

Liberalism and Religion

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I. Introduction

The relationship between liberalism and religion has received insufficient attention.¹ To be sure much literature has explored the role that liberalism would afford religion in democratic life.² But it has been too often assumed that there is only one liberalism and that liberalism and religion are inevitable adversaries.³ Actually there are many liberalisms with many different attitudes toward religion. Moreover these different liberalisms bring different assumptions to the most basic constitutional questions involving the Religion Clauses.

Of course, liberalism favors freedom of religion and separation of church and state, at least in the abstract. But different liberalisms have different understandings of what these concepts mean and why they should be supported. For example, with respect to the free exercise of

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¹ By liberalism, I mean broadly to include those on the left side of the political spectrum including many who would identify as radicals. The left is famous for its ability to engage in combat over political differences. My aim here is to explore those differences regarding the relationship between religion and the state. I do not include those radicals who are opposed to freedom of religion. I do not include libertarians who in the nineteenth century would be classified as liberals. Most of them ally themselves with the Republican party; some might form alliances with the left, but they are not on the left. In that sense, they are like Vatican Catholics, neither reliably on the left or right of the political spectrum, but forced to decide which candidate provides more than half a loaf.

² I believe the political aspects of that subject need somewhat more discussion. See text accompanying notes 79-119 *infra*.

³ STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 60 (1993)(referring to the “instinctive mistrust of God-talk by contemporary liberals”); Paul J. Weithman, *Introduction: Religion and the Liberalism of Reasoned Respect*, in PAUL J. WEITHMAN, RELIGION AND CONTEMPORARY LIBERALISM 1, 1 (1997)(“It is a shibboleth of contemporary political analysis that religion and liberalism are mutually antagonistic”).

religion, *Employment Division v. Smith*⁴ held that generally applicable statutes that burden religion are constitutional⁵ unless they were intended to burden religion⁶ or burden other constitutional rights as well.⁷ There is room for some liberals to agree with *Smith*,⁸ but most do not.⁹ In any event, they do not remotely agree on how to think about the case. Moreover the strength of their commitments to freedom of religion varies considerably.

With respect to the establishment of religion, *McCreary County v. American Civil Liberties Union of Kentucky*,¹⁰ presented the question whether the placement of large copies of abridged texts of the Commandments in two Kentucky county courthouses¹¹ violated the Establishment Clause.¹² A companion case, *Van Orden v. Perry*,¹³ presented the same question regarding the display of a 6 feet high and 3 ½ feet wide monument on the grounds of the Texas State Capital.¹⁴

In *McCreary*, the Court, emphasizing the religious purpose embedded in the events leading up to the placement, struck down the display on a 5 to 4 vote.¹⁵ In *Van Orden*, the Court upheld the display on a 5 to 4 vote.¹⁶ Liberals would uniformly oppose the government display in both of

⁴ 494 U.S. 872 (1990).

⁵ *Id.* at 890.

⁶ *Id.* at 877-88.

⁷ *Id.* at 881-82.

⁸ BRIAN BARRY, CULTURE AND EQUALITY 321 (2001) (“There is no principle of justice mandating exemptions to generally applicable laws for those who find compliance burdensome in virtue of their cultural norms or religious beliefs.”). Although Barry supports *Smith* (*id.* at 320-21), he might permit exemptions on the basis of prudence or generosity. *Id.* at 38-39. William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U.CHI.L.REV. 308 (1991). For a response to Marshall by a leading religious conservative, see Michael W. McConnell, *A Response to Professor Marshall*, 58 U.CHI.L. REV. 329 (1991).

⁹ Most supporters of *Smith* relied on conservative constitutional grounds. *See, e.g.*, Gerard V. Bradley, *Beguiled; Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L.REV. 245, 248 (1991) (defending *Smith* by looking to the understanding of the free exercise clause in the years 1789-91). Liberal groups, both religious and non-religious overwhelmingly opposed the outcome in *Smith*. *Id.* at 246.

¹⁰ 125 S.Ct 2722 (2005).

¹¹ *Id.* at 2728.

¹² *Id.* at 2745.

¹³ 125 S.Ct. 2854 (2005).

¹⁴ *Id.* at 2858.

¹⁵ 125 S.Ct. at 2737-41, 2745.

¹⁶ 125 S.Ct. at 2864; 125 S.Ct. at 2871-72 (Breyer, J., concurring). Justice Breyer provided the crucial fifth vote. He thought the display was primarily non-religious. *Id.* at 2871.

the Ten Commandments cases,¹⁷ but would again vary in reasons for their position.¹⁸ As I shall argue, these differences have significant implications for American politics.

Although the left reaches similar conclusions about the government's use of religious symbols through different though overlapping paths, the left is substantively divided (sometimes in surprising ways) concerning the important issue of aid to religious organizations such as schools and charities.

In understanding these differences, I think it is helpful to think about the role that attitudes toward religion play in the construction of political theory. In clarifying the relationship between liberalism and religion, I distinguish between five types of liberalism, four of them secular, one of them religious. I proceed to discuss how the various liberalisms relate to the Religion Clauses. My goal, however, ranges beyond taxonomy. I proceed to argue that religious liberalism is better equipped to engage or combat religious conservatism than is secular liberalism. This, I believe, is an important political contention, but not a general philosophical critique of secular liberalism. I will suggest, however, that much of what has been said about the relationship between religion and democracy is not only bad politics, but bad philosophy. The bad politics concerns me the most. It obscures or gets in the way of the vital role religious liberalism can play in combating injustice.

II. The Liberal Families

Each of the liberal families I describe is committed to free exercise of religion and the separation of church and state (otherwise, they would not be liberal). They are distinguished by

¹⁷ One prominent conservative judge has pointed to the Ten Commandments cases as an example of the Court's turn to "split the difference" jurisprudence (J. Harvie Wilkinson, *The Rehnquist Court at Twilight: The Lures and Perils of Split-The-Difference Jurisprudence*, 58 STAN. L.REV. 1969, 1973-74 (2006), a phenomenon he speculated may have been influenced by a reaction to the criticism of *Bush v. Gore*. *Id.* at 1971.

¹⁸ They would share an opposition to favoring some religions over others. For defense of this principle, see Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, The Ten Commandments, and the Future of the Establishment Clause*, 100 NW.U.L.REV. 1097, 1097-1103, 1117-21 (2006); Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L.REV. 9, 64-76 (2004).

their attitudes toward religion. More specifically, they are distinguished by the role that religion plays or does not play in the *grounding* of their *public* approach to defending liberalism. I do not propose to trace the views of individual liberals. The families I describe are more like ideal types, and they are not exhaustive. At least, they serve to illustrate that liberal views are compatible with a range of attitudes toward religion.

A. The Five Families Described

With respect to religion, liberalisms might be hostile, indifferent, mixed, cooperative, or favorable. Hostile or anti-religious liberalism is sometimes hostile to religion generally or to supernaturalism; it is generally hostile to organized religion. Indeed, it tends to define itself against religion. It proceeds from the view that institutional religion has a disreputable record of oppression, persecution, and violence. Hostile religion most readily finds a home in themes that found vigorous expression in the French Enlightenment.¹⁹ The Enlightenment arose from an antipathy to what it perceived to be blind adherence to authority, tradition, custom, habit, and faith.²⁰ It valorized reason, independent thought, autonomy, and scientific method.²¹ Representatives of this strand of liberalism might be Voltaire,²² John Dewey,²³ Alan Ryan,²⁴ and

¹⁹ “Liberalism is *par excellence* the doctrine of the Enlightenment. Brian Barry, *How Not to Defend Liberal Institutions*, 20 B.J.POL.S. 1, 2 (1990). On the hostility of much of the Enlightenment to religion, the subtitle of Peter Gay’s classic tells it all, PETER GAY, *THE ENLIGHTENMENT: AN INTERPRETATION, THE RISE OF MODERN PAGANISM* (1966). See also *id.* at xi: The philosophes’ rebellion was a “paganism directed against their Christian inheritance and dependent upon the paganism of classical antiquity, but it was also a *modern* paganism, emancipated from classical thought as from Christian dogma.”

²⁰ Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 456 (1996) (“The lasting accomplishment of the Enlightenment, then, was its development of an epistemological method. That method was a repudiation of the ‘millennium of superstition, other worldliness, mysticism, and dogma know as the Middle, or Dark, Ages.’”), quoting RALPH KETCHAM, *FRAMED FOR POSTERITY: THE ENDURING PHILOSOPHY OF THE CONSTITUTION* 21 (1993).

²¹ “A . . . notable aspect of the Enlightenment thought is the emergence of a scientific way of thinking” JAMES M. BYRNE, *RELIGION AND THE ENLIGHTENMENT* 10 (1996).

²² Voltaire’s “secular philosophy was a formidable, almost irresistible rival of Christianity.” PETER GAY, *THE PARTY OF HUMANITY* 5 (1964). For Voltaire, the “church was the implacable enemy of progress, decency, humanity, and rationality.” *Id.* at 44. See Byrne, *supra* note 21, at 2 (Voltaire’s criticism of Christianity and the church weakened the power of religion in French cultural life). On the other hand, Voltaire thought that it might be a good thing for the masses to remain religious despite his contempt for the religion they held. FRANK E. MANUEL, *THE CHANGING OF THE GODS* 66 (Hanover: Brown University Press, 1983).

²³ Dewey did not object to God talk, but he rejected any concept of the supernatural. ALAN RYAN, *JOHN DEWEY AND THE HIGH TIDE OF AMERICAN LIBERALISM* 273 (1995).

Richard Rorty.²⁵

Closely related, indifferent liberalism also highlights the importance of reason, independent thought, and autonomy, but defends liberalism without resort to anti-religious premises. In other words, if religion did not exist, indifferent liberalism's methods of justification would largely be unaffected. Ronald Dworkin²⁶ and Joseph Raz,²⁷ belong in this category.

Cooperative liberalism in part stems from a concern about the deep divisions flowing from religion.²⁸ It regards the pluralism of society as a challenge and an opportunity. It argues that liberalism might be grounded in a variety of possible comprehensive positions including those that are Kantian, Millian, or religious. The point of cooperative liberalism is that those of secular and religious views would engage in a system of fair cooperation that respected the different views that others hold. At least with respect to constitutional essentials and issues of basic justice, cooperative liberals would argue from secular premises²⁹ that could appeal to those who fit into an overlapping consensus of reasonable comprehensive views. John Rawls in

²⁴ *Id.* at 274 (referring to himself as an “aggressive atheist”).

²⁵ Richard Rorty, “Anticlericalism and Atheism,” in RICHARD RORTY & GIANNI VATTIMO, *THE FUTURE OF RELIGION* 40-41 n.2 (2005) (expressing the hope that institutionalized religion will eventually disappear); Richard Rorty, “Religion in the Public Square: A Reconsideration,” 31 *JOURNAL OF RELIGIOUS EDUCATION* 141, 142 (*accord*).

²⁶ RONALD DWORIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 281-84 (2000); RONALD DWORIN, *A MATTER OF PRINCIPLE* (1985); RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1977). I do not think Dworkin is generally hostile or favorable to religion in RONALD DWORIN, *LIFE'S DOMINION* (1993). He argues that the right to procreative autonomy should be protected under the religion clauses (*id.* at 160-68), and he argues that the question whether to abort is morally serious (*id.* at 68-101), but he does not make remarks for or against religion generally. He does indicate that government could encourage women to take the question of the sanctity of life seriously (*id.* at 168), and he suggests that the question of the sanctity of life is an essentially religious question. *Id.* at 163-64. One might argue that the latter commits him to a favorable view of religion (at least in this narrow area), but he recognizes that a belief in the sanctity of life could follow from traditional religion or from a belief in a godless nature that is not “conventionally religious”. *Id.* at 82. And he argues that it is no business of the state to settle on one account or another. *Id.* at 160-68.

²⁷ JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

²⁸ “In *Political Liberalism* and recent essays, the story Rawls tells us is that political liberalism [what I call cooperative liberalism] emerges out of the conflicts between opposing moral doctrines, specifically the early modern wars of religion and the debates about religious tolerance.” James Bohman, *Public Reason and Cultural Pluralism*, 23 *POLITICAL THEORY* 253, 253 (1995).

²⁹ Secular premises of comprehensive views would be excluded unless they were shared among other reasonable comprehensive views.

Political Liberalism is the leader of this liberal family.³⁰ Stephen Macedo³¹ also seems to qualify as a member.³² That Rawls designates some religions as “unreasonable”³³ and that Macedo would actively discourage some religions³⁴ should not blur the fact that their form of liberalism is designed to encourage cooperation between religions and non-religious perspectives that can commit to arriving at fair terms for a just society.

Mixed liberalism includes a number of attitudes toward religion that do not fit into the other secular families. In other words, different stories could be told about the role of religion in history before leading to some form of secular liberalism, *eg.*, it had and has oppressive and liberating humane aspects; *eg.*, it was useful, but it has outlived its usefulness; *eg.*, it continues to be useful in terms of having influenced modern humane values, but it is unrealistic. John Stuart Mill probably best fits into this category.³⁵

Although the four other families of liberalism justify conclusions from secular premises,³⁶ Favorable liberalism reaches liberal conclusions from religious premises. Although it respects other comprehensive visions, it has a more expansive conception of the role of religion in

³⁰ JOHN RAWLS, *POLITICAL LIBERALISM* (1996).

³¹ STEPHEN MACEDO, *DIVERSITY AND DISTRUST : CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* 169 (2000) (view about public reason is consistent with what Rawls advocates).

³² It is possible that Martha Nussbaum belongs here as well. She explicitly identifies with political liberalism (Martha C. Nussbaum, *A Plea for Difficulty*, in Susan Muller Okin with respondents, *Is Multiculturalism Bad For Women?* 105, 109-110 (Joshua Cohen, Mathew Howard, & Martha C. Nussbaum, eds., 1999) emphasizes the importance of respecting other comprehensive positions (*id.* at 109), and states that her comprehensive own vision as a Kantian reform Jew would not justify eliminating sex discrimination in the choice of Catholic priest or in abrogating various Jewish positions on sex equality (*id.* at 114) even though she repudiates the Catholic discrimination and the positions held by many Jews *id.*). But she might, consistent with the views she has stated, have a far more expansive conception of the role of religion in democratic life than Rawls. If she did, I would classify her as a favorable liberal.

³³ On the definition of reasonable comprehensive doctrines, see Rawls, *supra* note 30, at 59. For explication of the reasonableness requirement, see Samuel Freeman, *Deliberative Democracy: A Sympathetic Comment*, 29 PHIL. & PUB. AFF. 389, 399-405 (2000). Rawls’s conception of the reasonable has been carefully criticized. Onora O’Neill, *Political Liberalism and Public Reason: A Critical Notice of John Rawls, Political Liberalism*, 106 THE PHILOSOPHICAL REVIEW 411 (1997).

³⁴ STEPHEN MACEDO, *DIVERSITY AND DISTRUST*, *supra* note **ERROR! BOOKMARK NOT DEFINED.**, at 85 (impact of the content of public schools wisely makes it harder for some religions to perpetuate their views).

³⁵ In particular, see John Stuart Mill, *Utility of Religion*, in JOHN STUART MILL, *NATURE AND UTILITY OF RELIGION* 50-51 (1958)(belief in supernatural once served useful purposes, but was now dispensable). For commentary, see LINDA C. RAEDER, *JOHN STUART MILL AND THE RELIGION OF HUMANITY* (2002).

³⁶ Those cooperative liberals who are religious, nonetheless, justify their conclusions in terms that can be shared by other reasonable forms of liberalism. This excludes religious reasons.

democratic life than is entertained by Cooperative liberals. Favorable liberalism might be represented by John Locke³⁷ or, in more modern times, Michael Lerner,³⁸ Joan Chittister,³⁹ Dorothy Day,⁴⁰ Richard Rohr,⁴¹ and in many respects Jim Wallis⁴² and Ronald J. Sider.⁴³ It might also include Martin Luther King,⁴⁴ liberation theology,⁴⁵ and much of African American religious thought.⁴⁶ It could include much of Catholic social thought,⁴⁷ and dissenting Catholic moral theologians like Charles Curran.⁴⁸ The paucity of professional philosophers in the ranks of favorable liberalism seems conspicuous. But religious premises ground the thinking of millions of

³⁷ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* (Ian Shapiro ed., 2003). For discussion of the depth of the religious foundations of Locke, see JEREMY WALDRON, *GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS OF JOHN LOCKE'S POLITICAL THOUGHT* (2002).

³⁸ MICHAEL LERNER, *THE LEFT HAND OF GOD: TAKING BACK OUR COUNTRY FROM THE RELIGIOUS RIGHT* (2006).

³⁹ JOAN CHITTISTER, *IN THE HEART OF THE TEMPLE* (2004).

⁴⁰ DOROTHY DAY: *SELECTED WRITINGS* xv (Robert Ellsberg, ed., 1998)(Dorothy Day “wrote to give reason for a marriage of convictions that was a scandal and a stumbling block to many: radical politics and traditional, conservative theology”); see also MEL PIEHL, *BREAKING BREAD: THE CATHOLIC WORKER AND THE ORIGIN OF CATHOLIC RADICALISM IN AMERICA* (2006).

⁴¹ RICHARD ROHR & JOHN BOOKSER FEISTER, *HOPE AGAINST DARKNESS: THE TRANSFORMING VISION OF SAINT FRANCIS IN AN AGE OF ANXIETY* (2001); RICHARD ROHR & JOHN BOOKSER FEISTER, *JESUS' PLAN FOR A NEW WORLD: THE SERMON ON THE MOUNT* ().

⁴² JIM WALLIS, *GOD'S POLITICS: WHY THE RIGHT GETS IT WRONG AND THE LEFT DOESN'T GET IT* (2005).

⁴³ RONALD J. SIDER, *RICH CHRISTIANS IN AN AGE OF HUNGER* (20th anniv. Rev. (1997).

⁴⁴ MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* (2000); STEWART BURNS, *TO THE MOUNTAINTOP: MARTIN LUTHER KING JR.'S MISSION TO SAVE AMERICA: 1955-1968* (2005); TAYLOR BRANCH, *AT CANAAN'S EDGE: AMERICA IN THE KING YEARS, 1965-68* (2006); TAYLOR BRANCH, *PILLAR OF FIRE : AMERICA IN THE KING YEARS 1963-65* (1999); TAYLOR BRANCH, *PARTING THE WATERS : AMERICA IN THE KING YEARS 1954-63* (1989); Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King*, 103 HARV. L. REV. 985 (1990).

⁴⁵ GUSTAVO GUTIERREZ, *A THEOLOGY OF LIBERATION: HISTORY, POLITICS AND SALVATION* (1988); LEONARDO BUFF, *SAINT FRANCIS: A MODEL FOR HUMAN LIBERATION* (John W. Diercksmeier, trans., 1982). Religious liberalism, as I use the term, may include political radicals as well. My usage is thus somewhat broader than that of Paul Razor (see *FAITH WITHOUT CERTAINTY: LIBERAL THEOLOGY IN THE 21ST CENTURY 141-63* (2005), but his book is an outstanding introduction to liberal theology.

⁴⁶ *AFRICAN AMERICAN RELIGIOUS THOUGHT : AN ANTHOLOGY* (Cornell West & Eddie S. Glaude eds., 2003); MICHAEL JOSEPH BROWN, *BLACKENING OF THE BIBLE: THE AIMS OF AFRICAN AMERICAN BIBLICAL SCHOLARSHIP* (2004).

⁴⁷ Among other things, Catholic social teaching is concerned about the economic injustice associated with poverty and ill treatment of workers. *OPTION FOR THE POOR: A HUNDRED YEARS OF VATICAN SOCIAL TEACHING* (Donald Dorr, ed., 1992); *CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE* (Jean Vanier, ed., 1992); *MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES AND INTERPRETATIONS* (Anthony T. Padovano, ed., 2005); *MODERN CATHOLIC SOCIAL TEACHING : COMMENTARIES AND INTERPRETATIONS* (Kenneth R. Himes & Lisa Sowle Cahill, eds., [et al.], 2005). Of course, concern for the poor is common among ministers of virtually all denominations. ROBERT WUTHNOW, *THE CRISIS IN THE CHURCHES: SPIRITUAL MALAISE, FISCAL WOE* 207 (2006), but the involvement of churches does not match the need. *Id.* at 208.

⁴⁸ For an excellent introduction to his thought, see *A CALL TO FIDELITY: ON THE MORAL THEOLOGY OF CHARLES E. CURRAN* (Samuel Koranteng-Pipim, ed., D.C.2002).

citizens regarding liberal attitudes on civil rights, distributive justice, moral limits regarding war, and duties owed to the natural environment. They also ground the case for religious liberty and separation of church and state.

A note of emphasis: It is the nature of the secular or religious grounding of the family of liberalism that distinguishes the five families. Although I have designated the hostile, indifferent, mixed, and cooperative families as secular, a religious person could belong to any of these four secular families. To take the most obvious case first, by definition a religious person could be a cooperative liberal.⁴⁹ Second, a religious person could be an indifferent liberal who believes that liberalism should be justified on secular grounds. One's religion might embrace the view that religious premises should not directly provide a justification for actions that would coerce non-religious citizens. The concept of a religious neo-Kantian is not oxymoronic.⁵⁰ Third, a religious person could be a hostile liberal who believes that institutional religion is harmful and that liberalism should be justified on secular grounds; finally, a mixed liberal might have positive or even mixed views about his or her own religion, and mixed views about other religions. That liberal too might believe in a public secular grounding for political conclusions.

The hostile, indifferent, mixed, and cooperative families are *secular* not because you must be an atheist or an agnostic to belong, but because the public justification of liberalism is secular. Favorable liberalism is favorable because the public grounding for liberalism is religious. The category of favorable liberalism could itself be subdivided. Not all favorable liberals are alike. Rather than negotiate that terrain, I will employ the term "religious liberalism" to designate what I consider to be the best form of favorable liberalism though I will refer to open questions within religious liberalism as well.

B. Liberals and Religion Clause Issues

⁴⁹ Favorable liberals, unlike cooperative liberals do not accept the limits of public reason held by Rawls. For an intriguing account of why a Catholic should be a cooperative liberal, see Leslie Griffin, *Good Catholics Should be Rawlsian Liberals*, 5 S.CAL.INTERDISC.L.J. 297 (1997).

⁵⁰ Although she is not an indifferent liberal, Martha Nussbaum is a religious Kantian. See note 32 *supra*.

How would the various families of liberalism approach the questions of government use of religious symbols, government aid to religious organizations, and freedom of religion? Do the ways in which they approach the issues vary from family to family? Government display of religious symbols would draw opposition from each of the five families, and they would agree on at least a part of the rationale. They would argue that the religion of citizens or the lack of it should have no bearing on their relationship to the state.⁵¹ They should not be marked as insiders or outsiders.⁵² To place a crèche in a building that is supposed to stand for the impartial state⁵³ or to erect a religious monument on state capital grounds is to accord a privileged status to Christianity in the case of the crèche and to Jews, Christians, and Muslims in the case of the Ten Commandments. As we shall see, the case against these displays need not be confined to respect for equality, but liberals do share that respect.

The question of state aid to religious organizations is perhaps the most significant other issue involving the relationship between church and the state. Most secular liberals would oppose vouchers and funding for so-called faith based organizations that discriminate on the basis of religion with respect to their clients or their employees or that use funds to present a religious message. Sometime liberals argue that it is wrong to force taxpayer to

⁵¹ Justice O'Connor's theoretical commitments in this area were generally liberal: "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the religious community." *Lynch v. Donnelly*, 465 U.S. 668, 687 (O'Connor, J., concurring).

⁵² *Id.* at 688 (repudiating endorsement because it sends a message to some that they are insiders and to others that they are outsiders). Regrettably the endorsement test was, for the most part, ignored in the Ten Commandments cases. Greg Abbott, *Upholding the Unbroken Tradition: Constitutional Acknowledgement of the Ten Commandments in the Public Square*, 14 WM. & MARY BILL RTS. JR. 51, 54-55 (2005). For criticism of the endorsement approach, see Jesse Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.OF L.&POLITICS 499 (2002); Stephen D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L.REV. 266 (1987); William P. Marshall, "We Know it When We See It": *The Supreme Court and Establishment*, 59 S.CAL.L.REV. 495 (1986). For a modest modification of the endorsement test that speaks to some of the criticisms, see B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L.REV. 491, 539-544 (2005). For an even more ambitious discussion of the concerns that have been addressed by the endorsement test proposing a shift in focus, see Adam M. Samaha, *Endorsement Retires From Religious Symbols to Anti-Sorting Principles*, 2005 Sup.Ct. Rev. 135, 192 (2005)(focusing on the "strategic deployment of religious symbols" influencing religious demographics).

⁵³ *County of Allegheny v. ACLU*, 492 U.S. 573, 599-600 (1989)(striking down the display of a crèche in a county courthouse).

fund religious views to which they are opposed.⁵⁴ Nonetheless, it is hard to understand why funding religion is special. Taxpayers are routinely forced to support ideologies and programs to which they are opposed, even programs to which they have serious moral objections, e.g., wars. Indeed, if the concern about supporting religious organization was really based in protecting the conscience of taxpayers, the solution would be refunds, not a constitutional prohibition. On the other hand, in many, perhaps most, circumstances, there may be a substantive equality concern that one religion in particular is benefiting from the subsidy program⁵⁵ or a concern that the schools or charities are not doing a good job.⁵⁶ But neither of these objections, however well founded, are theoretical objections to the funding. They depend upon the facts on the ground though the interpretation of those facts may be influenced by one's attitudes toward religion.⁵⁷ In this connection, even favorable liberals might be concerned about vouchers. A favorable liberal may justify liberal conclusions from religious premises, but think that government aid to religious organizations will predominantly favor those whose ideologies are bad for children and

⁵⁴ James Madison is the father of this argument. James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), in James Madison: Writings 31 (Jack N. Rakove ed., 1999). The applicability of Madison's argument to vouchers has been resisted. Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375 (1999); Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance*, 87 CORNELL L. REV. 783 (2002).

⁵⁵ This was a concern in the landmark case of *Zelmon v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding Cleveland's voucher program despite the fact that 96% of the voucher students attended Catholic schools).

⁵⁶ This issue raises a dilemma. Either schools and religious organizations are not held accountable or they are held accountable and subject to potentially intrusive regulation leading to worrisome entanglement issues.

⁵⁷ Another important view of many liberals is that public education is to be preferred on the ground that it brings people of all races, classes, and religions and that a diverse student body promotes many important values including autonomy, empathy, respect, tolerance, social skills, and capacity for democratic deliberation. See generally, Steven H. Shiffrin, *The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers*, 11 CORNELL J. LAW & SOC. POL'Y 503, 514-23 (2002). This argument may have special attraction to perfectionist liberals or cooperative liberals (whose perfectionism is limited to developing skills and attitudes for participation in democratic life), but it depends upon the facts on the ground as well.

the common good.⁵⁸ Moreover, as we shall see, religious liberals have additional bases for concern about financial aid to religious organizations though they might well support such aid in particular contexts.

Liberals who support aid might do so for either or both of two considerations. First, the state offers secular education for free; an egalitarian could argue that this stacks the deck in favor of one perspective over another. Second, secular liberals have historic commitments to distributive justice. They might in a non-ideal world weigh the benefits to the poor of voucher funding or funding to faith based organizations and conclude that those benefits outweigh the concrete harm flowing from the infringement on the principle of separating church from state. To be sure, perhaps most secular liberals like to believe that the principle of separation of church and state should not be subject to utilitarian balancing and that faith-based organizations should not receive a dime of federal or state funds. But when liberals consider that Catholic, Jewish, and Lutheran organizations have received and continue to receive billions of dollars of government money to distribute to the poor, that they do not proselytize or discriminate on the basis of religion regarding their clients or employees, and that the poor would be significantly damaged if these sources of funding were taken away, most secular liberals are prepared to lower the high wall separating church and state.⁵⁹

Less clear is the reaction of liberals to the *Smith* case. Although the overwhelming majority of liberals would protect religious liberty in *Smith*, some might not. Secular liberals generally favor free exercise of religion without thinking religion is special. Secular liberals

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⁵⁹ There is a spectrum of charitable activities. At one end, it would be the rare liberal that would oppose the use of vouchers for medical care at a religious hospital. At the other end would be schools that are in the business of religious socialization. In between are a range of activities including soup kitchens and adoption agencies.

generally believe that the state should be neutral toward most conceptions of the good life.⁶⁰ Religion would be protected under this view, not because it was in any way special, but because it was a conception of the good life.⁶¹ This has implications regarding the question of religious exemptions from non-discriminatory laws or accommodations with respect to burdens on the exercise of religion not otherwise required under the Constitution. Such exemptions or accommodations from this perspective would generally be problematic on equality grounds.⁶² One can imagine a hostile liberal contending that religion deserves no special treatment, that the burden on religion occurred as the result of a generally applicable law, and that if a religious person violates the law, he or she should accept the consequences.⁶³ Indeed, John Locke, a favorable liberal, maintained that the magistrates acted within their authority when they enacted generally applicable laws burdening religious practice.⁶⁴

Nonetheless, liberals are largely opposed to the *Smith* decision, and the grounds are various. One possibility is to recognize that in some cases the affording of religious exemptions might be necessary in order to assure stability. This, of course, would depend upon the context,

⁶⁰ Ackerman, Dworkin. Some secular liberals are perfectionists and thus permit the state to favor some conceptions of the good life over others. Raz, *supra* note 27, Part VI (1986). Even then, the perfectionist liberal typically favors a broad range of life styles so long as they are autonomously chosen. The favoring of autonomously chosen life styles over non-autonomous life styles need not lead to the view that the latter receive no protection, but they might well receive less weight in a constitutional balance, and they would not be encouraged by the state. Some perfectionists who identify as liberals place stress on diversity without privileging autonomy. WILLIAM A. GALSTON, LIBERAL PURPOSES (1991). Other liberals emphasize the value of autonomy and diversity, but see this as part of the value of neutrality rather than an justification for perfectionism. JOHN STUART MILL, ON LIBERTY (Alan Ryan ed.,).

⁶¹ RAINER FORST, CONTEXTS OF JUSTICE: POLITICAL PHILOSOPHY BEYOND LIBERALISM AND COMMUNITARIANISM 69 (John M. Farrell trans., 1994) (“A person’s religious conviction is worthy of protection because it is identity-determining, and not because it is religious.”).

⁶² That is, they would favor religious over non-religious views. For development of this argument, see Marshall, *supra* note 8, A strong theme in the legal literature is that such accommodations tend to favor majority over minority religions. Stephen L. Carter, *The Resurrection of Religious Freedom?*, 107 HARV. L.REV. 118, 122-23 (1993); Ira C. Lupu, Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion, 140 U. PA. L.REV. 555 (1991); James D. Gordon, *Free Exercise on the Mountaintop*, 79 CAL. L.REV. 108 (1991).

⁶³ For the argument that a contrary result in *Smith* would privilege faith over reason and that the American Constitution is an Enlightenment Constitution that favors reason over faith, see Suzanna Sherry, Enlightening the Religion Clauses, 7 J.CONTEMP. LEGAL ISSUES 473, 477 (1996). Sherry maintains that reason is at odds with faith, but I think she would search hard to find believers that concede this. Rather they might say that faith is a gift *supported* by or fully compatible with reason. Indeed, some religious traditions regard reason as an important source of religious understanding.

⁶⁴ Locke, *supra* not 37, at 236-37, 243.

but it is an argument that would appeal to those who are hostile to religion. For many of them, a primary purpose of religious protection is to prevent the instability that follows in the wake of passionately held views. On the other hand, one might wonder in *Smith* whether Native Americans were a significant threat to stability. Perhaps, however, this is the wrong level of abstraction. Perhaps it is wrong to look at the particular threat of any individual group and right to be generally concerned in a post 9/11 era that restrictions on religion can lead to violent reaction.

A secular liberal might also argue that the formalism of the *Smith* decision did not appropriately implement the value of equality. It could be argued that the actors who put the state action into place in *Smith* did so without proper regard for the concerns of the religion involved even if they had no hostile purpose. A test for this type of discrimination might be to ask whether the law in question would have passed if it burdened a religious majority in the same way. This is the approach taken by Christopher Eisgruber and Lawrence Sager.⁶⁵ It does not value speech over other forms of the good life,⁶⁶ but it can lead to robust protection for the free exercise of religion.

Finally, it might be thought especially cruel to require someone to act or not to act when their conscience or sense of moral obligation demands otherwise.⁶⁷ The argument could be that such an approach does not assume that one form of the good life is better than another. Rather it assumes that some impingements on lives are worse than others. Indeed, one could think that a particular religion was preposterous while thinking that a burden imposed by law was especially harsh in individual cases. To be sure, from a secular perspective, one could not distinguish religious invocations of conscience from non-religious invocations of conscience. On the other

⁶⁵ Christopher L. Eisgruber and Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U.CHI. L.REV. 1245, 1285 (1994). [check page number]

⁶⁶ On the other hand, Eisgruber and Sager do not regard all liberties as alike. They maintain that deep commitments should be treated equally (*id.* at 1255) though it is not clear how they determine which commitments are deep. Andrew Koppelman, *Is it Fair to Give Religion Special Treatment*, 2006 U.ILL. L.REV. 571, 583-87 (2006).

⁶⁷ This would not cover many religious claims not based in conscience. Koppelman, note 66 *supra*, at 586. Indeed, important religious claims sometimes have nothing to do with voluntary actions of the claimants. David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L.REV. 769 (1991).

hand, one might regard any invocation of conscience as “religious” regardless of whether the source of the obligation was thought to be based on a Supreme Being.⁶⁸

On the other hand, some secular liberals, especially hostile liberals, might reject this whole line of argument. They might believe that the religious objector is simply another example of a person with expensive tastes who need not be catered to.⁶⁹ Or they might think that the privileging of claims of conscience over other preferences in fact unfairly favors one version of the good life over another.⁷⁰ In one sense this would be an odd position for most secular liberalisms to take. Secular liberalisms are typically and unmistakably moral theories with moral premises. Nonetheless, they balk at permitting the state to promote particular moral theories. On the other hand, secular liberalisms frequently find room to recognize the particular force of claims of conscience.⁷¹ Indeed, typically because of respect for freedom of conscience, many secular liberals regard freedom of religion as an important basic liberty.⁷²

That said, secular liberalism (whatever the private views of its adherents) ordinarily does not regard religion as especially valuable. Religion is simply one form of the good life or bad life, one form of autonomous choice, one exercise of liberty, basic or otherwise, that deserves to be respected. On these premises, there remain grounds why secular liberals would want to protect religious liberty along with other liberties. It might also be clear why religion might be singled out in the Establishment Clause. In addition, to avoiding the marking of outsiders and insiders, the secular liberal might fear violent struggles over capture of the state by one religion over

⁶⁸ United States v. Seeger, 380 U.S. 163 (1965)(conferring conscientious objector status to someone who declared a “religious faith in a purely ethical creed”)[page number?]

⁶⁹ Barry, note 8 *supra* at 34-35; Cf. RONALD DWORKIN, SOVEREIGN VIRTUE, *supra* note 26, at 154-55 (comparing the religiously intolerant to the person with expensive tastes).

⁷⁰ Check Eisgruber and Sager

⁷¹ Of course, it can be argued that state neutrality is a moral requirement.

⁷² Unlike garden variety liberties, a basic liberty may not be denied unless it interferes with another’s freedom (Kant), or compromises another’s “basic liberty” (Rawls) or “right” (Dworkin) or “harms the interests of others,” (Mill), and even then a further showing would ordinarily need to be made. Freedom of religion in this respect would occupy the same plane as other basic liberties. One of the problems for liberals is to explain how to distinguish garden variety liberties from more important liberties or rights.

another. But the fear that the use of religious symbols by the state such as the crèche in Allegheny County or numerous other uses of religious symbols by the state seems excessively fearful.

In the absence of that, secular liberalism has a hard time explaining why religion alone is subject to an Establishment Clause. If equality is the only basis for the Establishment Clause, if free exercise is guaranteed, and if religion is simply one of many forms of equal liberty, what is the justification for singling out religion as one of the rare types of speech in which government can not engage? I do not think secular liberalism has a satisfactory answer to this question.⁷³

Religious liberalism's approach to free exercise issues overlap those of the secular liberals. It too can be concerned about instability and discrimination. But it does not view religious practice to be simply one of many forms of the good life. It regards religious liberty to be particularly valuable although it need not endorse particular practices that it believes should be protected. This does not mean that religious liberals believe that all religious practices should be protected. Rather the claim would be that freedom of religion should be interpreted broadly: that religious burdens imposed even by non-discriminatory laws be scrutinized with special care and that the state should intervene to require religious accommodations for those burdened by non-governmental action. With respect to establishment issues, religious liberalism moves beyond concerns of liberty, equality and stability. Religious liberalism agrees that separation of church and state furthers liberty, equality, and promotes stability. Unlike secular liberalism, religious liberalism believes that religious liberty is particularly important and it would protect and separate religion from associations with government on the ground that tight connections with government are bad for religion. Secular liberalism either has no resources to make this contention or, worse, it suggests that the argument should not be made. Thus, the dominant strain of secular liberalism maintains that robust religion in the public square will interfere with the autonomy of the state, undermine the public interest, and create a legitimacy deficit. So, against

⁷³ Secular liberalism's best escape from this problem is to condemn government pronouncements on the good life generally whether of not religious in character. But this escape route leads to a minefield. See paragraph accompanying note 75 *infra*.

religious conservatives, the dominant strain maintains that it is wrong for them to introduce their views in the public sphere. By contrast, religious liberals argue that religious conservatives do no wrong in introducing their views in the public sphere. What is wrong with religious conservatives is that they have bad politics and bad theology. My view is the politics of religious liberalism are more promising than those of secular liberalism.

III. The Politics of Liberalism

A. Secular Liberalism

Secular liberals are on the defensive in American politics, and cases involving governmental displays of symbols are good vehicles for seeing why that would be the case. In *Van Orden*, Justice Breyer maintained that ordering the removal of a religious display would show hostility toward religion.⁷⁴ That claim has substantial power in American rhetorical and political life. It poses an especially difficult problem for secular liberals. With respect to hostile liberals, the claim of hostility, at least with respect to organized religion, is quite true. Though anti-religious rhetoric employed against a corrupt church has often been politically helpful in the European context, it is less effective in the American context. To be sure, criticism of the religious right is a powerful organizing tool in the Democratic Party, and many independents are not allies of the religious right. But there is a substantial political difference between attacking the religious right and being hostile to organized religion generally. An American politician who announces her hostility to religion, organized or not, is an office holder forging a quick path to the private sector.

⁷⁴ 125 S.Ct. at 2871. He cast the decisive vote in the case in part because he was concerned about divisiveness. *Id.* This has been met with substantial criticism. “Quelling public strife has been the Holy Grail or, perhaps more aptly, the siren song of religious liberty jurisprudence. . . . I submit that suggestions of this kind are both misplaced and quixotic: They are misplaced because we betray our constitutional aspirations if we compromise our commitment to equal membership in exchange for a bit more serenity, and they are quixotic because no Establishment clause doctrine will stop religious groups from bickering with one another in the public sphere.” Christopher L. Eisgruber, *Justice Stevens, Religious Freedom, and the Value of Equal Membership*, 74 *FORDHAM L.REV.* 2177 (2006); See also William Van Alstyne, *Ten Commandments, Nine Judges, and Five Versions of One Amendment – The First (“Now What?”)*, 14 *WM & MARY BILL RTS.J.* 17, 25 (2005); Erwin Chemerinsky, *Why Justice Breyer Was Wrong in Van Orden v. Perry*, 14 *WM. & MARY BILL RTS.J.*, 1 (2005). But see Richard A. Posner, *Foreword: A Political Court*, 119 *HARV. L.REV.* 31, 100 (2004)(agreeing with Breyer on the divisiveness concern).

Most hostile liberals, of course, will not put forth their hostility to religion as the basis for removal of a religious display. Like other secular liberals, they will argue that the state should be neutral about the good life. In the American political context, this too will fall on deaf ears. Neutrality liberalism has never been practiced in the United States. Subsidies for the arts favor one view of the good life over another. Dworkin offered a hair splitting set of arguments to the effect that this was not so,⁷⁵ but few voters would have been impressed. In addition, public education has consistently disfavored some views of the good life over others. The autonomous choice to make selfish hedonism and masochism the center of one's life may be honored by neutrality liberalism, but it would be discouraged in any public school. Neutrality liberalism is not only a political non-starter, but would equally arouse suspicions of religious hostility. Tearing down religious displays in the name of neutrality is likely to be experienced as an act of hostility covered up in neutrality dress. If Martin Luther King's I Have a Dream speech can be placed on a monument, but the Ten Commandments can not, what is the neutrality explanation? Hostile and Indifferent liberals might argue that these remarks do not refute either form of liberalism; indeed they would suggest that the lack of political appeal of either form of liberalism in the United States only shows how far the United States is from being a just society. I do not claim to have refuted either form of liberalism here. I have only tried to maintain that they are not yet politically attractive options in the American context.

By contrast, as I have suggested, religious liberals can effectively argue that religious displays are politically and theologically unsound. Before exploring this, we should consider the objections of secular liberals particularly those of John Rawls to this argumentative path.

B. Public Reason

The doctrine of public reason put forth by cooperative liberals in its narrow version is that

⁷⁵ Ronald Dworkin, *Can a Liberal State Support Art?*, in RONALD DWORIN, A MATTER OF PRINCIPLE 221 (1985).

those citizens who participate in the public political forum,⁷⁶ at least with respect to constitutional essentials and questions of basic justice,⁷⁷ should not argue on the basis of comprehensive views,⁷⁸ but should instead employ premises that can be shared by all reasonable citizens seeking to establishing fair terms of cooperation.⁷⁹ Although comprehensive views could be mentioned only in rare cases in the narrow view, John Rawls in later writing moved to the broader view that we could “introduce into political discussion at any time our comprehensive doctrine, religious or nonreligious, provided that, in due course, we give properly public reasons to support the principles and public policies our comprehensive doctrine is said to support.”⁸⁰ On either the narrow view or the broader view, Rawls maintained that, “Central to the idea of public reason is that it neither criticizes nor attacks any comprehensive doctrine, religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity.”⁸¹ Thus, religious conservatives could be criticized in the public political forum to the extent their doctrine was “incompatible with the essentials of public reason and a democratic polity,” but not on the grounds that they employed bad theology.

Rawls never maintained that these restrictions applied with the force of law. They were understood to be a “duty of civility,”⁸² a part of our understanding of what it means to be a good and reasonable citizen. Nor were these restrictions intended to apply throughout the society. In *Political Liberalism*, Rawls was understood to mean that the doctrine of public reason applied to political utterances about constitutional essentials and basic questions of justice addressed to the

⁷⁶ JOHN RAWLS, *POLITICAL LIBERALISM*, supra note 30, at 215. I focus on John Rawls’s writings because they have been the most influential and because they have tried to justify the doctrine in the circumstances where Rawls believes they are strongest. *Id.* at 215. I also focus on his later writings because they represent his most mature views.

⁷⁷ *Id.* at 214.

⁷⁸ *Id.* at 224-25.

⁷⁹ *Id.* at 224. The strong version even posits that controversial scientific (I assume including social science) positions may not be introduced in determining either constitutional essentials or principles of basic justice, or how they should be applied. *Id.*

⁸⁰ John Rawls, *The Idea of Public Reason Revisited*, 64 U.CHI.L.REV. 765, 776 (1997).

⁸¹ *Id.*

⁸² *Id.* at 769.

citizens at large.⁸³ In later writing, Rawls either changed or clarified his position. He argued that the doctrine included the discourse on the same kinds of questions by judges, government officials, candidates for public office, and their campaign managers “especially in their public oratory, party platforms, and political statements.”⁸⁴ Citizens on Rawls’s account, “fulfill their duty of civility and support the idea of public reason by doing what they can to hold public officials to it.”⁸⁵ But political discussions on issues of basic justice and constitutional essentials in the background culture, including the media and universities were not subject to the restrictions of public reason⁸⁶ whether or not they were addressed to the public at large.⁸⁷

According to Rawls, the doctrine of public reason implements a form of civic friendship,⁸⁸ an ideal of citizenship in which citizens justify fundamental arrangements in ways that others as free and equal can acknowledge as reasonable and rational.⁸⁹ Public reason is needed, argues Rawls, to secure legal legitimacy⁹⁰ and a stable society.⁹¹ In my view, however, the doctrine of public reason unnecessarily flees from politics.

The doctrine has an aesthetic symmetry. All comprehensive visions are treated alike: not of them can justify a decision on a constitutional essential or basic question without undermining legitimacy and stability. But all comprehensive visions are not alike.⁹² Suppose that a constitutional essential with respect to freedom of speech is decided with explicit resort to

⁸³ JOHN RAWLS, *POLITICAL LIBERALISM*, *supra* note 30, at 215: “[T]he ideal of public reason does hold for citizens when they engage in political advocacy in the public forum.” Indeed, he was interpreted to mean that the doctrine of public reason applied to political discussions on these issues not addressed to the public at large. See David Hollenbach, S.J., *Civil Society: Beyond the Public-Private Dichotomy*, 5 *THE RESPONSIVE COMMUNITY* 15 (Winter 1994/1995), cited in Rawls, *Public Reason*, note 80 *supra*, at 768 n.15.

⁸⁴ Rawls, *Public Reason*, *supra* note 80, at 767.

⁸⁵ *Id.* at 769.

⁸⁶ For a nuanced discussion of the varying contexts in which the limits of public reason should or should not apply, see KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASON* (1995). For a partial critique, see Steven H. Shiffrin, *Religion and Democracy*, 74 *NOTRE DAME L.J.* 1631 (1999).

⁸⁷ Rawls, *supra* note 80 at 768.

⁸⁸ *Id.* at 771.

⁸⁹ Rawls, *supra* note 30, at 217.

⁹⁰ *Id.*

⁹¹ *Id.* at 390-92.

⁹² Note on Robert Audi.

Kantian premises or a significant freedom of press issue by explicit reasoning from comprehensive utilitarian premises. Surely, such decisions would not risk instability in a country like the United States, nor is it easy to see they would be deemed illegitimate. In other words, it is unclear that one would find more problematic a decision based on Kantianism or comprehensive utilitarianism than a decision based on value weighing without resort to comprehensive views that seemed insensitive, so much so that the former would be considered illegitimate.⁹³

One's reflective intuitions might well be different if the rationale for a constitutional essential were based on theological premises, but that does not justify ruling out constitutional essentials based on other comprehensive visions. It simply demands an explanation as to why religion is special. Why is it that secular comprehensive visions do not raise legitimacy concerns, but religious comprehensive visions do? I suspect that what is really driving the doctrine of public reason is fear about the instability effects of religion and that the entire apparatus has been set up with that concern lurking in the background. At the risk of euphemism, it is fair to say that much European history supports such a concern.⁹⁴ American history from the abolitionist movement to the Progressive movement to the Civil Rights movement to the modern Religious Right, however, is a different story. The exclusion of comprehensive views has never been a part of American

⁹³ Cooperative liberals insist, however, that restrictions are necessary to achieve political consensus based on shared premises. This may be true. But this assumes a political consensus is in the cards. Political consensus among millions of citizens is a rare event. Nicholas Wolterstorff, *Why We Should Reject What Liberalism Tells Us About Speaking and Acting in Public for Religious Reasons*, in RELIGION AND CONTEMPORARY LIBERALISM 162, 174 (Paul J. Weithman, ed., 1997) ("There's no more hope that all among us who are reasonable and rational will arrive, in the way Rawls recommends, at consensus on principles of justice, than that we all, in the foreseeable future, will agree on some comprehensive philosophical or religious doctrine."); Cf. Marci A. Hamilton, *What does Religion Mean in the Public Square?*, 89 MINN. L.REV. 1153, 1157 (2005) (not clear that all important controversies can be resolved in this way). The exclusions seem designed not to achieve consensus, but to channel the character of the disagreement.

⁹⁴ Rawls refers more than once to religious wars in Europe. Perhaps I am too cynical or have too many Marxist bones in my body, but I believe that much governmental action done in the name of religion has been a cover for economic advantage. European governments may have said they fought wars in the name of one religion or another; they may have said that they colonized in the interests of educating the uncivilized and spreading Christianity. Religion may well have been a contributing factor, but it is way too fast to look to religion as the major cause of instability. And, may I say, anyone who thinks that President Bush's belief in Jesus Christ had anything to do with American entry into the Iraq war knows nothing of American politics.

history.⁹⁵ American free speech doctrine expresses what the Court has called “our profound national commitment to the principle that debate on public issues should be uninhibited robust and wide-open.”⁹⁶ There is no exception for religious speech either in law or culture. This history does not reveal the instability that supposedly warrants the exclusion of religion from public reason.⁹⁷

The same point applies to that part of the doctrine of public reason that limits criticism of opposing comprehensive doctrines.⁹⁸ At least from the vantage of Rawls’s early writing, this doctrine would limit the ability of religious liberals to criticize the comprehensive vision of religious conservatives in the public sphere. In part, the point appears to be that such criticism would not show proper respect. But any argument from respect would conflate the need to respect persons with a supposed need to respect positions.⁹⁹ A Millian can respect a Kantian while disagreeing with his comprehensive views. Moreover, the narrow version of the argument fails to recognize that a Kantian might learn from a Millian who advances her comprehensive views in the public sphere. So too Millians and Kantians might learn from Christians or Jews.¹⁰⁰ Similarly,

⁹⁵ Hamilton, *supra* note 93, at 1158 (“[T]here has never been a time in the United States when religion has not been a driving force behind public policy . . .”).

⁹⁶ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

⁹⁷ Cf. Philip L. Quinn, *Political Liberalisms and Their Exclusions of the Religious*, 69:2 PROCEEDINGS AND ADDRESSES OF THE AMERICAN PHILOSOPHICAL ASSOCIATION 35 (no dangerous conflict despite the use of religious arguments on a massive scale). We have survived with a *modus vivendi* and that is all we have needed; Robert Merrihew Adams, *Religious Ethics in a Pluralistic Society* 93, 102-07 in *PROSPECTS FOR A COMMON MORALITY* (Gene Outka & John Reeder, Jr., eds., 1993). For concerns about instability stemming from religious intolerance, see Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U.CHI. L. REV. 195, 197 (1992).

⁹⁸ See text accompanying note 81 *supra*.

⁹⁹ Gutmann and Thompson, who are committed to mutual respect and the principle of reciprocity, recognize the need to resort to general philosophical and moral considerations when mutually agreeable premises are not available to resolve disputes. AMY GUTTMAN & DENNIS THOMSON, *DEMOCRACY AND DISAGREEMENT* 76 (1998).

¹⁰⁰ As David Tracy has argued, public reason is not just about arguments; public reason is about conversation. Conversation in Tracy’s sense can take place between a citizen and a work of art or a classic in a religious tradition. The classic in a particular tradition communicates a universal message. That message is not static. As Gadamer maintains, it must be interpreted in terms of the different horizons of time and place. Just as Ralph Waldo Emerson repeatedly emphasized the extent to which the universal is to be found in the particular, so work such as the Bible may communicate a message that has force outside a particular religious tradition. Even if that is not the case on particular subjects, citizens learn more about each other if they understand what is important to them. But they can not learn about each other if they can not advance their comprehensive position in public life.

it would be hard to show that criticism of comprehensive views has been historically excluded from the public forum.

If comprehensive views have routinely been a part of the political public forum, the public reason doctrine certainly does not describe American politics. If the point of public reason theory is to design a utopia for an imaginary pluralistic society without any hope of political implementation, then claims of political infeasibility would miss the mark. But the public reason doctrine has been developed with more ambition than that. Can it be held up as a regulative ideal? The problem with this suggestion is that movement toward the ideal would be counterproductive. This conclusion also follows from the fact that arguments from comprehensive views have always been part of the public dialogue, and there is no reason to believe that will ever change. To try to take a step toward the utopian public forum by self censorship of your own comprehensive views will not produce followers from your adversaries; it will simply leave the field open to them.¹⁰¹ If the religious right is in the public forum, it needs to be attacked not because it violates the strictures of public reason, but because it embraces bad politics and bad theology.¹⁰²

Has Rawls successfully responded to these criticisms by (1) expanding the extent to which comprehensive visions may be introduced in the public forum¹⁰³ and (2) narrowing the venues in which the doctrine of public reason applies?¹⁰⁴ Allowing comprehensive visions to be freely introduced into the public forum certainly responds to the criticism that citizens can not really understand their fellow citizens without knowing where they are coming from. It also brings the

¹⁰¹ See Quinn, *supra* note 97, at 50 (only liberals would be tempted to accept the obligations of public reason).

¹⁰² After some earlier attempts to defend a middle ground position, see Michael J. Perry, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS 99-100, 139-41 (1991), this is the conclusion endorsed by Michael J. Perry, *Religious Morality and Political Choice: Further Thoughts-And Second Thoughts-On Love and Power*, 30 SAN DIEGO L.REV. 716 (1993). See also Sanford Levinson, *Religious Language and the Public Square*, 105 HARVARD L.REV. 2075, 2077 (1992)(accord); Shiffrin, *supra* note 86 (accord). For a middle ground position, see Robert Justin Lipkin, *Reconstructing the Public Square*, 124 CARDOZO L.REV. 2025 (recommending that some forms of religious argument be considered inappropriate in the public square).

¹⁰³ See text accompanying note 80.

¹⁰⁴ See text accompanying notes 84 to 87.

doctrine closer to the realities of American politics. But it does not get close enough. On the Rawls revision, the doctrines are introduced not for persuasive purposes, but merely for informative purposes. But this too is utopian and also can not serve as a regulatory ideal for the same reasons rehearsed earlier. Religious conservatives are introducing their comprehensive visions into public life for persuasive purposes, not just to tell us where they are coming from. The same is true of religious progressives.

The restriction of venues where public reason is to apply is somewhat more complicated. I would put on the utopian side the insistence that citizens enforce the doctrine of public reason in their voting. This does not happen and will not happen. Also, I very much doubt that a Kantian legislator or a utilitarian legislator would be remotely deterred from saying so in public utterances unless particular political circumstances happened to dictate otherwise. On the other hand, the Establishment Clause may well put limits on what a government legislator can say about religious purposes in some circumstances. Certainly a legislature could not say that it had religious purposes in passing an act (though it could have Kantian purposes), nor could a court responsibly live up to its oath in supporting the Constitution and give religious reasons for a decision.

On the other hand, Rawls' revised views permit opinion and will formation to take place in civil society. That formation may well be influenced by religion. If Rawls supposed that legislators are going to ignore public will because it has been formed by the introduction of religious comprehensive views, he was supposing ideal legislators who for the most part do not exist.

More significant, Rawls' revision permits criticism of comprehensive views in civil society from the print, broadcast, and blog media to the universities, but apparently prohibits such criticism by political leaders and judges. One could quibble over aspects of this, but the main point is that the retreat of Rawls here opens the field to effective criticism of comprehensive views in most aspects of the public forum. For those who think that, "Central to the idea of public

reason is that it neither criticizes nor attacks any comprehensive doctrine, religious or nonreligious . . . ,”¹⁰⁵ it seems that Rawls’ revision took the fangs out of this central aspect. In truth, the choice for Rawls was bleak. Either argue for an unrealistic utopia or for a more realistic doctrine with a scope so limited that the vision of a cooperative citizenry was seriously compromised.

It bears emphasizing, however, that religious liberals agree with Rawls that *government* may not use religious reasons in justifying legislation (for example, in whereas clauses or legislative reports) even though citizens and legislators may have been influenced by religious reasons.¹⁰⁶ Government must supply fully adequate secular reasons for its actions in order to avoid violating the Establishment Clause. This puts considerable pressure on legislators not to give religious reasons for legislation¹⁰⁷ though it need not do so for citizens and it puts no special obligation upon citizens to enforce public reason regarding legislators.

A final objection to the introduction of religious arguments in the public square is that it is futile: Religion is a “conversation stopper.”¹⁰⁸ But this claim is also politically inept. It imagines a conversation between an atheist and a religious fundamentalist who invokes the Bible. Unwittingly, it partly plays on the stereotype of an ignorant and stupid atheist who has not read the Bible and would not understand it if he did (somehow it would be “inaccessible”).¹⁰⁹ Moreover, it assumes that the fundamentalist stubbornly adheres to a particular interpretation and can not be moved by argument. I do not wish to deny that there are atheists who have not read the Bible. I would deny that they have some special inability to comprehend what they read. I do

¹⁰⁵ See text accompanying note 81 *supra*.

¹⁰⁶ I do not believe that this calls upon legislators to be deceptive. There is a difference between being deceptive and not engaging in full disclosure. Greenawalt, *supra* note 86, at 139, 165; Steven D. Smith, *Augustinian Liberal* 74 NOTRE DAME L.REV. 1673, 1683 (1999)(accord). Moreover, from at least one religious perspective, the inability to engage in full disclosure is consistent with the understood conflict between the kingdom of God and the kingdom on earth. See *id.* at 1684-89.

¹⁰⁷ This assumes that legislative history is relevant to determining the purposes of a statute.

¹⁰⁸ Richard Rorty, Religion as a Conversation-Stopper,” 3 COMMON KNOWLEDGE 1, 2 (1994).

¹⁰⁹ The inaccessibility argument posits a citizen who claims to be following the directions of an angel who appeared to him. Arguments in the public forum are rarely of this type, and if introduced in a public forum, it would not likely be effective.

not deny that stubborn, close-minded fundamentalists exist in substantial numbers. But the notion that fundamentalists or evangelicals (they are not the same) can not be persuaded on theological issues is untenable. Indeed, one of the most important changes in American politics involved persuading religious conservatives to abandon a fundamental aspect of religious doctrine.

For most of the last century, millions of conservative Protestants adhered to a strict interpretation of the doctrine of two kingdoms. Believing that the kingdom of God was not of this world, these Protestants stayed out of American politics.¹¹⁰ But Jerry Falwell and other conservative Christians argued on theological and political grounds that, properly interpreted, the Bible demanded political participation, not political quietism.¹¹¹ The face of American politics changed significantly.¹¹²

Ninety per cent of Americans believe in God.¹¹³ I would guess that the overwhelming majority of them are not theologically sophisticated. Moreover, I would argue that millions of religious people are open-minded on a broad range of subjects. A large majority of American Catholics, for example, reject some Vatican teachings,¹¹⁴ and by implication, the Vatican's move to the doublespeak position that freedom of conscience means Catholics must submit to Vatican teachings.¹¹⁵ This does not mean that Christians can be easily persuaded to become Jews or vice

¹¹⁰ ROBERT BOOTH FOWLER & ALLEN D. HERTSKE, *RELIGION AND POLITICS IN AMERICA: FAITH, CULTURE, AND STRATEGIC CHOICES* 38-39 (1995).

¹¹¹ Evangelicals were not united on this score. Bob Jones called Jerry Falwell "the most dangerous man in America." *Id.* at 39.

¹¹² Until the 1970's, the main religious lobbies in the United States were liberal. See MICHAEL CORBETT & JULIA MITCHELL CORBETT, *POLITICS AND RELIGION IN THE UNITED STATES* 97 (1999).

¹¹³ Harris Interactive, *The Religious and Other Beliefs of Americans 2003*, THE HARRIS POLL #11, Feb 11, 2003, http://www.harrisinteractive.com/harris_poll/index.asp?PID=359 (last visited August 20, 2006). 68 per cent believe in the Devil and 69 per cent believe in hell. *Id.*

¹¹⁴ ANDREW GREELEY, *THE CATHOLIC REVOLUTION: NEW WINE, OLD WINESKINS, AND THE SECOND VATICAN COUNCIL* 34-40 (2004).

¹¹⁵ Pope John Paul II in his encyclical *Veritas Splendor* stated that the magisterium "teaches the faithful specific particular precepts and requires that they consider them in conscience morally binding." PAULINUS IKECHUKWU ODOZOR, C.S.SP., *MORAL THEOLOGY IN AN AGE OF RENEWAL* 316 (2003). Although there is precedent for this view in the Catholic tradition, there is a counter tradition that makes it the right and the duty of Catholics to follow their conscience when it is contrary to the magisterium. RICHARD MCBRIEN, *CATHOLICISM* 972-75 (New ed. 1994). For exploration of the two editions, see LINDA HOGAN, *CONFRONTING THE TRUTH: CONSCIENCE IN THE CATHOLIC TRADITION* (2001); *CONSCIENCE: READINGS IN MORAL THEOLOGY* NO. 14 (Charles Curran ed., 2004). Even if the former view of conscience is accepted,

versa, but a wide variety of political issues fit in indeterminate ways in most religious frameworks. They can and do provoke dialogue between and among religious traditions. Although Richard Rorty might be conversationally stopped by religious dialogue,¹¹⁶ religious debate with political implications is a standard feature of American political life. It seems vastly counterintuitive that liberals should refuse to join that dialogue.

To be sure, for many it will seem disappointing to give up on public reason. It seems for them to assure illegitimacy. But this form of illegitimacy is dwarfed by far more serious forms of injustice. Indeed, injustice is a permanent feature of any large society. Large societies need hierarchies and those with power are often corrupt or see things in a biased way that operates to their advantage. In addition, power in one hierarchy spills over to another. Money buys political favors. Distributive injustice is rampant. Environmental exploitation to the detriment of future generations is dangerously persistent. Elites have greater access to the media, and have substantial ability to paper over substantial injustice. In very complex ways, the media's financial interest and various aspects of the American election system and its financing restrict the public agenda.

In my view, the doctrine of public reason with its precious conception of respect, its inflated worries of instability, and its narrow emphasis on a particular aspect of legitimacy is a theory at war with the needs of progressive politics. Let me put it in a less inflammatory way. In Rawlsian terms, at least two conditions must be satisfied in order to achieve legitimacy. The limits of public reason must be respected. The principles of justice must be complied with. In my view, neither condition will ever be satisfied, but progress in satisfying the principles of justice is far more important than respecting the limits of public reason. John Rawls came close to acknowledging

there are technical questions as to what counts as a teaching of the magisterium or as levels of authority within the magisterium. See generally *MAGISTERIUM AND MORALITY* (Readings in Moral Theology, No 3) (Charles E. Curran, ed., 1981).

¹¹⁶ See note 108 *supra*.

this in *Political Liberalism* when he observed that it was appropriate for the abolitionists¹¹⁷ and Martin Luther King¹¹⁸ to depart from the limits of public reason. Generously read, I think he might be understood to maintain that it was appropriate for the abolitionists and Martin Luther King not only to argue from their comprehensive position, but also against the comprehensive position of their opponents. This concession of Rawls, however, was too limited. By using the examples of slavery and segregation, he encouraged the view that one might depart from public reason in only rare instances. But the extent of injustice and the pervasive departures from public reason in the public realm should make departures from the limits of public reason appropriate whenever it would advance other principles of justice to do so.¹¹⁹ Second, Rawls argued that the arguments of abolitionists and Martin Luther King were acceptable because they would strengthen adherence to the limits of public reason in the long run.¹²⁰ This strikes me as whistling in the dark. Departures from the limits of public reason legitimize further departures from the limits of public reason. If the notion is that limits on public reason will be more understandable when we reach an otherwise just society, I adhere to my view that we will never achieve a just society.

We can do better. But the doctrine of public reason just gets in the way.

B. Religious Liberalism

Christian conservatives would have to get up very early in the morning to suggest that wars, let alone unilateral wars, ¼ of American children living in poverty, corporate materialism and power, the destruction of the environment, and the torture of human beings are consistent with biblical teachings. It is hard to get a message of war, torture, and ignoring the poor out of the

¹¹⁷ JOHN RAWLS, *POLITICAL LIBERALISM*, *supra* note 30, at 249.

¹¹⁸ *Id.* at 250.

¹¹⁹ For the claim that the exception for abolitionists and for Martin Luther King would stimulate many others to think that they are similarly excepted, see Elizabeth H. Wolgast, *The Demands of Public Reason*, 94 COLUM.L.REV. 1936, 1944 (1994).

¹²⁰ JOHN RAWLS, *POLITICAL LIBERALISM*, *supra* note 30, at 251.

Sermon on the Mount. What about religion and the state?

On the question of free exercise, religious liberals and religious conservatives share common ground. Indeed, religious liberals are closer to religious conservatives on this issue than to many on the left. *Smith*, after all was an easy case that was wrongly decided. It involved Native Americans ingesting peyote as a part of a religious ceremony. And the Court held that no religious issue was even implicated. The left with its historical concern for the plight of minorities has an easy time in opposing *Smith*. But the world of free exercise does not stop with *Smith*, and religious conservatives are more likely to weigh religion heavily than many on the secular left. In any event, religious liberals and religious conservatives are unlikely to divide over issues of free exercise on a systematic basis.

When confronting the use of religious symbols by government, however, religious liberals share common ground with secular liberals. Outside museums and the like, they believe that liberal principles condemn government's use of religious symbols. They share the view that government sponsorship of religious views unfairly discriminate.¹²¹ In the case of the Ten Commandments, as previously mentioned, such sponsorship violates equality. It does not does not show appropriate respect¹²² for agnostics, atheists, Buddhists,¹²³ and Hindus.¹²⁴ But religious liberals advance arguments that are more likely to speak to religious moderates and conservatives.

Religious liberals maintain that government sponsorship of religious symbols is bad for religion. Government sponsorship can compromise the meaning of otherwise religious symbols, do little to advance religion, and can undermine the perceived and actual integrity of religious

¹²¹ See text accompanying notes 51 to 53 *supra*.

¹²² It also discriminates between Jews, Catholics, and various Protestant denominations. See text accompanying notes 130 to 137 *infra*.

¹²³ On Buddhist life and thought in the United States, see DIANA L. ECK, A NEW RELIGIOUS AMERICA ch. 4, 142-221 (2001); ROBERT WUTHNOW, AMERICA AND THE CHALLENGES OF RELIGIOUS DIVERSITY 47-56 (2005).

¹²⁴ On Hindu life and thought in the United States, see Eck, *supra* note 123, ch.3, at 80-141; Wuthnow, *supra* note 123, at 38-47.

groups.¹²⁵ Religious liberals maintain that government ties with religion are bad for religion.

In the eyes of religious liberals, the Constitution respects these concerns. Governmental affirmations of monotheism may be acceptable under the Constitution,¹²⁶ but the protection of religion demands that further involvement of government with religion be cabined. From the perspective of the religious liberal, the question is not *whether* the Constitution favors religion (it does), but *how* the Constitution favors religion. And the Constitution largely favors religion by keeping government out of the way.

First, and foremost, religious liberals believe that government should not be a theologian. It must not tell us what God has to say about any subject. To allow this would be to permit cynical and corrupt politicians use religion for political ends while favoring some religions over others. This is one of the reasons why government may not give religious reasons for legislation. And it also speaks to the heat of the abuses involved in the displays of the Ten Commandments. For example, in some translations, the Ten Commandments state that “You shall not covet your neighbor’s . . . male or female slave . . . , nor anything else that belongs to him.”¹²⁷ The language is disturbing. It seems to approve property rights in human beings and it would seem to condemn efforts to rescue slaves from their owners. Neither in *McCreary*¹²⁸ nor *Van Orden*¹²⁹ did the government include this language in the display. But it seems deeply problematic for the state to decide what religious doctrines to endorse or not or to engage in a joint enterprise with a private party that has made the doctrinal choice.

¹²⁵ The attempt to argue that religious symbols like under God in the pledge of allegiance are not really “religious” is one example of pettifoggers at work.

¹²⁶ I refer here to practices such as placing “In God We Trust” on the currency and coins. For the argument that the constitutionality of these practices shows a constitutional commitment to monotheism, see Shiffrin, *supra* note 18. But see Colby, *supra* note 18 (disputing this view). For a thoughtful attempt to define and limit practices such as these to be a de minimis exception, see Douglas Laycock, Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty, 118 HARV. L.REV. 155, 231-238 (2004).

¹²⁷ The New American Bible 75, translating Exodus, 20: 17 (1987).

¹²⁸ 125 S.Ct. at 2728.

¹²⁹ 125 S.Ct. at 2874. The translation used in *Van Orden* referred to a neighbor’s manservant or maidservant rather than a slave.

Equally serious, when the state displays the Ten Commandments, it must decide which version to post. Christians, Jews, and Muslims do not agree on the proper translation, and the different translations can make a difference.¹³⁰ For example, the Catholic and most Protestant bibles say, “Thou [or You] shall not kill.”¹³¹ The Torah and the Lutheran Bible says, “You shall not murder.”¹³² The former version is an inspiration for Christian pacifists. In addition, the very choice of which biblical translation to pick represents a choice between religions. The different translations order the commandments differently, number the commandments differently, and, as we have seen, word the commandments differently. In *McCreary*¹³³ and *Van Orden*¹³⁴ the displays said “Thou shalt not kill,” siding with most Protestants and Catholics against Jews and Lutherans. In *McCreary*¹³⁵ and *Van Orden*¹³⁶ the wording of the Ten Commandments prohibited the making of graven images, a matter of dispute between Catholics and most Protestants that lay near the heart of the Reformation.¹³⁷

¹³⁰ Even if Christians, Jews, and Muslims were united, the displays discriminate against Hindus, Buddhists, atheists and agnostics among others.

¹³¹ Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *FORDHAM L.REV.* 1477, 1489-90 (2005).

¹³² *Id.* at 1489, 1491.

¹³³ 125 S.Ct. at 2728.

¹³⁴ 125 S.Ct. at 2874. The translation used in *Van Orden* referred to a neighbor’s manservant or maidservant rather than a slave.

¹³⁵ 125 S.Ct. at 2728.

¹³⁶ 125 S.Ct. at 2874. The translation used in *Van Orden* referred to a neighbor’s manservant or maidservant rather than a slave.

¹³⁷ The dispute over the wording of the Ten Commandments regarding graven images does not precisely line up Protestants against Catholics. On one side of the divide are Lutherans and Catholic. On the other, are Jews and the rest of the Protestant denominations including the Anglican community. DAIRMAID MACCULLOCH, *THE REFORMATION: A HISTORY* 145-46 (2003). The monument in *Van Orden* favored the Lutheran version. Finkelman, *supra* note 131, at 1486-87. In response to the arguments about the various translations, Justice Scalia argues in *McCreary*: “The sectarian dispute regarding text, if serious, is not widely known. I doubt that most religious adherents are even aware that there are competing versions with doctrinal consequences (I certainly was not). In any event, the context of the display here could not conceivably cause the viewer to believe that the government was taking sides in a doctrinal controversy.” It is hard to understand why Justice Scalia thinks the government was not taking sides when it chose the King James version of the Ten Commandments in *McCreary*. Nor is it easy to understand the relevance of the undoubtedly correct assertion that most people are unaware of the textual difference in the Ten Commandment or the doctrinal disputes associated with them. If Justice Scalia, a Catholic, walked into a Texas courthouse and a Ten Commandments display said, “Though shall not murder,” he would quickly learn that the Catholic version was not on display.

But the question in Establishment Clause law is not what Justice Scalia knows. It is what a hypothetical reasonable observer armed with all of the relevant facts would know and whether that

Apart from the discrimination, the Commandments cases contain features that no religious body should find appealing. In both cases the government parties attempted to argue that their purpose was secular.¹³⁸ In *McCreary*, one of the earlier resolutions calling for a prominent display of the Commandments acknowledged Christ as the “Prince of Ethics.”¹³⁹ The Commandments were then surrounded by other documents with a religious theme.¹⁴⁰ After a court injunction against the display, the counties surrounded the Commandments with documents such as the Bill of Rights and the Declaration of Independence.¹⁴¹ The lawyers advising the counties presumably thought this might help cover over the religious purpose.¹⁴² But the Court emphasized that the purpose test was not a “pushover for any secular claim.”¹⁴³ The idea that the Court should ignore the religious purpose so obviously present in earlier displays was cast aside: “[T]he world is not made brand new every morning.”¹⁴⁴

Religion is not served by association with lawyers’ sleights of hand. Moreover, it is not clear how a government scripted abridged version of the Ten Commandments serves a religious purpose that a group need care about. In addition, it is hard to believe that the posting of an abridged version of the Ten Commandments in a court house actually influences moral behavior. What it can do is trigger resentment in those groups excluded by the language. This too is not a religious advance.

Van Orden had most of these problems and more. The monument in that case had been

knowledge would inform the observer that he or she was an outsider or an insider. For establishing purpose, this test makes sense. Suppose the Kentucky counties’ drew lots and picked the relevant text out of a hat. This would tell the reasonable observer that the counties were not endorsing one text over another. On the other hand, attributing knowledge an ordinary person is unlikely to have to a hypothetical observer is not appropriate if one is trying to determine the effects of a religious display. People entering courthouses with Ten Commandment displays in the absence of recent publicity are likely to know nothing about how the Commandments got there. The reasonable Jew will reasonably conclude that the Torah is not being employed because of the views of a religious majority reinforcing his or her outsider status.

¹³⁸ *McCreary*, 125 U.S. at 2732 (referring to counties’ claim that the purpose of the displays was secular); *Van Orden*, 125 U.S. at 2870 (referring to briefs of the United States and the State of Texas).

¹³⁹ 125 S.Ct. at 2739.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 2731.

¹⁴² *Id.* at 2739-40.

¹⁴³ *Id.* at 2736.

¹⁴⁴ *Id.*

donated to the state more than forty years earlier by the Fraternal Order of Eagles.¹⁴⁵ It contained the text of the Ten Commandments with two Stars of David below it and the superimposed Greek letters Chi and Rho which represent Christ¹⁴⁶ together with a statement indicating that the monument had been donated to the state by the Eagles.¹⁴⁷

Judge E.J. Ruegamer, a Minnesota juvenile court judge and Chairman of the Eagles National Commission on Youth Guidance, initially came up with the idea of distributing paper copies of the Ten Commandments after encountering a juvenile offender who had never heard of them.¹⁴⁸ The Eagles themselves required a belief in God as a condition of membership.¹⁴⁹ Cecil B. DeMille, who at the time was filming the movie called the Ten Commandments, heard of this and joined with the Eagles to produce the granite monolith in front of the Texas capital and others elsewhere.¹⁵⁰

Van Orden seems to present an unsatisfactory mix of religious and secular motives. The Eagles wished to combat juvenile delinquency by using the state to participate in their program of religious evangelism.¹⁵¹ Cecil B. DeMille's motives may have been exactly the same, but it surely occurred to this astute businessman and showman, if it were not his primary motivation, that promoting memorials to the Ten Commandments promoted his film. It must have also occurred to the politicians who approved the memorial that the use of religious symbols might improve their political appeal. It can not be good for religion for its symbols to be used instrumentally for commercial and political gain.¹⁵² Even if crass motivation were not present, however, religions

¹⁴⁵ 125 S.Ct. at 2858.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ 125 S.Ct. at 2877 (Stevens, J., dissenting).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ The religious purpose of the Eagles screams out from their presentation of the Ten Commandments. The words "I Am the Lord Thy God," are in substantially larger print than the rest of the displayed text. 125 S.Ct. at 2891 (Appendix to Stevens, J., dissenting opinion). The Commandments were referred to by the Eagles as the "foundations of our relationship with our Creator." 125 S.Ct. at 2878 (Stevens, J., dissenting).

¹⁵² For the suggestion that commercial motivation should count in favor of the display, see Richard A. Posner, *Foreword: A Political Court*, 119 Harv. L.Rev. 31, 101 n.216 (2004).

that employ the state for evangelistic purposes risk dependency and backlash.¹⁵³

These are precisely the kinds of concerns that give religious liberals pause about financial aid to religious organizations. Pages of European experience are disturbing in this regard. The Catholic Church worked hard to secure privileges and funding in southern European countries. But it is hard to believe that the Catholic Church, for example, was helped by its ties with corrupt Kings, with Vichy France, Franco, Salazar, and Mussolini. This not only interfered with the kind of witnessing that was called for.¹⁵⁴ It among other things put the Church on the wrong side of history in the eyes of millions of Europeans.

There is a special appeal to conservatives in these kinds of arguments. An important strand of much conservative ideology has been to argue for freedom and against powerful government.

¹⁵³ Although Justice Breyer joined the majority's opinion in *McCreary*, he thought the display in *Van Orden* met constitutional standards. Justice Breyer realized that the display communicated a religious message, but he thought a predominantly secular message predominated. He was impressed by the placement of the monument in a large park containing 17 monuments and 21 historical markers, all of them secular. He concluded that the setting contributed to the view that the message was primarily about a historical effort to tie the law to morals. But see Chemerinsky, *supra* note 74, at 11 (the closest other monuments were 30 feet away and blocked by hedges). The fact that a group (Breyer characterized it as primarily secular) contributed the monument to the state further distanced the state from the religious aspects of the message in his view. The forty year history of the monument without litigation suggested to him no serious objections had been taken. Any other conclusion in this case Justice Breyer argued would show hostility toward religion and lead to the kind of divisiveness the Establishment Clause was designed to forestall.

This is not nonsense, but it is ultimately unpersuasive. The text of the Ten Commandments emphasized the religious aspects. The lettering of "I am the Lord thy God . . ." was substantially larger than the parts of the commandments compatible with secular morals. No theme tied the monuments together. The other monuments could not be seen from the area in front of the Ten Commandments. The memorial was sectarian. The "primarily secular" Eagles organization designed the memorial to combat juvenile delinquency (not as a history project) and "recognized that there can be no better . . . program . . . than the laws handed down by God himself to Moses more than 3000 years ago . . . They are a fundamental part of our lives . . . the foundation of our relationship with our Creator." The forty year history is not surprising since Establishment Clause claims are difficult (and would have been especially difficult forty years ago) and not financially rewarding. It provides no warrant for the proposition that the memorial was experienced by visitors as consistent with religious equality. As to hostility to religion and divisiveness, Justice Breyer does not explain how an emphasis on hostility or divisiveness can distinguish the Kentucky cases from the Texas case, how divisiveness can be avoided by any outcome, how judges are qualified to determine divisiveness in individual cases, or how it is consistent with their constitutional duties to decide such cases on the basis of such determinations.

¹⁵⁴ NICHOLAS ATKINS & FRANK TALLETT, *PRIESTS, PRELATES AND PEOPLE: A HISTORY OF EUROPEAN CATHOLICISM SINCE 1750*, at 324 (2003) (explaining that, in return for benefits from the state, the Church preached submission to the temporal authority though it practiced extensive charitable work).

Religious conservatives ordinarily are suspicious of government in a broad swath of areas. This is consistent with their Augustinian distrust of human beings.¹⁵⁵ But they seem comfortable with government promoting religion. If conservatives can not trust government to handle welfare checks or education or housing, why would they trust government with the promotion of religion? It is doubtful that conservatives can justify being so distrustful of government in one set of cases, but not the other. Particularly from a biblical perspective, it would be difficult for religious conservatives to justify their selective trust and distrust of government.

The role that religion should play regarding the state is much debated within Catholic, Protestant, Jewish, Muslim traditions among others. To approach the question from a purely secular perspective is to miss much of intellectual interest and of political importance. Secular liberals can argue that government involvement with the state is bad for religion as well (indeed, John Rawls makes this argument),¹⁵⁶ but the question of what is good or bad for religion ultimately drives one toward theology which is what secular liberals hope to avoid. My claim is that it is bad politics to avoid it.

VI. Conclusion

In the aftermath of the 2004 Presidential election,¹⁵⁷ Democrats worried that the language of secular liberalism was ill designed to meet the religious sensibilities of the nation.¹⁵⁸ But the long

¹⁵⁵ MacCulloch, *supra* note 137, at 107, 109 (referring to Augustine's view of the worthlessness of humanity).

¹⁵⁶ JOHN RAWLS, POLITICAL LIBERALISM, *supra* note 80, at 795-97.

¹⁵⁷ For an excellent brief review of the data involving the role of Christian conservatives in the 2004 Presidential election, see Mark J. Rozell & Debasree Das Gupta, "THE VALUES VOTE"? MORAL ISSUES AND THE 2004 ELECTIONS, IN THE VALUES CAMPAIGN: THE CHRISTIAN RIGHT AND THE 2004 ELECTIONS (John C. Green, Mark J. Rozell, & Clyde Wilcox, eds. 2006).

¹⁵⁸ Consider Bruce Ledewitz, *Up Against the Wall of Separation: The Question of American Religious Democracy*, 14 WM & MARY BILL OF RIGHTS J. 555 (2005): "The political importance of religion in the 2004 election lay not in the mere existence of those voting patterns, for patterns like them had existed before. The change lay in the intention of the Bush campaign to win the Presidential election by using these election patterns – an apparently successful strategy." Whether the intention was unique – I doubt it – the public manifestation of that intention seemed to be a new development in modern Presidential campaigning. Despite the intent of Democratic politicians to be more open to religion, they continue to fare

term political solution is not simply to appear religious to voters¹⁵⁹ or even to emphasize issues that appeal to religious voters. The long term struggle must go beyond the sound bytes of election campaigns and move to the communicative interactions of civil society. Even the explicit politics of church/state questions are most crucial at the local level. Questions about the relationship between church and state are not simply legal questions. For there to be a case, government (typically local government) has to do something that gives rise to a case. Whether government should do something that might give rise to an Establishment Clause issue is part of our daily local political struggles as religious conservatives press for a larger voice in the public square. In opposing these pressures, it is politically more effective to argue that conservative victories are bad for religion than to argue that they are bad for atheists, agnostics, or non-theistic religions.

Even if secular liberals have the best political theory, and even if they believe religion is superstition, secular liberals need to stop defining those who are religious as the Other. They need to stop supposing that religion is synonymous with conservative.¹⁶⁰ It is long past time to engage the theology of the religious right because bad theology leads to bad politics.

badly in polls on this score. Only 29 per cent of Americans polled in August 2005 believed that the Democratic Party was friendly to religion. At the same time 45 per cent of Americans thought religious conservatives had too much power in the Republican Party. The Pew Research Center for the People and the Press, *Religion A Strength And Weakness For Both Parties* (August 30, 2005) (last visited August 21, 2006).

¹⁵⁹ David Brooks, *A Matter of Faith*, at A19 (June 22, 2004)(Americans want to be able to see their leaders' faith).

¹⁶⁰ For a brief survey of the religious left, see John A. Coleman, *Left Behind: Who and Where is the Religious Left in the United States*, 194 AMERICA 11 (April 24-May 1, 2006).