exclusion would need to apply equally to all comprehensive doctrines, whether they are secular doctrines like utilitarianism or theological doctrines like Calvinism.

Moreover, in the context of political discussion in the public sphere, there are powerful reasons for allowing comprehensive moral and religious doctrines to enter into public political debate and discussion. Initially, it seems obvious that the deep premises of moral philosophy and theology are viewed by reasonable citizens as relevant to their deliberations about these questions. An ideal of public reason that excluded these considerations would require reasonable citizens to withhold their own reasons from political discussion—encouraging secrecy or even dissimulation. And it is not clear that there is any good reason for citizens to exclude such reasons from political debate. These deep reasons—beliefs about God or the ultimate nature of the good—may not provide reasons that can be accepted by all fellow citizens, but by itself this is no reason for their exclusion.

There is an alternative to a principle of exclusion. It could be argued that public political debate by citizens should be governed by a principle of inclusion. That is, citizens might be seen as having an obligation to supplement the deep reasons supplied by moral philosophy or religion with public reasons—values that are derived from the public political culture and that can be shared by the adherents of a variety of belief systems.¹⁹

So far we have been discussing the ideal of public reason that is appropriate to public political debate and discussion. Let us now turn to the judicial context: what ideal of public reason is appropriate for judges in their formal written opinions?

¹⁸ *Id.* at 752–53.

¹⁹ *Id.*

The answer to this question will be an ideal of *public legal reason*.²⁰ The intersection between public reason and legal reason is a large topic, but we can narrow it by addressing the question that is most relevant to the topic at hand: *should judges rely explicitly on particular religious doctrines and values, or should judicial deliberations and opinions be limited to public reasons?*

How can we approach this question? One method is to perform a thought experiment. We can imagine a possible world that is similar to contemporary America, with the following difference: for purposes of the thought experiment, we assume that judges accept a principle of *laissez-faire* as the governing principle of public legal reason. That is, we will imagine that our hypothetical judges believe that they are normatively justified in relying on the deep premises of comprehensive moral or religious doctrines when they deliberate and when they write opinions. To make our thought experiment clear, we can imagine judges routinely disclose their actual reasoning in full. When our hypothetical judges write opinions, they disclose the deep reasons that ground their opinions. In other respects, these hypothetical judges are like the judges of the actual world. As a consequence, the hypothetical judges reflect the moral and religious pluralism that prevails in the actual world. Some judges are welfarists, committed to normative law and economics; others believe that fundamental rights trump wealth maximization. Some judges are theists; others are nonbelievers.

What would the judicial opinions of these imaginary judges be like? Our hypothetical judges would sometimes rely on their deepest beliefs about morality or religion as reasons for the legal decisions. For example, in cases involving the margins of life and personhood—paradigmatically, abortion and euthanasia—some judges might rely on deep premises about the moral status of persons. One judge might disclose that she relied on a religious belief that unborn children are ensouled at the moment of conception. A different judge might maintain that God does not exist and argue that full moral personhood depends on the capacity for reason, which does not exist until after birth or even after infancy.

There are reasons to believe that acceptance of the principle of *laissez-faire* would be a bad thing and not a good one. For example, a principle of *laissez-faire* has the potential to destabilize the law. If judges relied directly on the deep reasons of their moral or religious belief systems in their opinions and deliberations, then religious and moral divisions would translate directly into legal divisions. Courts would divide explicitly along religious and moral lines. As a result, the effect on outcomes of judicial beliefs about religion and morality would become explicit and transparent. Presumably, this would directly affect the judicial selection process—with judges supported and opposed explicitly on the basis of their religious affiliations.²¹ And this in turn might

²⁰ *Id.*

²¹ See generally Paul Horwitz, *Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations*, 15 WM. & MARY BILL RTS. J. 75 (2006) (examining “the role of religion in judicial nominations”).

destabilize the law—with the outcome of the great conflicts of the day becoming dependent on the moral and theological balance of power. Of course, all of these phenomena are observed to some extent today—but the argument is that a principle of laissez-faire could result in additional destabilization.

It might be argued that this fear of destabilization is exaggerated because of the stabilizing influence of the doctrine of *stare decisis* or precedent. Does this reply work? *Stare decisis* is an appropriate device for producing agreement on questions of law: It is a legal rule that settles the meaning of other legal rules. But it is not clear that precedent is the right sort of tool to produce agreement on the deep questions of morality and theology. Following precedent is not a cogent reason for believing in God or for believing that rights trump consequences. If I am right about this, then in our hypothetical world the deep foundations of the law will be inherently unstable—subject to tectonic shifts with the composition of various tribunals. Of course, it is hard to know in advance just how unstable the law might become. But just as there is no reason to be certain that a legal system governed by a principle of laissez-faire would be unacceptably unstable, there is also no reason for confidence that it will produce the stability, predictability, and certainty that we associate with the rule of law.

A principle of laissez-faire for legal reason would give rise to a second problem, which we might call the problem of legitimacy. In our thought experiment, many or most citizens will reject the particular comprehensive religious or moral doctrine that provides the crucial deep premises for many judicial decisions. Of course, no legal system can provide reasons that everyone will accept. There is, after all, disagreement about legal propositions—sometimes strong and persistent disagreement. But there is a difference between legal disagreement and disagreement over the deep premises of morality and theology.

This contrast can be illuminated by considering three examples:

- An initial example: Consider the contrast between an empirical disagreement and one that is theological. It is one thing to be asked to accept a judicial decision based on contestable evidence that dioxin causes cancer, but it seems quite different to be asked to accept a decision based on the premise that God's plan requires that women be subservient.
- Another example: It is one thing to be asked to accept a judicial decision based on the controversial legal premise that Eleventh Amendment constitutional sovereign immunity applies in federal question cases; it seems quite different to be asked to accept a decision based on the premise that God does not exist and therefore, that religious education is harmful to children.
- A final example: It is one thing to be asked to accept a decision based on a controversial understanding of the text of an ambiguous statute, but this is different from being asked to accept an authoritative decision that is justified on the basis of the controversial moral theory that holds that only utility (welfare) has ultimate moral significance.

What is the source of our intuition that there is a real contrast in each of these cases? One possibility is rooted in the concept of legitimate authority.²² Our intuition might be based on the notion that citizens are not obliged to regard themselves as legitimately bound by the authority of decisions that rest on deep moral or religious judgments that they cannot accept as reasonable. In the context of a pluralist society, many or most citizens will regard any legal decision that rests on the deepest and most controversial premises of religious or moral doctrines as illegitimate in the sense that the citizens will believe that the decision lacks reasonable justification. And legitimacy is important. One reason for the importance of legitimacy may be prudential; the primary reason that citizens obey the law may be because they believe that the law is legitimate.²³

Of course, much more would need to be said in order to specify the full content of an ideal of public legal reason. And still more would be necessary in order to justify such an ideal. On this occasion, the point of the thought experiment is to establish the plausibility of an approach to public legal reason that would exclude direct consideration of deep and controversial premises from moral philosophy and theology and would require that legal decisions be based on public legal reasons.

III. LEGAL FORMALISM

Suppose we were to reject a principle of laissez-faire as the appropriate ideal of public legal reason. What are the alternatives? If we believe that the fact of pluralism (which includes religious division) means that legal decisions should not be based on deep moral or religious premises, then what should be the basis for judicial decisions? One obvious answer to this question is that public legal reason should limit itself to rationales and justifications that are drawn from the law itself—from the texts of rules, statutes, and the Constitution, from precedent or from widely-shared social norms.²⁴ This idea is an old one—some would say an “old-fashioned” one. The idea that judges should base their decisions on law and not on underlying considerations of policy, morality, or theology is associated with formalism or, for the sake of clarity, with “legal formalism.”²⁵

²² See generally Lawrence B. Solum, *Legal Theory Lexicon 046: Legitimacy*, LEGAL THEORY LEXICON, June 12, 2005, http://lsolum.typepad.com/legal_theory_lexicon/2005/06/legal_theory_le_2.html (examining meaning of the word “legitimacy”).

²³ See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (paperback ed. Princeton Univ. Press 2006).

²⁴ The question whether “widely shared social norms” are laws or lawlike is an old one. The ancient Greek words usually translated as law and laws, *nomos* and *nomoi*, include both positive law and social norms or customs. See RICHARD KRAUT, *ARISTOTLE: POLITICAL PHILOSOPHY* 105 (2002). See generally *id.* at 98–181.

²⁵ See generally Lawrence B. Solum, *Legal Theory Lexicon 043: Formalism and Instrumentalism*, LEGAL THEORY LEXICON, May 22, 2005, http://lsolum.typepad.com/legal_theory_lexicon/2005/05/legal_theory_le_1.html [hereinafter *Legal Theory Lexicon 043*]

What would a formalist theory of public legal reason look like? How could judges resolve cases on the basis of legal texts without reference to underlying values? One way to answer this question is simply to lay out a decision procedure for formalist judges. Consider the following six principles as one version of legal formalism:²⁶

- *Legal Formalism, Principle One, Precedent*: Judges should follow an adequate and articulated doctrine of *stare decisis*. Among the features of such a doctrine is that even courts of last resort (i.e. the United States Supreme Court) should regard their own decisions as binding, overruling prior cases (or limiting them to their facts) only when the precedents themselves require this result.
- *Legal Formalism, Principle Two, Plain Meaning*: When the precedents run out, judges should look to the plain meaning of the salient provisions of the relevant legal text, e.g. the Constitution, statutes, rules, or regulations, subject to a well-defined set of principles for resolving conflicts.
- *Legal Formalism, Principle Three, Intratextualism and Structure*: When the text of a particular provision(s) is ambiguous, judges should construe that provision so as to be consistent with other related legal texts and with the structure of the texts as a whole.
- *Legal Formalism, Principle Four, Original Meaning*: If ambiguity still persists, judges should make a good faith effort to determine the original meaning of the relevant legal text, where original meaning is understood to be the meaning that (i) the drafters of the text would have reasonably expected (ii) the audience to whom the text is addressed (iii) to attribute to the drafters (iv) based on the evidence (public record) that was publicly available at the time the text was promulgated.²⁷
- *Legal Formalism, Principle Five, Default Rules*: And when ambiguity persists after all of that, then judges should resort to general default rules

(defining legal formalism as the idea that “the law . . . provide[s] rules and these rules can, do, and should provide a public standard for what is lawful (or not)”).

²⁶ This version of the six principles builds on several prior versions. For the first version, see Legal Theory Blog, http://lsolum.blogspot.com/archives/2003_05_01_lsolum_archive.html#200307682 (May 18, 2003, 15:00 EST); see also Legal Theory Blog, http://lsolum.typepad.com/legaltheory/2003/05/a_neoformalist_.html (May 18, 2003, 17:00 EST).

²⁷ This formulation is an adaption of Paul Grice’s famous distinction between speaker’s meaning and sentence meaning. See H.P. Grice, *Utterer’s Meaning, Sentence-Meaning, and Word-Meaning*, 4 FOUNDATIONS OF LANGUAGE: INT’L J. OF LANGUAGE AND PHIL. 225–42 (1968); H.P. Grice, *Utterer’s Meaning and Intentions*, 78 PHIL. REV. 147–77 (1969). Both essays are reprinted in PAUL GRICE, *STUDIES IN THE WAY OF WORDS* (Harvard Univ. Press 1989). See also Richard E. Grandy & Richard Warner, *Paul Grice*, STAN. ENCYCLOPEDIA OF PHIL. (Winter ed. 2005), <http://plato.stanford.edu/archives/win2005/entries/grice/#Mea>; Lawrence B. Solum, *Constitutional Texting* (unpublished manuscript, on file with author).

that minimize their own discretion and maximize the predictability and certainty of the law.

- *Legal Formalism, Principle Six, Lexicality and Holism*: The first five principles are to be understood as lexically ordered in the following sense. Judges should order their deliberations by the first five principles—attempting to structure their conscious deliberations by attending to the features highlighted by each principle in order before proceeding to the next principle. But this requirement does not entail that judges either will not or should not recognize that the considerations thematized by one principle may be relevant to deliberations explicitly organized by another principle. Thus, the interpretation of a precedent will sometimes (perhaps always) require consideration of the text, structure, and original meaning, and so forth.²⁸ These are principles not rules, and lexical ordering operates as a methodological heuristic and not as a rigid rule.

The six principles provide the outline for a method of judicial decision that would adhere to a principle of public legal reason that would exclude direct reference to morality, politics, or religion. Of course, these six principles are not the only method that would satisfy such a principle of exclusion. For example, principle one embodies a very strong view of the proper effect of *stare decisis*. But this feature is not necessary to satisfy an exclusive principle of public legal reason; such a principle might be satisfied by a method that elevated the plain meaning of rules, regulations, statutes, and constitutional provisions over precedent. The point of offering the six principles is to show how legal formalism might work—not to argue that it must or should work in a particular way.

The essential idea is that legal formalism complies with a principle of public legal reason, because it excludes the deep premises of moral philosophy and theology and includes reasons that are inherently public in nature—the reasons provided by authoritative legal texts, such as constitutions, statutes, rules, regulations, and precedents. Formalist reasons are public in three related senses. First, in a democratic society, such reasons are public in the sense that they are promulgated by democratic processes in which the public can participate. Second, formalist reasons are public in the sense that the authoritative legal materials are themselves public—satisfying the rule-of-law requirement of “publicity.” Third, formalist reasons are public in the sense that the reasons provided by positive law are accessible to citizens who adhere to a variety of comprehensive moral and political doctrines: Almost any reasonable comprehensive moral and political doctrine will accept as reasonable the normative

²⁸ Lexical ordering is a guideline for structuring deliberation, and is not inconsistent with the observation that interpretation involves what Hans-Georg Gadamer called the “hermeneutic circle.” See HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall trans., Crossroad Publ’g Corp., 2d rev. ed. 1989) (1960).

proposition that positive law provides a reasonable basis for authoritative official action.²⁹

There is one important caveat that should be made explicit before proceeding further. My claim is that formalist reasons are public. That claim does not entail the further claim that formalist reasons trump conflicting reasons in all cases. There may be social conditions under which formal legal reasons will rarely be decisive—perhaps a thoroughly wicked legal system is an example of such conditions. Even if social conditions generally satisfy the requirements of justice and morality, there may be particular laws that are fundamentally unjust. In either case, further questions arise: can public reasons resolve these conflicts of law, on the one hand, with morality and justice, on the other? If public reasons are insufficient, then what role should the deep premises of morality and theology play? These questions are important, but they are not addressed here.³⁰

The debate over legal formalism and legal instrumentalism is one of the central issues in normative and positive legal theory.³¹ Its resolution is certainly beyond the scope of this short Article. These brief remarks are limited to a sketch of the broad outlines of an argument that would ground legal formalism in a theory of public legal reason.

IV. FEASIBILITY AND POSITIVE THEORY

Suppose that a normative case were to be made for an ideal of public legal reason that incorporated legal formalism. Even if we came to believe that judges should eschew reliance on deep moral or religious reasons, it would not follow that legal formalism is feasible or politically realistic. It might be argued that even if judges should be legal formalists, they are likely to vote their values in cases that matter. And even if some judges are formalists (or could become formalists), it might be the case that formalist judges will not be selected (nominated and confirmed). One way of framing this issue is to ask whether an ideal of public legal reason that incorporates legal formalism is within the feasible choice set.³²

²⁹ The question whether any reasonable doctrine can entirely reject the authority of positive law is an interesting one, but is outside the scope of this Article. Even strong libertarian and anarchist theories of legal obligation might accept the obligation to obey laws under current conditions while arguing that as a matter of ideal theory, social arrangements should be based entirely on voluntary arrangements. *See generally* Lawrence B. Solum, *Legal Theory Lexicon 048: Libertarian Theories of Law*, LEGAL THEORY LEXICON, June 26, 2005, http://lsolum.typepad.com/legal_theory_lexicon/2005/06/legal_theory_le.html.

³⁰ There are many possible solutions. For example, if public reasons cannot resolve a question, then a default rule might come into play, e.g., a presumption in favor of autonomy.

³¹ *See Legal Theory Lexicon 043, supra* note 25 (last visited Aug. 24, 2006) (defining and comparing concepts of legal formalism and legal instrumentalism).

³² *See* Lawrence B. Solum, *Legal Theory Lexicon 011: Second Best*, LEGAL THEORY LEXICON, Nov. 23, 2003, http://lsolum.typepad.com/legal_theory_lexicon/2003/11/legal_theory_le_1.html (discussing the meaning of “feasible choice set” in greater detail).

Before proceeding any further, let me specify what I mean by referring to the idea of a “feasible choice set.” Begin with the set of all possible legal policy options—in this case, all possible ideals of legal reason. We can then lay out well-defined criteria for feasibility and apply the criteria to the set, sorting the options into the feasible choice set and the infeasible choice set.

Although the criteria for feasibility are themselves subject to debate, in the context of normative theories of judging two criteria seem obviously relevant. The first criterion is psychological realism: Our theories of judging are feasible only if they are psychologically possible. If legal formalism required judges to behave in ways that are contrary to our understandings of human cognitive capacities, then formalism is outside the feasible choice set. The second criterion is political realism: Normative theories of judging are feasible only if they are politically possible. Even if some individuals would deliberate and decide on the basis of formal legal reasons, the actual implementation of legal formalism requires that political processes—nomination and confirmation or election—select formalist judges. Undoubtedly, there are other criteria for feasibility.

Whether the practice of legal formalism is inside the feasible choice set is in dispute. For example, Stephen Feldman observes:

From a theoretical standpoint, the reason that politics necessarily influences judicial decision making is that the interpretation of legal texts is not mechanical. When the Supreme Court decides a case, the justices must interpret case precedents and other legal texts, including the Constitution. Like with all interpretation, legal interpretation is simultaneously enabled and constrained by our participation in communal traditions, which inculcate us with expectations, interests, and prejudices. Our expectations, interests, and prejudices open us to the meaning of the text, but also limit our possible understandings of the text. When we interpret a text, we can therefore discuss and debate its meaning, but we can never determine the meaning through some mechanical or methodical process.³³

In particular, Feldman argues that religion necessarily influences judging: “[C]ulturally inculcated values, whether religiously based or otherwise, can be categorized as contributing to our political preferences or as a distinct component of our expectations, interests, and prejudices. Either way, one’s cultural background, including religion, and one’s political preferences are always integral to legal interpretation.”³⁴ Feldman’s

³³ Stephen M. Feldman, *Empiricism, Religion, and Judicial Decision-Making*, 15 WM. & MARY BILL RTS. J. 43 (2006). See generally CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006) (examining the complexities of judicial behavior).

³⁴ Feldman, *supra* note 33, at 46.

argument is not directed at the question we are addressing, whether legal formalism is feasible. Nonetheless his remarks provide a clear statement of ideas that might be thought inconsistent with the feasibility of formalism.

One version of the objection might be based on an assumption—that legal formalism is identical to something called “mechanical jurisprudence.”³⁵ The “mechanical jurisprudence” characterization of formalism is based on a set of interrelated but inconsistent ideas.³⁶ Characteristically, the idea is that legal formalism could work only if “mechanical jurisprudence” were possible. The next step is to argue that the application of legal rules cannot be “mechanical”—judgment is required for rules to be applied to particular facts. Because “mechanical jurisprudence” is impossible, legal formalism is a myth.

Of course, this objection is partially correct: Purely “mechanical jurisprudence”—the kind that could be performed by a machine—is currently impossible (and likely will remain impossible without major breakthroughs in the foundations of artificial intelligence). The error lies in the assumption that legal formalism must be mechanical. It is true that formalism requires rule following. But rule following need not be “mechanical” in any literal sense of that word. The application of rules to particular facts may require sensitivity to context and purpose, but that does not mean that there are no rules or that the rules do not have constraining force.

One way to get at the way in which law can constrain without mechanistic determination of results is by making a distinction between “indeterminacy” and “underdeterminacy” of law.³⁷ It might be thought that, if the law does not mechanically determine the outcome of disputes, then the law is indeterminate—that it does not constrain results. There is, however, a third possibility—that results are underdetermined by the legal materials. We can say that the outcome of a case is underdetermined by the law if the outcome (including the formal mandate and the content of the opinion) can vary within limits that are defined by the legal materials. The “mechanical jurisprudence”

³⁵ The *locus classicus* is Roscoe Pound’s famous “Mechanical Jurisprudence.” See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605–23 (1908); see also Arthur J. Jacobson, *The Other Path of the Law*, 103 YALE L.J. 2213, 2218 (1994); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1058 (1993–1994); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 462–63 (1908–1909) (discussing mechanical jurisprudence as “the rigorous logical deduction from predetermined conceptions in disregard of and often in the teeth of the actual facts”); William H. Simon, “*Conceptions of Legality*”, 51 HASTINGS L.J. 669, 669–70 (1999–2000).

³⁶ The discussion in this paragraph and the next is based on Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. (forthcoming 2006).

³⁷ See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987); see also Lawrence B. Solum, *Legal Theory Lexicon 036: Indeterminacy Introduction*, LEGAL THEORY LEXICON, May 16, 2004, http://lsolum.typepad.com/legal_theory_lexicon/2004/05/legal_theory_le_2.html (critiquing the indeterminacy thesis as it has been developed in critical legal scholarship).

objection has its real force within the zone of underdeterminacy—the set of outcomes that can be justified by reasonable formalist arguments.

It might be thought, however, that the existence of such a zone of underdeterminacy entails that legal practice and judicial decisions must be driven by extralegal considerations—for example, by religious or secular morality—in a manner that is inconsistent with legal formalism. But this assumption is also incorrect. In order to see why, we need to distinguish the role that religious or secular worldviews play as *reasons* and the role that they play as *causes*. No one should deny that worldviews have a causal influence on judgment. Indeed, that idea is one of the primary components of Rawls's idea of the burdens of judgment.³⁸ But there is a difference between a judge being causally influenced by the deep premises of morality and religion and the same judge drawing on those premises as “reasons” in either deliberation or opinion writing.

The important point is that it is possible for judges to exclude the deep premises of morality or religion from their deliberation. When deciding which decision is most consistent with the law, the judge can rely solely on legal reasons, choosing among reasonable alternatives on the basis of consistency and coherence with the existing legal topography. This ability is not inconsistent with the fact that the judge's worldview may have a causal influence on the process of deliberation. Some rules may seem to have greater legal salience, because the judge's moral outlook gives them moral salience. When legal values must be balanced, moral importance may causally influence the weight the judges assign.

This causal role is consistent with the claim that the reasons provided by legal formalism meet the requirements of public reason. Indeed, in this regard legal formalism plays a role that is exactly parallel to the role played by public values in political deliberation. The general idea of public reason requires that public values—the values derived from the public political culture—play some special role in public political debate. But given the burden of judgment, citizens and officials will be influenced by their comprehensive doctrines. An ideal of public reason cannot demand the impossible—that citizens or officials somehow step outside their own worldviews. So even if citizens conscientiously adhere to an ideal of public reason, their deliberations will be influenced by the comprehensive moral and religious doctrines. Likewise, an ideal of public legal reason cannot ask judges to shed their religious or moral views. What is required is what *is* possible: that deliberation be limited to formalist reasons.

Nevertheless, it might be argued that even this is psychologically impossible. That is, it might be argued that humans cannot exclude deep religious or moral reasons from their deliberations. At bottom, such an argument would have to be based on a controversial and unproven belief about human psychology. Moreover, the necessary assumption—that humans cannot exclude moral and religious reasons from deliberation—seems implausible. Indeed, training students to exclude extralegal premises

³⁸ See Rawls, *supra* note 2, at 1–8 (outlining the features of a “political conception of justice”).

from their reasoning about cases has been a substantial component of a traditional legal education—even in the realist and post-realist eras. Surely, answering a legal question on the basis of legal reasons is a familiar experience.

Nothing that has been said so far guarantees that legal formalism will be translated into practice. The argument has been that it is possible for judges to be formalists, not that all judges are formalists and certainly not that all judges are necessarily formalists. This point leads to a final objection to legal formalism. It could be argued that the political system will inevitably select realist judges. Put another way, the objection is that the selection of formalist judges is not politically feasible. For example, it might be argued that rational political actors will try to entrench their political programs by selecting judges who will make political decisions. Certainly, it is now commonplace to view the selection of federal judges as a political process in which senators and Presidents are concerned with the political ideology of judges.³⁹

Once again, the argument rests on controversial empirical assumptions. Although there may be models of judicial selection that assume that political actors select judges on the basis of political ideology, these assumptions hardly establish that the political system *cannot* select formalist judges. Moreover, there are a variety of reasons to believe that political actors could be motivated to select formalist judges. Here are two. First, a preference for formalist judging might itself be incorporated within a political ideology. Certainly, there is evidence that a variety of political actors have expressed preferences for judges who “follow the law” rather than “make it.” Second, even if political actors had no ideological preferences regarding judicial philosophies independent of their effect on outcomes, it might be the case that in a political system in which a variety of different political viewpoints competed for power, political actors would prefer formalist judges who were politically neutral to the possibility of losing the struggle to entrench one’s own political viewpoint by appointing realist judges who shared one’s politics.

It goes without saying that these questions about the limits of judicial selection are complex. The limited point to be made in this Article is that the selection of formalist judges is not demonstrably outside the realm of political possibility.

Stepping back, there is a larger point to be made about feasibility as an objection to any normative legal theory. Sometimes feasibility arguments are made as if they were self-evident or obvious. One hears:

- “That could never happen.”
- “That’s unrealistic.”
- “It might be a good idea in theory, but it couldn’t happen in practice.”

³⁹ See generally David S. Law & Lawrence B. Solum, *Judicial Selection, Appointments Gridlock, and the Nuclear Option*, 15 J. CONTEMP. LEGAL ISSUES (forthcoming 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896421 (arguing that political ideology should play a minor role in selecting judges); Lawrence B. Solum, *Judicial Selection: Ideology Versus Character*, 26 CARDOZO L. REV. 659 (2005).

Assertions like these—without supporting arguments grounded in sound positive theory—are hardly arguments at all. At a minimum, anyone who raises a feasibility objection to a position in normative legal theory owes us three things. First, the criteria for feasibility should be stated with specificity: what makes a position feasible? Second, the evidence for infeasibility should be laid out: on what basis do you assert that the criteria for feasibility are not met? Third, the feasibility standard should be applied consistently: is your own preferred position feasible on the basis of the criteria you identify?

V. RELIGIOUS DIVISION REVISITED: FROM PLURALISM TO FORMALISM

The main idea of this Article is that pluralism—religious and moral division—gives us reason to affirm an ideal of public legal reason that is best instantiated in the practice of legal formalism. Some may find this conclusion surprising. Normative legal theory can respond to the fact of pluralism in a variety of ways. One such response is found in a strand of legal realism—the project of an instrumentalist practice of law that seeks to reconcile divergent interests by taking them into account through a process of balancing. At one time this instrumentalist project seemed to shine with great promise. The project of legal instrumentalism offered the hope of legal reform accomplished by judges who were sensitive to the consequences of legal rules but neutral as between various factions and worldviews.

As the decades have passed, however, the shiny surface of the instrumentalist project have become tarnished. The instrumentalist approach to judging puts judges in the position of explicitly considering underlying values. Once judges are in this position, the role of neutral arbiter is a difficult one—if values are to be weighed and some are to give way, instrumentalist judges will be hard put to balance interests in a way that subordinates their own moral and religious values and beliefs.

This problem is compounded by the practical difficulty that attends the “balancing test”—the chief conceptual innovation and main doctrinal tool of the instrumentalist. Balancing tests are notoriously subjective. Even more significant, the idea of reconciling opposing worldviews and interests through balancing rests on the implausible assumption of commensurability. If all social interests were conceived on the economic model of utility—as self-regarding preferences or desires—then balancing might offer a mechanism for mutual adjustment and accommodation. But precisely because of the fact of pluralism, the interests of the adherents of different worldviews resist the collapse into mere preference. Religious values are particularly resistant to instrumentalist reduction to “interests” that can be weighed, balanced, and compromised.

Although instrumentalism continues to be the dominant paradigm in the legal academy, that dominance has increasingly been challenged. Critical legal studies questioned the assumption that interest balancing could produce a stable and coherent

method for the resolution of legal disputes. Neoformalists argued that instrumentalist judging was subjective, unpredictable, and uncertain. Legal economists argued for the reduction of interests to mere preferences, with the consequence that “interest balancing” came to be seen as merely a form of utilitarianism—a particular comprehensive moral doctrine. For all of these reasons, the rhetoric of neutrality and reconciliation came to be seen as a thin disguise and instrumentalists as the partisans of a particular worldview.

But if cynicism about the end product of instrumentalist practice is combined with blind acceptance of the instrumentalist thesis that legal formalism is impossible, the result can only be despair. Legal intellectuals in the early twenty-first century are hardly unfamiliar with this condition of learned hopelessness—the feeling that a sophisticated understanding of positive and normative legal theory simply confirms the fear that law is inherently incapable of doing “the law-jobs.”⁴⁰ Revealingly, over the course of the past two decades, talk of the “death of law”⁴¹ has itself become shopworn. One claim of this Article is that it is far too early in the day to put legal formalism to bed. In a real sense, the enterprise of formalist theorizing about law has only just begun. The news is not about the death of the law; the news is about its renaissance.

⁴⁰ The phrase “law-jobs” is from Karl Llewellyn. See K. N. LLEWELLYN, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 273–74 (1973).

⁴¹ The phrase was popularized by Owen Fiss’s well-known article. See Owen M. Fiss, *The Death of the Law?*, 72 *CORNELL L. REV.* 1, 1–16 (1986).