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# Concerning Secularists' Proposed Restrictions on the Role of Religion in American Politics

*Richard H. Jones\**

What is the proper role of religious convictions in deciding political issues in America? Recent answers to this question run the gamut from the complete denial of any role of religious faith in justifying, and perhaps even motivating, laws or other public policies (the secularists, such as Bruce Ackerman, Thomas Nagel, and Robert Audi)<sup>1</sup> to permitting only a certain type of religious faith to enter our political arena (Michael Perry)<sup>2</sup> to suggesting that religious adherents should voluntarily bracket their religious commitments in certain instances (Kent Greenawalt).<sup>3</sup>

In this article, I will defend the extreme position, usually attacked today in academic circles in our society: that of a full-blooded role for *all* religious commitments as legitimate sources of justification and motivation of the position one takes on any public issue. The only limitation (with minor qualifications) that we should recognize on what can be

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1 BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259 (1989) [hereinafter *The Separation of Church and State*], *Religion and the Ethics of Political Participation*, 100 ETHICS 386 (1990), and *Religious Commitment and Secular Reason: A Reply to Professor Weithman*, 20 PHIL. & PUB. AFF. 66 (1991) [hereinafter *Religious Commitment*]; Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215, 218-34 (1987).

2 MICHAEL J. PERRY, *LOVE AND POWER* (1991).

3 KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988) [hereinafter *RELIGIOUS CONVICTIONS*]; *Religious Convictions and Political Choice: Some Further Thoughts*, 39 DEPAUL L. REV. 1019 (1990) [hereinafter *Some Further Thoughts*]. That Greenawalt would accept a role for religious convictions in certain instances and his discussion of the Establishment Clause separate him from the secularists on important points.

advocated in politics in our society—and it is an important one—is imposed by the Establishment Clause.

This article sets forth the argument for this position in four parts. Part I explores certain points about what constitutes religion relevant to this issue. Part II advances an interpretation of the Establishment Clause as it is applicable to politics. Part III discusses the role of reliance on religious commitments within the political process in a society based upon the Establishment Clause, and part IV points out certain problems with secularists' visions for our society.<sup>4</sup>

## I. RELIGION

### A. *Religion as a Way of Life*

Those who favor a strict separation of "church and state" most often characterize religion as, in the words of Thomas Jefferson, a private "matter which lies solely between man and his God."<sup>5</sup> As the accommodationist Chief Justice Warren Burger stated, "[t]he Constitution decrees that religion must be a private matter for the individual, the family, and the institution of private choice."<sup>6</sup> Secularists (i.e., those who would deny religion any legitimate role in political decision-making or other public matters) take this view as ruling out the legitimacy of religion influencing civic affairs through the actions of private individuals acting upon their private religious convictions. Religion is reduced to a private matter for individuals, families, or private groups and of no relevance for issues that govern society as a whole.

This view, however, misses the most important point about the role of religion in American politics: the way in which religion is *comprehensive*. Needless to say, not everyone who claims to be religious takes religion seriously; many merely identify with the religion of their youth or attend religious

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4 Whether a distinction should be drawn between private citizens and public officials on this issue will not be addressed here. See *Some Further Thoughts*, *supra* note 3, at 1035-36.

5 *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (citing Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802)). Separationist characterizations of religion (such as those of James Madison) are most often cited in discussions of the Framers of the Establishment Clause; but these do not necessarily represent the views of all who revised and ratified the First Amendment. LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 54-55 (1986).

6 *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

services for an hour on weekends without religious faith affecting the rest of their lives. But the problem of religion in politics centers on those people for whom religious faith is not reducible to the acceptance of a set of propositions having no bearing outside one's intellectual life, or to an isolated set of personal practices, or a set of customary social practices that one does regardless of what one believes. Instead, religious faith for them is commitment to an encompassing *way of life* whose logical skeleton consists of (1) fundamental beliefs about the nature of reality and a person and history, (2) guides for action (codes of conduct, norms, or ideals), and (3) values and goals, all oriented around what Paul Tillich referred to as an "ultimate concern."<sup>7</sup> Not all religious ways of life successfully integrate these elements into a systematic, consistent whole, but all these elements are present in them. One's faith provides the framework within which one leads one's life and is expressed, among other ways, in one's actions towards others.

Religious persons, like the nonreligious, search for a meaning and order which will bring coherence to the disparate elements of their lives.<sup>8</sup> What separates religious persons from the nonreligious is that the former find some purpose or other meaning to life, or a way to overcome suffering, that is not self-created, individually or collectively. In other words, while it is certainly possible to have an ultimate concern or to find supreme meaning in what we are doing without being religious, one cannot be *religious* and think that the significance of living is only supplied by ourselves. For the religious, the meaning instead comes from a source which, by definition, must transcend that to which it gives meaning. And thus, religious people claim that the meaning they find in life is not subjective but is in some sense grounded in a reality encompassing us all. This reality in our country is usually conceived of in various theistic ways, but nontheistic realities are also possible sources of religious meaning. All dimensions of life are interpreted in light of this transcendent reality. The ultimate meaning and significance of any activity, including politics, is understood in terms of this source.

Traditionally, religions provide a vision of life in which the most comprehensive ideas about the structure of reality (the

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7 PAUL TILLICH, *THEOLOGY OF CULTURE*, 7-8 (1959).

8 PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* 124-25 (1967).

worldview) are such that the most general values and norms (the ethos) of the way of life are appropriate.<sup>9</sup> The ethos, or "style of doing things" (e.g., nonviolence or compassion), gives a general orientation; even it does not determine one's course of action in any actual, complex situation. Basic symbols, such as "God," the Indian concept of "*dharma*," and the Taoist "*tao*," are not disinterested, descriptive terms depicting reality but instead integrate factual and normative components into one order. Thus, basic values and the way of life as a whole are grounded in the very structure of reality. In this way, the predominant religion in a culture legitimizes the society's moral order—the religion renders the social order acceptable to its members and is therefore justified.<sup>10</sup>

In sum, religion creates a framework providing meaning for a person's life. It is therefore unrealistic to hope to relegate religious faith to the realm of purely private opinion which should have no consequences for one's life as a whole or for one's public action in particular.<sup>11</sup> Not only does religion govern more than the limited areas in the life of the religious, it is irreducible to something exclusively personal or private. Instead, religion is comprehensive in the sense that all aspects of one's life are related in one degree or another to this fundamental framework.

### *B. The Social and Political Expression of Religion*

The social and political expression of a religious person's life cannot be left outside of this fundamental and comprehensive framework. Religion is never solely about life after death, or similar "other-worldly" matters, or any strictly private matter—it concerns the whole of our lives here and now. As part of this, actions toward other people are an essential part of religious ways of life, whether these actions are expressed on a one-to-one basis or on a society-wide basis.<sup>12</sup> As Tillich said,

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9 CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 7, 89-90, 127 (1973).

10 ROBERT N. BELLAH, *BEYOND BELIEF: ESSAYS OF RELIGION IN A POST-TRADITIONAL WORLD* 21 (1970); BERGER, *supra* note 8, at 33.

11 Religion is very much a social and public phenomenon. Each person's religious beliefs, values and practices may be his or her own variation or interpretation, but the components of one's religious faith are not individual to the exclusion of any role for a religious community and a continuing tradition. Religion is seldom private in the sense of being totally individual. The communal and historical dimensions of faith are paramount.

12 Like many liberal dichotomies, the political distinction between "public"

“an ultimate concern must express itself socially. It cannot leave out any sphere of human existence.”<sup>13</sup> Even for religious communities which withdraw from society at large, issues of governing remain.

In most Jewish and Christian traditions, God is viewed as concerned with human history, and it is the faithful's obligation to follow God's will on earth. Active participation in most public aspects of life becomes an obligation. One consequence of this is that there is no absolute dichotomy between religion and politics—politics of course is open to the nonreligious, and religion encompasses more than politics, but concern with social and political issues is one dimension of a religious way of life.<sup>14</sup> In short, participation in public life is part of the traditional religious life.

Thus, the realms of God and Caesar are not totally distinct. Indeed, in many cultures and eras, church and state exist only within one order. This brings up another misapplied dichotomy—that between the *religious* and the *secular*. Secularization is related to a decline in the influence of religion, although “secular” is a term, like “religion,” for which there is no established meaning or agreed-upon use.<sup>15</sup> American politics was “secularized” by the Establishment Clause in that our Constitution precludes religious authorities (texts, institutions, traditions, experiences, and persons) from being the exclusive source for justifying political positions—the unified church/state order was replaced by a “new order for the ages” in this regard. Thus, religion's traditional role in legitimizing our society was undercut.

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and “private” life has been called into question. See Duncan Kennedy, *The Stages of Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

13 TILLICH, *supra* note 7, at 178.

14 “Social” and “political” cannot be absolutely distinguished. Politics may be construed broadly to include any issues related to power and economics, or restricted narrowly to problems of governing or managing a society. But both social and political issues involve concern for how people live together and thus cannot be completely separated. Similarly, morality, which involves how we act toward others and what weight we give to their well-being, may be expressed in individual interactions or on a society-wide scale. Thus, morality and politics do not operate in totally distinct realms either.

15 See Larry Shiner, *The Concept of Secularization in Empirical Research*, 6 J. SCI. STUD. RELIGION 207 (1967) (covering the history of the term “secularization,” identifying six different senses of the term, and arguing that the term should be dropped from empirical research because of the ambiguity in its use or explicitly recognized as covering more than one idea).

But some theorists on the role of religion in American politics have been misled by the concept "secular" to conclude that there is a dichotomy of a religious realm and a secular one. "Secular" for these theorists comes to mean "nonreligious" plain and simple—something totally distinct from religion. In particular, our political realm must be *nonreligious* or *antireligious* in the strong sense that religion can play no role in politics. Religion is thereby reduced from being the defining characteristic of a society to being totally privatized, i.e., having no direct or indirect public role. However, if "secular" is taken to mean "barren of religion" or "hostile to religion," then politics in America is not *secular* and was never meant to be. Instead, as will be discussed below,<sup>16</sup> a better concept for describing the public life under our Establishment Clause is that of *neutrality* between religion and nonreligion. The religious have rights equal to the nonreligious in the public sphere (within the limits set by the Establishment Clause). Under our Constitution, government cannot marginalize or exclude religion from public life.

The religious often take stands on "religious" issues (such as school prayer), but they also take stands on issues which secularists consider "secular" (such as abortion and slavery). Religious stands on political issues seem out of place to secularists because they wrongly equate religion with other-worldly concerns or private conduct. Secularists apparently would permit the religious to *believe* whatever they want but not to *act* on those beliefs; they would reduce religion to merely ideas, not the framework of one's entire life. However, if secularists realized the comprehensive nature of religion, they would see that taking a stand on worldly issues is actually integral to many religious ways of life—political activity is an integral part of such ways of life, not merely an incidental consequence of belief which can be eliminated without affecting the way of life itself. Not all religious ways of life are concerned directly with politics, if politics is narrowly conceived as activities relating to the structures and processes of governing society. Nevertheless, social issues and politics are never totally distinguishable, and social issues of concern to many religious persons are part of the political realm. For example, to the religious, concerns for

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16 See discussion *infra* part II.A.1.

the poor and for justice are at the same time worldly and religious.

However, while religion has a social/political dimension, not all religious people—even those whose faith shapes their lives deeply—feel compelled, when acting upon social issues on a society-wide scale, to impose on *nonbelievers* what their religious faith dictates. For example, Governor Mario Cuomo personally accepts the Catholic prohibition against abortion but does not feel that abortion should be prohibited for all people.<sup>17</sup> This does not mean he is insincere or does not take his religious faith seriously, but merely that in making political decisions affecting all people, his religious code of conduct is not his only consideration.

There is no contradiction in accepting certain principles as governing one's own personal conduct (and that of those who also voluntarily adopt them) and yet not requiring everyone to do likewise. For example, the issue is not what *you* would do if you became pregnant by rape but the separate issue of what you would require or allow *other* rape victims to do. Even some Evangelical Christians choose a non-imposition option because of the principles of religious liberty and tolerance.<sup>18</sup>

Other religious people are more theocratic and weigh competing considerations very differently. In a theocracy, the religious authority is seen as answering the basic political questions, and thus no political function exists for the citizenry except to enact what the religious authority states is to be the law. Church and state are thereby integrated: the state authority is used to enforce conformity to a particular religious code on everyone. The theocrats' objective is to require all people to follow their code of conduct by making the public laws mirror what their religion demands of everyone's actions. The laws enacted in the state become those of a particular religious group, and that group's religious precepts are thereby imposed upon nonbelievers regardless of their beliefs.<sup>19</sup>

17 Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POLY 13 (1984). Justice William Brennan is another example of a public official who was both a staunch separationist and an observant Roman Catholic.

18 See Samuel W. Calhoun, *Conviction Without Imposition: A Response to Professor Greenawalt*, 9 J.L. & RELIGION 292-93 (1992).

19 For the distinction between imposition of a religious position and having a secular (nontheocratic) purpose or reason for a religious position, see discussion *infra* part II.B.

Secularists misconstrue the nature of religion in thinking that the logic of religious faith dictates that religious persons must try to impose their principles on the population as a whole. That is, if a group believes it has discovered the ultimate truth, its members have no choice but to try to require it of everyone.<sup>20</sup> In short, to be religious is to be theocratic. But secularists must realize that there is no one "religious" position on the issue of governing. In addition to Governor Cuomo's example, the fact that some religious groups (e.g., the Amish) withdraw from society at large demonstrates this point. Religious precepts, while comprehensive and compelling for the faithful, are not always felt to be required of everyone else in society, regardless of their faith. That is, the religious precepts of a community of believers govern their *own* lives and actions toward others.<sup>21</sup> Politics involves another issue: how people *outside* one's religious community should themselves act. A decision has to be made by the religious as to how their faith relates to that issue. As indicated above, the decision is not a question of how sincerely or seriously one holds one's faith but what to require of people outside one's faith. A political judgment, made within the framework of one's faith, is still needed. One option is neither to attempt to keep one's religious precepts strictly private nor to impose them by force of law on society as a whole, but to have one's faith inform one's political decisions as to how other people should act. One's faith in such circumstances would be a central consideration but not the only factor in determining what political position one chooses.

In sum, secularists in their characterizations of religion miss an essential and separate issue in the area of governing: how should the religious deal with the conduct of people *out-*

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20 E.g., Stephen Gey, *Why Is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 176 (1990).

21 People may feel alienated if a political position they oppose wins majority support; they may feel the laws are being imposed upon them. If the religious feel that God's law supersedes the nation's laws, and therefore they do not have to obey the latter, the issue is not a theocracy but a Free Exercise exemption to the applicable laws. The Supreme Court in *Employment Div. v. Smith*, 472 U.S. 872, *reh'g denied*, 496 U.S. 913 (1990), came close to eviscerating the Free Exercise Clause in holding that the religious could not claim an exemption, no matter how compelling their religious reasons, to any neutral and generally applicable law. The Religious Freedom Restoration Act of 1993 reinstates the "compelling state interest" requirement for enforcing a law when a Free Exercise exemption is claimed.

*side* their faith? To this question, there is no one "religious" answer.<sup>22</sup>

### C. *The Concreteness of Religions*

Michael Perry has made the nature of religion an issue in the question of the role of religion in American politics. Perry's vision of "ecumenical politics" would permit only a certain type of conviction to be relied upon in political discussions. Perry would exclude "sectarian" religious beliefs, i.e., those beliefs which are considered "epistemologically privileged" and not intelligible or accessible to people who do not share those beliefs.<sup>23</sup> To this end, he distinguishes between "religious faith" and "religious beliefs."<sup>24</sup> Religious *faith* is characterized as "trust in the ultimate meaningfulness of life—that is, the ultimate meaningfulness of the world and of one's own life, one's own being, as part of and related to, as embedded in, the world."<sup>25</sup> Contrasted with this is religious *belief*: belief is "religious faith mediated by—understood and expressed in the medium of—words, whether concretely, in stories, or abstractly, in concepts and ideas."<sup>26</sup> In this way, an "unknowable reality" becomes an object of belief as the specific source of meaning for a religious person.

Perry would permit into political discussions only those persons who are willing to subject their religious commitments to a "self-critical rationality."<sup>27</sup> What remains after this exercise is faith, as distinct from the particular beliefs of a specific religious tradition. Persons of religious faith, in contrast to those of religious belief, can share "commitment to certain authoritative political-moral premises" and a pluralistic form of government.<sup>28</sup>

The problem with this proposal is basic: *all* religious commitment is "sectarian"—there is no generic religious *faith* disembodied from specific religious *beliefs*. Perry's characterization of religious faith may be useful as a *definition* of religion, but it

22 Secularists' embarrassing caricatures of religion (e.g., ACKERMAN, *supra* note 1, at 40) reveal a lack of understanding of the subject under study that probably would not be tolerated for any other subject in academia.

23 PERRY, *supra* note 2, at 106.

24 *Id.* at 100-01.

25 *Id.* at 73.

26 *Id.*

27 *Id.* at 74, 103.

28 *Id.* at 125.

does not follow that there is any abstract, beliefless faith that is the substance to which all truly religious persons should actually adhere. To use an analogy, consider language. No one speaks *language* in the abstract. Instead, we speak English or some other specific language—there is no generic “language” but only a collection of activities that share a common feature or have family resemblances among themselves that we call languages.<sup>29</sup>

The same is true of religion: no one has a contentless faith in some generic Ultimate Reality or a commitment to the “ultimate meaningfulness of life” in the abstract—all religious persons have specific beliefs.<sup>30</sup> These beliefs cannot be treated as mere vehicles to an abstract, unknowable reality any more than specific languages can be treated as mere attempts to speak language in the abstract. Beliefs and values are the *substance* of a person’s way of life, determining how one sees the world and treats others. Concrete beliefs and values of a total way of life, not an abstract category (“faith”) within which all such ways of life fall, provide meaning to one’s life. To say that the religious should not become too attached to their beliefs is to miss entirely the significance of such beliefs within a way of life.

Similarly, different concepts of God and nontheistic transcendent realities may all fall within the category theorists create called “Ultimate Reality.” But that does not mean any religious person has faith in an abstract category rather than some concrete, highly-delineated reality.<sup>31</sup> Belief in God is not a matter of faith (in Perry’s sense of the term) but is as sectarian as belief in Jesus as the Christ or in the sacredness of the *Qur’an*. All versions of theism contrast, for example, with the

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29 George Santayana made the inverse point: “Any attempt to speak, without speaking some particular language, is just as hopeless as the attempt to have a religion that shall be no religion in particular.” REASON IN RELIGION 15 (1906).

30 “Believe” in the context of religion should not be contrasted with “know” to suggest an element of doubt or uncertainty. Instead, “believe” denotes a declaration of one’s faith (e.g., to “believe in” God means more than an intellectual assent to the proposition that there is a God), and one’s “beliefs” are the intellectual content entailed by the commitment to a way of life.

31 Perry may properly cite an historian of religions, Wilfred Cantwell Smith, for some support. Smith divides religion into two components: “personal faith,” which all religious people share, and the differing “cumulative traditions” which are the vehicles for faith. See generally WILFRED C. SMITH, THE MEANING AND END OF RELIGION (1963) and FAITH AND BELIEF (1979). However, while Smith’s work is highly influential, he does not have many followers on this point among historians of religions.

*Brahman/Atman* of Advaita Vedanta in that the religious reality in each of them is conceived as a personal, loving source. To reduce religion to some "faithness," devoid of any belief and value content, about the nature of reality, a person, and history is impossible. Religion is not an intellectual exercise; it is a way of life, and belief in a concrete reality informs that way of life. Perhaps some intellectuals, such as John Dewey in *A Common Faith*, with his vague sense of transcendence, might satisfy Perry (even though that conception is itself specific and different from traditional religious realities).<sup>32</sup> But all religious persons who adhere to more than a merely ethical "religion" have no such abstractions at the center of their ways of life.

No study of religious persons could reveal them to be anything but "sectarian." Thus, despite what Perry says, *all* religious discourse would have to be excluded from public political discussions if his proposal were accepted. That such a position conflicts with the Establishment Clause is the next topic.

## II. THE ESTABLISHMENT CLAUSE

Central to the position I am defending is that the Establishment Clause encapsulates the vision of what public role religion should play in our society. However, the constitutional requirement that "Congress shall make no law respecting an establishment of religion"<sup>33</sup> is subject to very different interpretations. Therefore, I must clarify the interpretation of the clause advocated here as it applies to the issue of religion in politics.

### A. *Presuppositions of the Establishment Clause*

That there is no neutral interpretation of the anti-establishment requirement is evidenced by the dispute over the intent of the Framers between the "separationists" (who adhere, in different degrees, to a strict separation of church and state) and the "accommodationists" (who would permit varying degrees of public accommodation of religion, short of an established church).<sup>34</sup> However, the clause in its

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32 JOHN DEWEY, *A COMMON FAITH* 29-57 (1934).

33 U.S. CONST. amend. I. The Establishment Clause became applicable to the states by operation of the Fourteenth Amendment in *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

34 For a study of the tension between the two approaches see Richard H.

historical context appears to presuppose three fundamental premises which favor a generally separationist interpretation: neutrality between religions, the separation of the institutions of church and state, and a favorable view of a role for religion in American public life.

*1. The government must be officially neutral with regard to religion*

First, the Framers lived in a religious society which may have had a de facto Protestant establishment, but the Establishment Clause they created envisions a society in which the government must be officially *neutral* between religions.<sup>35</sup> No religion is to be privileged, and thus our society is religiously pluralistic in the eyes of the law. The Supreme Court has articulated this principle to mean that under the Establishment Clause the government cannot establish an official church, and in addition, cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another."<sup>36</sup> Thus, "government may not promote or affiliate itself with any religious doctrine or organization."<sup>37</sup> This principle does not mean government must take a hostile, anti-religious stance; rather, the

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Jones, *Accommodationist and Separationist Ideals in Supreme Court Establishment Clause Decisions*, 28 J. CHURCH & ST. 193 (1986). Political theorists may not be interested in what the Framers intended, arguing that the role of religion in politics has now changed. But the Framers' intent is what courts purport to look at in their decisions.

35 *E.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). Neutrality itself is open to separationist and accommodationist interpretations. See Jones, *supra* note 34, at 204-06. The Supreme Court has made the controversial expansion of this neutrality principle to include not aiding religion over nonreligion. *Everson*, 330 U.S. at 15. It may be argued that the Establishment Clause permits favoring religion over nonreligion. See Richard H. Jones, "In God We Trust" and the Establishment Clause, 31 J. CHURCH & ST. 411-16 (1989). Nonreligion in the form of atheism (i.e., the denial of any kind of God) simply did not exist in America at the time the Constitution was framed. JAMES TURNER, *WITHOUT GOD, WITHOUT CREED* 44 (1985). Therefore, the Framers in all likelihood were not considering the relation of religion and nonreligion. However, it can also be argued that since nonreligion is an option today that the Establishment Clause has to treat equally with the religious those for whom religious questions hold no significance and those who are anti-religious, since they all compete on the same level as ways of life. That is, the Constitution cannot favor religious ways of life over nonreligious ones, and so neutrality must be maintained among all comprehensive views and the lack of any.

36 *Everson*, 330 U.S. at 15. This principle has been affirmed as recently as the last Term. *Lee v. Weisman*, 112 S. Ct. 2649, 2661 (1992).

37 *County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989).

government can neither advance nor hinder the cause of religion.<sup>38</sup> In short, our government "has no authority whatsoever in religious matters."<sup>39</sup>

This neutrality, however, means that the First Amendment is *not* neutral to all types of religion. The Framers' position entails a value judgment as to the nature of our society: our society is to be pluralistic, not theocratic. Therefore, the Establishment Clause will conflict with those religious ways of life that advocate a theocratic society. In a theocracy, the government reflects one set of religious beliefs and values—the country's laws will be "God's laws," or our country will be declared to be a "Christian nation" (or the equivalent for another tradition).<sup>40</sup> But in adopting the Establishment Clause, the Framers denied that the government would advocate one revelation or one religious way of life as privileged. Even if we could somehow determine one religious tradition to be the "true religion," we have nevertheless chosen to structure our country so as not to live in a theocracy. In the words of Justice Felix Frankfurter, this clause withdraws "from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief."<sup>41</sup>

All religious advocacy in our system becomes a matter exclusively for private parties. This does not mean, however, that religion is thereby relegated to the sphere of the purely private, but only that, unlike in a theocracy, no religion is to be proclaimed or otherwise endorsed by the government as the true religion or denounced as false. Thus, America is not a Christian nation *de jure*, no matter what the religion of the majority of the populace, and attempts to translate religious values into public policy will be limited by the requirements of the Establishment Clause.<sup>42</sup>

38 That this clause also protects religion from intervention by the government is often overlooked. As the Supreme Court recently said: "The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Weisman*, 112 S. Ct. at 2656.

39 THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 215 (1986).

40 See discussion *supra* part I.B.

41 *McGowan v. Maryland*, 366 U.S. 420 at 465-66 (1961).

42 The need for a nontheocratic purpose or justification (discussed *infra* in part II.B) is particularly great since there is a dominant *de facto* religious majority

This neutrality is often labelled "secularity," but that label is deceptive. The problem once again is what exactly "secular" means. The Establishment Clause forbids governmental hostility toward religion.<sup>43</sup> The Supreme Court's comment about a "secular state" reflects this: "A secular state, it must be remembered, is not the same as an atheistic or anti-religious state. A secular state establishes neither atheism nor religion as its official creed."<sup>44</sup> Thus, it is more accurate to refer to a state under the Establishment Clause as *pluralistic* or *neutral* rather than *secular*. For the issue at hand, the most important consequence of this is that, as far as the government is concerned, the political arena is pluralistic, not free from religion.

## 2. *Separation of the institutions of church and state*

The second presupposition relates to the first. The First Amendment neither defines the phrase "respecting an establishment" nor what constitutes a "religion." It does not use the words "church" and "state," a dichotomy introduced into our jurisprudence later by Thomas Jefferson.<sup>45</sup> However, despite the clause's broad language, most scholars agree that the Framers' concern was with taxes and other support for churches.<sup>46</sup> That is, "establishment" involves governmental financial or symbolic support for *institutions* (i.e., Christian churches or

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in our society. Guarding minorities against the danger of the possible "tyranny of the majority" is central to the First Amendment. See Jones, *supra* note 35, at 402. Courts must invalidate a law, no matter how popular that law might be, if the argument for it is based exclusively on the religious authorities of one or more religious groups.

43 The government may not interfere with the role of religion in society—hostility toward religion is an effect as prohibited under the Establishment Clause as aid for religion. *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947). Secularists may argue that by eliminating all references to basic frames of reference they are treating religious persons neutrally. See discussion *infra* part IV.B. However, in requiring that political debate be carried on in secular terms, they are not being neutral. Use of nonreligious language is not the lowest common denominator between competing ways of life but instead reflect specific belief-commitments. (No attempt at a lowest common denominator would satisfy everyone since it would not reflect the full commitment of faith which the participants would require.) Not only would religion not be treated neutrally in the language of political debate under the secularists' vision, but the secularists could (not surprisingly) use their own frameworks without adjustment, unlike the religious participants.

44 *County of Allegheny*, 492 U.S. at 610.

45 *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (citing Letter to Danbury Baptist Association (Jan. 1, 1800)).

46 CURRY, *supra* note 39, at 120.

non-Christian equivalents); it does not involve more generally the religious beliefs and practices of individuals.<sup>47</sup> The prohibition against favoring one religion over another or aiding all religions, therefore, must be interpreted as a prohibition against promoting religious institutions, not a restriction on the religious beliefs and actions of individual people.

The consequence for the issue at hand is that the institutions of *church* and *state* are to be kept separated, but no such constitutional requirement exists for the activities of *religion* and *politics*. The difference is that religious commitments can inform people's positions on public matters, while the institutions of church and state remain distinct. Religious commitments of religious citizens may influence government action, but there is no identification of church with state. This differs from a theocracy in that, even if a church endorses a particular position, the governmental action must be justified on nontheocratic grounds.<sup>48</sup> Thus, the Establishment Clause does not relegate religion to a strictly private role in persons' lives—religion's public function is permitted to flourish.

Nothing in the Supreme Court's decisions suggests a separation of religion and politics. Even a strict separation of institutions has not been consistently maintained by the Court. Accommodationist justices often argue that the First Amendment, in the words of Justice William O. Douglas, "does not say that in every and all respects there shall be a separation of Church and State. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly."<sup>49</sup> Allowing some accommodation by government of citizen's religious interests merely reflects, in the words of the Supreme Court, the "common sense" of the matter—the state's "callous indifference" toward religion was never intended by the Establishment Clause.<sup>50</sup> Former Chief Justice Burger put the point this way:

No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation

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47 Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1615-25 (1989); Steven D. Smith, *Separation and the 'Secular': Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 962-71 (1989).

48 See discussion *infra* part II.B.

49 *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

50 *Id.* at 314.

from all the other parts, much less from government. It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state.<sup>51</sup>

Even separationist justices accept some accommodations.<sup>52</sup>

### 3. *Role for religion in American public life*

The second presupposition is supported by the third: the Founders, as evidenced by the acts of the early federal government, valued the social role of religion and did not intend to make religion absolutely separate from government. Many, although not all, of the Founders were profoundly religious and their consensus was that religion and morality were essential for the survival of the Republic. In the words of George Washington from his Farewell Address: "Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports."<sup>53</sup> The actions of the First Congress also show that the Founders did not intend the Establishment Clause to bar all government support of religion in its public capacity.<sup>54</sup> For example, the oft-cited Northwest Territory Ordinance of 1789 in providing for schools refers to religion, along with morality and knowledge, as "being necessary to good government and the happiness of mankind."<sup>55</sup>

In sum, the Establishment Clause operates in a society in which religion has a public function and it merely prohibits the establishment of one or more particular religions. The implication here is that reliance upon religious commitments (other than theocratic ones) in political matters is constitutional. Separationists who are hostile to religion in general or to its public expression may disagree; but other separationists, along

51 *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (citation omitted).

52 See e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 61-62 (1947) (Rutledge, J., dissenting); *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970); *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2465-67 (1993).

53 Robert N. Bellah, *Civil Religion in America*, reprinted in RUSSELL E. RICHEY & DONALD G. JONES, EDS., *AMERICAN CIVIL RELIGION* (1974), at 26. As Bellah notes, the words may be Alexander Hamilton's.

54 Douglas Laycock, *'Non-Preferential' Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 909 (1986).

55 1 STATUTES AT LARGE 51, 52 (1789). Citing actions of the First Congress for evidence of the intent of the Framers is problematic—some of their actions were unconstitutional. But those actions are some indication of the general atmosphere of the time.

with accommodationists, will agree that reliance on such religious commitments does not raise a constitutional issue. The issue instead turns to how we distinguish theocratic from nontheocratic actions.

### B. *Determining if Governmental Action Is Constitutional*

The principal test developed by the Supreme Court to determine if a governmental action is constitutional is set forth in *Lemon v. Kurtzman* in three prongs: the action (1) must have a legitimate secular purpose, (2) must not have the principal or primary effect of either advancing or inhibiting religion, and (3) must not foster an excessive governmental entanglement with religion.<sup>56</sup> Any attempt to restrict religious commitments as a source of political action would no doubt be decided under this test.<sup>57</sup>

Focusing here on the "secular purpose" requirement is sufficient to see the problems for the issue at hand (although it must be remembered that the effect and entanglement requirements also need to be satisfied). Under this purpose requirement, the question is whether the government's "actual purpose is to endorse or disapprove of religion."<sup>58</sup> The Supreme Court has summarized the analysis as follows:

A governmental intention to promote religion is clear when the State enacts a law to serve a religious purpose. This intention may be evidenced by promotion of religion in general, or by advancement of a particular religious belief . . . . While the Court is normally deferential to a State's articulation of a

56 403 U.S. 602, 612-13 (1971). Despite profound criticism of each prong by members of the Court and by commentators, the *Lemon* test is still alive. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S.Ct. 2141, 2148 (1993); 113 S.Ct. at 2149-51 (Scalia, J., concurring).

57 Other Establishment Clause tests apply only in more specialized circumstances, not general political discourse. See Richard H. Jones, "In God We Trust" and the *Establishment Clause*, 31 J. CHURCH & ST. 381, 404-10 (1989).

58 *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (quoting *Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring)). Justice O'Connor in her concurrence in *Lynch* advanced an influential "endorsement" test for the purpose requirement: the question becomes whether the governmental action "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." 465 U.S. at 688. Any governmental action that singles out all religious persons in their political activities from the nonreligious, as the secularists would, would fail under this test by sending a message to the religious that they are outsiders.

secular purpose, it is required that the statement of such purpose be sincere and not a sham.<sup>59</sup>

What the Court has not made clear is what exactly is "secular" and what exactly is a "purpose." Kent Greenawalt proposes the seemingly innocuous requirement that the purpose cannot be, for example, to end "sinfulness," but must identify "some genuine damage to individuals or society (or other entities)."<sup>60</sup> However, the problem here is that people will disagree over what exactly is *genuine* damage. The answer will depend upon one's frame of reference: some religious persons will think that sinfulness is as genuine and objective as any physical or psychological damage—it may be less tangible, but it is no less real.<sup>61</sup> Similarly, people will disagree over what is the public good to be achieved for the society as a whole, and consequently over what constitutes harm. All legislation necessarily reflects particular background beliefs and values.<sup>62</sup> Thus, it is difficult to attempt to limit the scope of governmental action only to what everyone agrees is genuine damage precisely because the real political dilemmas over such social issues as abortion arise only where there is fundamental disagreement at the time over underlying beliefs.

### 1. *Defining "religious purpose"*

The disagreement leads to the larger issue of defining a religious purpose. What the anti-religious consider a "religious" purpose may not appear particularly religious to the faithful. Perhaps no one can neatly segregate all elements of their own way of life into "religious" and "nonreligious" segments. What appears to one who participates in a certain way of life to be simply "the way things really are" may appear to an outsider as unwarranted, speculative assumptions. The same holds for values within a way of life: to an insider, the values do not appear to be "religious," they are simply objective facts, grounded in reality, by which we all ought to live. For example, for the religious, morality is no more "secular" than "religious."

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59 *Aguillard*, 482 U.S. at 585-87 (citations omitted).

60 RELIGIOUS CONVICTIONS, *supra* note 3, at 94.

61 See discussion *infra* part IV.B., concerning frameworks of belief.

62 Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 403 (1963).

In addition, religious people are as divided on political issues as the nonreligious—there is no one “religious” position on any major social/political issue. Therefore, whatever action the government takes will have to coincide with the values and goals of some religious people. But “that the Judeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny.”<sup>63</sup> As the Supreme Court has often noted, harmonizing with a religious position on a social issue (such as abortion) is not sufficient to render a governmental action unconstitutional, as long as the action has a valid secular justification.<sup>64</sup> Indeed, there have been religious justifications for any political position (e.g., before the Civil War, both for and against slavery),<sup>65</sup> and there will always be a religious purpose to be satisfied on both sides of any controversial issue. In such circumstances, defining a purpose as *secular* is not a simple matter.<sup>66</sup> As Laurence Tribe states: “If a purpose were to be classified as non-secular simply because the resulting state practice coincided with the beliefs of a religion, or because it originated in a religion, then virtually nothing that government does would be acceptable.”<sup>67</sup>

Thus, in the context of the Establishment Clause, “secular” cannot mean simply “not religious.” A more appropriate standard for the requirement of secularity should therefore be merely a restatement of the anti-theocracy requirement: the government’s purpose must be more than simply trying to align society with some religious vision. Theocrats’ political goal is to impose their religious authority on people outside the group. This is precisely what the Establishment Clause prohibits the government from doing.<sup>68</sup>

However, one may nevertheless argue *religiously* without being *theocratic*. Such arguments would be grounded in the beliefs and values of a particular religious way of life but would not consist solely of the fact that certain religious authorities require the governmental action. For example, the religious may advocate laws against murder out of a concern with the

63 *Harris v. McRae*, 448 U.S. 297, 319 (1980).

64 *Bowen v. Kendrick*, 487 U.S. 589, 603 n.8 (1988); *Lynch v. Donnelly*, 465 U.S. 668, 682 (1984); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

65 See RELIGION AND SLAVERY xi-xiii (Paul Finkelman ed., 1989).

66 Smith, *supra* note 47, at 999-1007.

67 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-9 (2d ed. 1988).

68 See discussion *supra* part II.A.

ultimate significance (as defined by that religion's belief-framework) of each human life; such arguments need not be either theocratically-based (i.e., solely invoking what the religious authorities require) or "secular" in the sense of not being tied to the dimension of ultimate meaning in a religious way of life. The religious arguments for an action need not convince the nonreligious or appeal to members of other religious groups. But the Establishment Clause prohibits a governmental action whose only support is merely that the authorities of one or more religious groups require it. Operationally, this means that the religious cannot rest their arguments exclusively with Biblical or other religious decrees.

Thus, a religious purpose for a governmental action is legitimate, but its support cannot be limited to the religious authority of a group.<sup>69</sup> Therefore, "secular" in this context means simply any argument not justified *exclusively* by reference to a religious community's authority (such as a revelation embodied in a fundamental text) or to some private insight or other personal religious experience, not the opposition with all things religious.<sup>70</sup>

In short, if we continue to use the concept of "secularity," then "secular" in the context of the Establishment Clause means simply "nontheocratic." Any other "religious" elements to a justification or to the identification of a social harm are "secular" in this regard. This suggests once again that the dichotomy between *religious* and *secular* is at best unhelpful and that some other concept (such as "neutral" or "pluralistic") should be used instead of "secular" in defining this prong of the *Lemon* test.

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69 The purpose requirement cannot be simply that an action is for the good of everyone or open to all people, since theocrats would argue that that is precisely what they also want. Like most political advocates, theocrats would say that what they advocate is good for all of society and open to all who wish to join, and that their authorities are in fact open to all to adopt. See also discussion *infra* note 116.

70 See discussion *supra* part I.B. Audi defines a "secular reason" as "one whose normative force . . . does not (evidentially) depend on the existence of God . . . or on theological considerations." *The Separation of Church and State*, *supra* note 1, at 278. However, this definition would apparently remove all of religion. For example, are all moral considerations by a religious person within a moral religious way of life "theological considerations?" A religious person would certainly think so. Secularists cannot simply separate out what they value and call it "secular."

## 2. *Defining "purpose"*

Turning to the second problem—the absence of a definition of “purpose”—difficulties resurface. Purpose is distinguished by the Court as different from effect (what actually results from a governmental action) but is not otherwise characterized.<sup>71</sup> The term “purpose” is open to many different meanings: it may mean purpose proper (the goal or objective to be achieved), motive (why we are doing the action), justification or rationale (the reasons or evidence for defending the purpose as valuable for all members of society), or argumentation (the presentation or advocacy of the justification). These various concepts, while related, must be distinguished. The Supreme Court, however, has not clearly distinguished the purpose from the motive or rationale for an act. In particular, the Supreme Court has found legislation in four cases to be unconstitutional for violating only the purpose requirement when the Court focused primarily upon the legislators’ motives.<sup>72</sup>

If the various concepts packed into the purpose requirement are separated, the interpretation which best captures the purpose requirement is: (1) the predominant *goal* or *objective* for the governmental action must be clearly secular;<sup>73</sup> or (2) if the goal or objective is ambiguous, then the government must

71 *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

72 *Edwards v. Aguillard*, 482 U.S. 578, 591-95 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 57, 60 (1985); *Stone v. Graham*, 449 U.S. 39, 41, 43 (1980); *Epperson v. Arkansas*, 393 U.S. 97, 107-8 (1968) (pre-*Lemon* case utilizing the same purpose requirement). Each of these cases would have the same result under the refinement of the purpose requirement proposed here, since no “secular” purposes or justifications (other than shams) were advanced. In none of these cases does the Supreme Court ever clearly differentiate motive from objective (purpose). For example, in *Jaffree*, the Court said “the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.” 472 U.S. at 56. Whether anyone is “entirely motivated” by any one source is questionable, and mixing motive and purpose here only confuses the issue more.

73 *Lee v. Weisman*, 112 S. Ct. 2649, 2654 (1992) (“clearly secular purpose”). How much nonreligious purpose is enough? The Supreme Court has not been clear concerning whether any legitimate nonreligious purpose, no matter how insignificant, is sufficient to render an action constitutional (as suggested by *Jaffree*, 472 U.S. at 56, where the Court stated that a statute must be invalidated if it is entirely motivated by a purpose to advance religion; cf. *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988); *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984)), or whether the religious purpose must predominate to find the action unconstitutional (*Aguillard*, 482 U.S. at 593 (Powell, J., concurring)). The latter position appears to be more realistic: the Establishment Clause should not turn on simply finding any insignificant nonreligious purpose. In short, the theocratic purpose must not predominate to the exclusion of other purposes.

advance a clearly secular *justification* (the set of reasons showing why the purpose should be achieved) sufficient to support the action. "Secular" here is used in the narrow (anti-theocratic) sense, discussed above in this section, which requires that revelations in religious texts or personal religious experiences are not the only justifications for the government's action. The first condition requires that if an action's purpose is primarily *theocratic* (in that it has no goal or objective other than attempting to align society with some religious vision), then the action is unconstitutional; justifications are irrelevant. The second condition comes into play only if the government's stated goal is not clearly secular. Such a circumstance occurs when the objectives are mixed, i.e., both theocratic and nontheocratic objectives exist for an act. The nontheocratic justification must be genuine and sufficient enough to withstand a court challenge: just as there may be sham purposes contrived only to try to satisfy the *Lemon* test, so may the courts have to determine if a purported secular justification does in fact justify the action or is merely contrived for the sake of appearance.<sup>74</sup>

The problem of sham objectives in politics is very real. In such cases, courts must decide which is the predominant objective. Sanford Levinson poses a problem in this regard which is the opposite of the usual problem of religious purposes disguised as secular.<sup>75</sup> What if legislation with a genuine secular objective is clothed in religious garb, e.g., an environmental protection act entitled "The Stewardship of God's Creation Act of 1993?" Under the interpretation of the purpose requirement proposed here, if the primary objective clearly is narrowly theocratic (i.e., having no purpose other than to align society with a religious vision), as would appear to be the case from its title and preamble, then the statute would be unconstitutional despite its secular value. The second condition (a clearly

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74 It should be noted that courts have accepted sacrilegious purposes (e.g., promoting tourism and sales by use of Christian symbols during the Christmas season) as satisfying the purpose requirement. *E.g.*, *ACLU v. Rabun County*, 698 F.2d 1098, 1109 (11th Cir. 1983). Courts may be similarly lenient with regard to the secular justification requirement. In any case, something of a philosophical judgment is required in determining what is the "primary" purpose and what is a sufficient justification.

75 Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061, 2071-73 (1992) (book review).

nontheocratic justification) would not be considered since the statute's purpose is not ambiguous.

Most importantly, under the interpretation proposed here, the *motive* of the individual legislator or other government official is always irrelevant.<sup>76</sup> Motives, even more than objectives, will probably be mixed—we seldom act for any one motive. They are also more difficult to discern. Secularists may feel that determining the motivation of religious persons is a simple matter—that religious faith is always the sole source shaping and controlling other beliefs, but that is not always so. Consider William Jennings Bryan's fundamentalism and his opposition to evolution. Prior to World War I, he was neutral on the issue of evolution. But after the war, he concluded that the evolutionary doctrines of Darwin and Nietzsche were the cause of the war. He then began to oppose evolution and also took a more fundamentalist turn in his religion.<sup>77</sup> Thus, what might appear to be a simplistic religious opposition to science was actually more complex. *Politics* was a motive for the change in *religious belief*, not vice versa.

Motives may involve psycho-social causes and various rationales that are hard to distinguish, and, more importantly, are simply irrelevant to the purpose and effect of the governmental action. The motive for supporting some legislation may be primarily to get re-elected or to please family and friends. Even if some legislators act purely from religious motives, their acts would be held constitutional as long as one of the two conditions above is fulfilled.<sup>78</sup> Thus, motives do not need to be analyzed at all since they are irrelevant to assessing the value

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76 The interpretation proposed here would modify the requirement in *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987), that if a religious motive is shown, then the advocates of the challenged action must show that the action would nevertheless have been undertaken even in the absence of such motivation. Instead, the requirement should be that even if a theocratic motive is shown, the action is constitutional if there is a legitimate nontheocratic purpose or justification. The action may not have been undertaken in the absence of theocratic motivation, but it would still be constitutional under such circumstances.

77 See GARRY WILLS, *UNDER GOD: RELIGION AND AMERICAN POLITICS* 101-05 (1990).

78 To apply this principle to another area: judges who are permitted to exercise their discretion and who are acting within sentencing guidelines should be allowed to rely upon their (nontheocratic) religious convictions. *But see* *United States v. Bakker*, 925 F.2d 728, 740-41 (4th Cir. 1991) (rejecting this position). Compare Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083, 1083 (1990), with Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 943 (1989), and RELIGIOUS CONVICTIONS, *supra* note 3, at 239-41.

of the proposed governmental action.<sup>79</sup> The psychological or social factors animating our motivations are not related closely enough to the public purpose or effect of an action to be a relevant consideration. We need not find the "real" reasons or causes for wanting an act if the purpose is secular (i.e., nontheocratic), or if the purpose is unclear, the justification is secular. Certainly requiring, as Robert Audi would, a "secular motivation" for advocating any public policy is unnecessary if either of the two conditions is satisfied.<sup>80</sup> His position reflects more an unabashed prejudice against religion than any constitutional requirement. No motive, unlike purposes and justifications, is constitutional or unconstitutional, and attempting to restrain motives unnecessarily restricts the religious.<sup>81</sup> In short, no motive is illegitimate or impermissible, no matter how dominant and apparent—only the purpose and justification matter.

Finally, the *argumentation* for the secular purpose may be anything the arguer thinks will be persuasive. It is the purpose or justification that must satisfy the two conditions, not the argumentation. The difference between justification and argumentation lies between a rigorous presentation of the rationale for a position (the justification) and the marshalling of whatever reasons one wishes to advance for a position (the argumenta-

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79 It is not clear what sense can be made of the concept of the collective motive of legislators or citizens. For a discussion of the problems of delving into legislators' subjective motives, see *Edwards v. Aguillard*, 482 U.S. 578, 614-17 (1987); RONALD DWORKIN, *A MATTER OF PRINCIPLE* 18-23 (1985); Hal Culbertson, *Religion in the Political Process: A Critique of Lemon's Purpose Test*, U. ILL. L. REV. 924-5 (1990) (legislative purpose as legal fiction). In the absence of a clear concept, keeping motive out of constitutional analysis can only help. Certainly dealing with purposes and justifications is at least somewhat more "objective" in the sense of being more open to discernment and consensus.

80 *The Separation of Church and State*, *supra* note 1, at 284. Audi defines his principle of secular motivation as "one should not advocate or promote any legal or public policy restrictions on human conduct unless one . . . is . . . motivated by adequate secular reason . . ." *Id.* He does allow motivation by religious considerations as well, as long as there is an adequate or sufficient set of secular reasons. *Id.* This principle is for him an additional requirement to a secular rationale for advocating a public policy. *Id.* at 279.

81 When people cannot advance legitimate secular (nontheocratic) purposes or reasons for a political position, we can safely say that they are motivated solely by religion. Thus, in this narrow usage, "religious motive" is simply another way of saying "no legitimate secular justification," and so "religious motivation" in this limited sense would be unconstitutional. But religious motivation in the more usual sense of the phrase—i.e., religious commitments motivating a political position—is as constitutional as any motivation when the secular purpose requirement is fulfilled.

tion). The former is a more limited enterprise, while the latter encompasses any free-wheeling debate tactic.

Thus, participants in political debates may rely in their argumentation on religious sources if they think that, as a practical matter, the religious sources help the argument. Like anyone else, religious participants may choose, for tactical reasons, to present only some of their reasons and to leave out what they think will not be persuasive to anyone outside their religious group.<sup>82</sup> Common sense dictates that quoting the Bible will not convince atheists, and that one's argument should be selected according to one's audience. Most arguments on social issues by religious people in disputes with persons outside their religious group may in fact be indistinguishable from arguments by the nonreligious, if they can be confined to the level of political actions alone and not involve the underlying bases for holding the different positions.<sup>83</sup> But if Christian fundamentalists want to assert a Biblical basis for an act that has a secular (nontheocratic) objective or justification, they may. There is no need to advance only reasons that supposedly all citizens would accept, even if such arguments were possible.<sup>84</sup>

Similarly, it is perfectly legitimate (contra Audi) to use as justifications, reasons that do not personally motivate the arguer.<sup>85</sup> The religious may advance reasons that are acceptable to their nonreligious opponents to try to convince them. As long as one finds those reasons legitimate, there is nothing hypocritical or deceitful in only advancing arguments that one thinks are legitimate and will convince one's opponent, even if the arguments are not part of the proposed justification for the action.<sup>86</sup> Such tactics are constitutional—deciding to restrict the range of one's arguments is different from imposing restrictions on the permissible purpose or justification for a govern-

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82 *E.g.*, Board of Educ. v. Mergens, 496 U.S. 226, 248-49 (1990).

83 Whether this is possible is questionable. See discussion *infra* part IV.B.

84 See discussion *infra* part IV.B.

85 *The Separation of Church and State*, *supra* note 1, at 282. Compare RELIGIOUS CONVICTIONS, *supra* note 3, at 220 (effective political discourse does not require full disclosure of all personal judgments and other bases upon which a decision is reached) and *Some Further Thoughts*, *supra* note 3, at 1023, 1046.

86 One might go even further and argue that one may use arguments one does not in fact accept. For example, secularists could study the Bible in order to try to convince Christian fundamentalists on biblical grounds that they are wrong on a political issue. Either side might use arguments that only appeal to the other side in such circumstances.

mental action.<sup>87</sup> Politics is comparable to arguing in court, with extremely broad rules of evidence, in this regard: as long as what the law requires is fulfilled (the nontheocratic purpose or justification), there is wide latitude toward what evidence is marshalled for use and what strategy is chosen to convince the jury (the argumentation).

Thus, religious argumentation is constitutional. Christian fundamentalists, like everyone else (including secularists), need not disclose their motives but only their purposes and justifications for the proposed actions. In this way, religious discourse has a legitimate place in the public political arena, even if governmental actions cannot be for "religious" purposes and reasons (in the narrow theocratic sense discussed earlier in this section).

This requirement for constitutionality is a modest one. Most governmental actions should pass the purpose requirement. The only actions that would fail are those for which there is no secular (nontheocratic) predominant purpose or sufficient justification, i.e., the actions' defenders can only advance religious texts embodying revelation or personal experiences as purposes or justifications. Such an action would gain majority support normally only in communities in which most of the population belongs to the same religious group. For example, in a town in Missouri where dancing violated religious tenets of the majority, a ban on school dances was upheld by the school board even though no secular (nontheocratic) purpose or justification was articulated at trial.<sup>88</sup> On a larger social scale, however, the population is more pluralistic, and so arguments with wider appeal than the narrow theocratic ones usually must be advanced in order to gain majority support for a governmental action (although exceptions, such as the legislation at issue in *Epperson v. Arkansas*<sup>89</sup> and *Edwards v. Aguillard*,<sup>90</sup> have occurred).

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87 All that should be excluded from politics is deception or dishonesty concerning proposed actions, purposes, or justifications. That is, we should not conceal our true political program but be forthright about our positions on issues, regardless of our motives and total arguments for them.

88 The district court held the school board's action to be unconstitutional, but the court was reversed on appeal, even though the court of appeal did not identify any secular purpose. *Clayton by Clayton v. Place*, 690 F. Supp. 850 (W.D. Mo. 1988), *rev'd*, 884 F.2d 376 (8th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990).

89 393 U.S. 97 (1968).

90 482 U.S. 578 (1987).

## III. RELIGION IN POLITICS

The conclusions of parts I and II are as follows: First, religious ways of life are not purely private matters but have a social/political dimension, and not all religious persons are committed to the theocratic option in politics. Second, the Establishment Clause does not require a religiously sterile public life, and, more particularly, it does not prohibit all reliance on religious commitments in the political arena—the usual dichotomy between “secular” and “religious” does not adequately analyze the issues. Under the purpose requirement of the *Lemon* test for constitutionality, political positions may be maintained for religious reasons as long as their predominant purposes are secular (in the sense of not being theocratic, i.e., not exclusively based on religious revelations and personal experiences), or if the purpose is ambiguous, the positions have a sufficient secular justification. In short, revelation or other religious authority is a legitimate source of political ideas and justifications, but more must be advanced by the religious as justification than simply that their religion requires aligning society with a religious way of life.

In the context of politics, this interpretation means that only theocrats, who want to impose God’s law or another religion’s equivalent upon believers and nonbelievers, would be advocating unconstitutional positions because they assert and rely only upon what they take to be revealed rather than advance other purposes or justifications.

The final step in the argument is to show that the Establishment Clause is the only restriction we should recognize in this democracy on the issue of religion in political life. The principal argument in favor of this position is simply to note the *absence* of either any other legal restrictions (except for two to be mentioned shortly) or of any plausible alternative interpretation of the Establishment Clause in the context of politics.

Perry and Audi frame their discussions of religion in politics as “ideals” for a democratic society to be voluntarily chosen rather than to be imposed by force of law.<sup>91</sup> But, if we ignore the Establishment Clause or some other legal framework, it is difficult to make sense of what restrictions these theorists

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91 *The Separation of Church and State*, *supra* note 1, at 276, 283; *Religious Commitment*, *supra* note 1, at 76; PERRY, *supra* note 2, at 137. See discussion *infra* part IV.C.

propose.<sup>92</sup> What are they talking about if not the legal framework of this society? After we determine what actions are permitted under the law, what is left? What other type of *restrictions* can our society impose? What other type of *sanctions*? In short, if we do not voluntarily adopt the restrictions of the secularist ideals, what recourse do the secularists propose? They may feel our society would be better if everyone accepted secular ideals as political conventions. For this, they would have to argue that a society with no religion in the public forum is better than our existing society.

Indeed, it would be very difficult to defend other restrictions on religious political speech. The Free Exercise Clause of the First Amendment restricts the government from limiting the right of the religious to participate in politics.<sup>93</sup> The Free Speech Clause only enhances the protection of religious speech in public. According to the Supreme Court, public debate of political issues is to be "uninhibited, robust, and wide-open."<sup>94</sup> Political speech is the paradigm of what is protected under the First Amendment, and all political speech—including religious political speech—is on the same footing in the marketplace of ideas. This means that religious persons may advocate any position in any way they choose (within the court-interpreted restrictions on their Free Speech rights). The restriction of the Establishment Clause is that *governmental action* must have a secular purpose or justification (in the narrow anti-theocratic sense of "secular")<sup>95</sup> to withstand a court challenge. But no political speech can be excluded simply because it is religious.

Two qualifications must be noted here. First, Article VI, Clause 3 of the Constitution prohibits any "religious test" for holding public office. Under the Supreme Court's interpretation

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92 William Marshall is more explicit about the absence of a legal basis for the secularists' restrictions. He concedes that religious involvement "is not formally constitutionally proscribed" and that "informal constraint has no legal effect." Yet he still feels that "there is something improper about religion's involvement in politics." *The Other Side of Religion*, 31 HASTINGS L.J. 843 (1993). He articulates no basis for restricting all religious involvement. Greenawalt also argues that no one is proposing legal restrictions on religious people but about "political ethics," i.e., about how people should act. *The Role of Religion in a Liberal Democracy: Dilemmas and Possible Resolutions*, 35 J. CHURCH & ST. 503, 505-06 (1993).

93 *McDaniel v. Paty*, 435 U.S. 618 (1978) (right of religious ministers to hold office).

94 *Id.* at 640 (Brennan, J., concurring)(quoting *New York v. Sullivan*, 376 U.S. 254, 270 (1964)).

95 See discussion *supra* part II.B.

in *Torcaso v. Watkins*, this prevents "probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps, more properly, profess to have, a belief in some particular kind of religious concept."<sup>96</sup> In effect, this clause reduces to one special application of the Establishment Clause under the interpretation advocated here.

Second, a distinction must be made in one respect between religious individuals and religious institutions. Under federal law, tax-exempt organizations may keep their tax-exempt status only if no "substantial" part of their activities "is carrying on propaganda, or otherwise attempting, to influence legislation . . . , and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."<sup>97</sup> In short, religious and nonreligious organizations must choose between a tax-exempt status and legislative lobbying or involving themselves directly in political campaigns.

This latter restriction, however, does not apply to *individual* members of such organizations (although it is not always clear when a member of a religious group is speaking individually or for the organization). Nor does it apply to religious organizations that do not claim tax-exempt status. For those groups and for individuals, only the Establishment Clause provides a restriction on religion in politics. Even tax-exempt organizations under the above-cited statute may take stands on moral and social questions that are current campaign issues as long as they do not lobby or directly participate in a specific political campaign (e.g., endorsing a specific candidate). In this way, religious groups may influence public policy and the political process in general.

With these qualifications in mind, the Establishment Clause remains the only major limitation against relying on religious convictions in politics. Religious political speech cannot be treated differently from other forms of political speech. In the words of former Justice William Brennan, "Religionists

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96 367 U.S. 488, 494 (1961).

97 26 U.S.C. § 501(c)(3) (1986); see *Legislative Activity by Certain Types of Exempt Organizations: Hearings Before the House Ways and Means Committee*, 92d Cong., 2d Sess. 99, 282-312 (1972) (comments by religious organizations). Religion is not discriminated against here since this restriction applies to all tax-exempt organizations.

no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally."<sup>98</sup> Professor Tribe summarizes the situation:

American courts have not thought the separation of church and state to require that religion be totally oblivious to government or politics; church and religious groups in the United States have long exerted powerful political pressures on state and national legislatures, on subjects as diverse as slavery, war, gambling, drinking, prostitution, marriage, and education. To view such religious activity as suspect, or to regard its political results as automatically tainted, might be inconsistent with first amendment freedoms of religious and political expression.<sup>99</sup>

There is no other legal restriction on the admission of religion to the public arena. Indeed, as mentioned above, the Establishment Clause is only a restriction on governmental action, not on private advocacy. It restricts what can be advocated only in the sense that in order for an advocated act to withstand a constitutional challenge, it must have a purpose or justification which is secular (nontheocratic).<sup>100</sup>

#### IV. PROBLEMS WITH SECULARISTS' VISIONS FOR SOCIETY

Because the Establishment Clause is the controlling principle, issues raised by Audi, Perry, Greenawalt, and others—such as acceptable versus unacceptable religious beliefs, or public versus religious reasoning<sup>101</sup>—simply dissolve. But there are certain legal and philosophical problems with the secularists' positions, even as *ideals* for society, that must be pointed out.

##### A. *Fallibilism and Politics*

Michael Perry sets forth a vision of an "ecumenical politics" in which some persons with religious convictions may rely on

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98 *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring).

99 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 866-67 (1978) (cited in *McDaniel v. Paty*, 435 U.S. at 641 n.25 (Brennan, J., concurring)). More recently, Justice Scalia put the point succinctly: "political activism by the religiously motivated is part of our heritage." *Edwards v. Aguillard*, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting).

100 See discussion *supra* part II.B.

101 See, for example, *RELIGIOUS CONVICTIONS*, *supra* note 3, at 49-76, for further discussion.

those convictions both in motivating political choices and in publicly debating those choices.<sup>102</sup> Nevertheless, Perry does not treat all religious convictions equally: two attitudes are essential for membership in the ecumenical political dialogue—pluralism and fallibilism.

### 1. *Pluralism*

Pluralism is, in effect, merely accepting dialogue rather than the dogmatic assertions of one's position.<sup>103</sup> Theocrats, who do not recognize the possible legitimacy of other positions, would thus be eliminated from politics, as would any nontheocrats who accept nontheocratic purposes and justifications but are nevertheless dogmatic. Nonetheless, not all religiously-based citizens who take their religious faith seriously are dogmatic with regard to how other people should lead their lives, and many allow a difference of positions on political issues. Such people should be able to accept democratic processes on political issues. Perry's requirement indicates one of the secularists' prejudices against religion—that all religious persons are dogmatic about their beliefs.<sup>104</sup>

Secularists believe religious people are not open to the possibility of nontheocratic forms of government; instead, the religious vote with one voice as their dogmatic leaders instruct them. A recent remark by Justice Harry Blackmun suggests this position:

Democracy requires the nourishment of dialogue and dissent, while religious faith puts its trust in an ultimate divine authority above all human deliberation. When the government appropriates religious truth, it 'transforms rational debate into theological decree.' Those who disagree no longer are questioning the policy judgment of the elected but the rules of a higher authority who is beyond reproach.<sup>105</sup>

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102 PERRY, *supra* note 2, at 112.

103 *Id.* at 110.

104 Many religious persons have genuine doubts about the certainty of their beliefs and how to lead their lives while still remaining committed to that way of life. But this does not mean that Perry is correct about self-critical "faith" versus "belief"—the religious are not any closer to holding an abstract faith because of their doubts. Their concrete religious values and beliefs, not some abstract faith, remain the substance of their ways of life and of their doubts.

105 Lee v. Weisman, 112 S. Ct. 2649, 2666 (1992) (Blackmun, J., concurring) (citation omitted).

To have all religious believers alike in this matter is unlikely (e.g., religious groups disagree over official prayers in schools; and not all Roman Catholics vote against pro-choice candidates). This position does not take into account the striking diversity of religious political views exemplified by the contrast between Jesse Jackson and Pat Robertson.<sup>106</sup> In addition, whether religious believers are in fact any more intransigent in their political beliefs than those nonreligious persons who are serious about their own beliefs and values is a matter for empirical investigation.

Our constitutional rights in this regard do not turn on an empirical inquiry. Anyone, religious or nonreligious, who feels the irrefutable rightness of his or her position may still enter the political arena. To pass constitutional muster, they must advance purposes or justifications for their position which are secular in the anti-theocratic sense. Even theocrats, with their appeals to revelation or personal experiences, can legitimately enter political debates on one issue: whether to amend the Constitution to abolish the Establishment Clause and create a theocracy. The theocrats' appeal to revelation is constitutionally problematic because of their views on the nature of *government*, not because of any dogmatic assertion that their political position is not open to debate or vote: it is the political program constituting an integral part of the theocrats' way of life that is in conflict with the Establishment Clause, not *how* they hold their faith. Nothing in the history of the Establishment Clause or its jurisprudence suggests that the modern liberal/secularist reading of the First Amendment requires an allegiance by citizens to rational debate, so that those who would advocate religious grounds for public policy must defend their convictions by appeal to considerations that can be assessed by all members of the public.<sup>107</sup> The intent of the Establishment Clause is to eliminate the possibility of a theocracy, but not to otherwise limit participation in the processes of governing.

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106 Cf. PETER L. BENSON & DOROTHY L. WILLIAMS, RELIGION ON CAPITOL HILL: MYTHS AND REALITIES 123-39, 143-48 (1982) (diversity of politicians' religious views correlated with a wide variety of political beliefs).

107 *Contra* Franklin I. Gamwell, *Religion and Reason in American Politics*, 2 J.L. & RELIGION 325 (1984). Some of the Founders were heavily influenced by the Enlightenment, but not all who framed and ratified the First Amendment were; and nothing in the history of the Establishment Clause suggests that the Enlightenment rationality was to play a central role in what was being required of the citizenry.

## 2. *Fallibilism*

Perry's second requirement—fallibilism—presents a greater problem. He characterizes this attitude as the ideal of self-critical rationality (exemplified in the sciences) in which one holds one's fundamental beliefs open to scrutiny, revision, and possible rejection.<sup>108</sup> According to fallibilism, only people who hold their religious faith open to such self-criticism would be permitted to participate in the political arena.

Two objections to this argument, one legal and one philosophical, present themselves immediately. First, the Establishment Clause under every interpretation prohibits discrimination *among* religions,<sup>109</sup> with the qualification that it does discriminate against those religious persons whose *political program* is incompatible with the anti-establishment requirement itself (i.e., advocates of theocracies).<sup>110</sup> Under Perry's proposal, the religious would be divided on the basis of the very nature of the religious *commitment*, not upon whether their political programs conflict with the Constitution. Any proposal that would exclude the political speech of some religious persons while permitting that of others could not be enforceable in any way. Distinguishing "true" from "false" religions in any respect is simply not a matter for the government.

In addition, fallibilism has another substantial problem: most religious people simply do not consider their faith in such terms. While the religious may have doubts about their particular way of life or even concede the theoretical possibility of error, they still remain committed to that way of life. Perry may be able to find a few liberal academics who shape their faith in a fallibilistic manner, but to require such a standard would exclude the vast majority of religious Americans. People, religious and nonreligious, simply do not hold their fundamental beliefs open to such self-critical analysis.

Moreover, people need not hold their fundamental beliefs open to such criticism in order to participate in our public life. Fallibilism may be the appropriate attitude in a philosophical discussion or in a dialogue between religious faiths, but it is totally irrelevant to politics. All that is needed to participate in our political arena is a willingness to accept secular

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108 PERRY, *supra* note 2, at 110.

109 *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947); *Larson v. Valente*, 456 U.S. 228, 246-52 (1982).

110 See discussion *supra* part II.A.

(nontheocratic) purposes and justifications for governmental actions. This does not mean that we must be willing to question our own belief-framework, but only that we accept a nontheocratic government. It is a matter of accepting the nature of our country, not about the nature of one's religious commitment.

Theocrats would be excluded from the political arena, but other religious persons who hold firmly to their faith would not be excluded as long as they accept that this republic is based on a pluralism of faiths (and non-belief), and is not simply a mirror of one religious vision. For example, Roman Catholics need not doubt their church's official position on issues of abortion, divorce, and conception, and they may even work to change the laws regarding these issues so that they reflect Roman Catholic beliefs, but they must accept the secular purpose and justification requirements of the Establishment Clause. The issue is what actions one would require of people outside one's own faith.<sup>111</sup> For that, there is no requirement that we have to question our fundamental beliefs as applied to our own lives or to hold them open to doubt. Being open to persuasion about how the country is to be run may be a prerequisite to participating in politics, but being open to, in effect, a religious conversion is not.

In short, Perry's fallibilism is impossible from a practical standpoint and unnecessary from a legal standpoint. Perry's fallibilism, combined with his distinction between faith and belief,<sup>112</sup> produces a lop-sided compromise between religious and anti-religious extremes that would allow only certain religious persons to be heard—that is, only those religious persons whose faith fits a distorted version of religious commitment. Perry's distinction between "faith" and "belief," if accepted, would mean that no conviction based upon real religion—i.e., the commitment embodied in religious *belief*, not some artificially abstracted faith—would be permitted into the public realm.<sup>113</sup> Those religious persons who are firmly committed to their faith—and who often advocate conservative political beliefs—would be excluded. This vision may suit theorists whose political beliefs are left of center, but there are no reasons

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111 See discussion *supra* part I.B.

112 See discussion *supra* part I.C.

113 Thus, Perry's program has the effect of a secularist's, even if Perry does not consider himself a secularist.

(other than transparently political ones) to adopt Perry's position.

### B. Reason and Politics

Some secularists accept that religious convictions may play a role in motivating political positions, but that such reliance must be bracketed in justifications.<sup>114</sup> In their political ideal, universal reason, or at least premises and methods of reasoning generally accepted in our culture, will eventually be able to resolve political issues,<sup>115</sup> and therefore religion, with its private sources of insights, will play no role in such resolutions.<sup>116</sup> In the words of Stephen Gey, "religion is fundamentally incompatible" with "the critical rationality on which democracy depends," because religious ideas cannot be scientifically proven.<sup>117</sup> Politics is to be rational and voluntary, not irrational and dictated by religious leaders. Only secular reasons are therefore permitted in debating political positions.<sup>118</sup>

114 *E.g.*, *Separation of Church and State*, *supra* note 1, at 284.

115 ACKERMAN, *supra* note 1, at 24-30.

116 It should be noted that some philosophers and theologians think that religion is as publicly accessible as science, i.e., revealed claims are accessible to all or fundamental religious claims are provable by publicly accessible reason (e.g., reliance on public evidence and reason in the classical proofs of the existence of God). These theorists believe that religious beliefs are objective, and that anyone who accepts their truth will see that. (Under such a position, that their arguments do not convince everyone only shows the limitation of any appeal to public reason.) Others would argue that even mystical experiences are open to everyone—we merely must be willing to undergo the rigors of the training. One theorist, Ronald Green, believes that "religions are primarily moved by rational moral concerns." RELIGION AND MORAL REASON 228 (1988). Theocrats may also feel that their authorities are open to all. See discussion *supra* note 65. Since I do not adhere to this position on the nature of religious faith, I will not use it for support. There may be some beliefs held within both religious and nonreligious ways of life which are rational in the sense that everyone who understood them would accept them, whether they are within that religious tradition or not. See *Some Further Thoughts*, *supra* note 3, at 1032. But all basic belief-commitments—religious and nonreligious—are nonrational (as discussed below). Even if all the political arguments made by the religious and nonreligious within their particular ways of life satisfied a public accessibility standard, the basic commitments of the ways of life will still not be dictated by those arguments (as discussed below). Fundamental choices will remain. But for the issue of governing, it is the secular purpose and justification requirements, not any alleged rationality of political claims, that differentiates the arguments.

117 Gey, *supra* note 20, at 174.

118 This position is broadly based on a commitment to rationalism of the modern Enlightenment. Publicly accessible reason is our highest faculty; it can destroy superstitions, dissolve delusions, and resolve all disagreements—in fact, reason will provide a basis for ethics and hence for politics, and lead to a univer-

Of course, rationality does play a role in politics to a certain extent. Presumably, no legislature would pass a bill for which supporters can only advance a justification that is patently irrational in the sense that it is somehow based on an empirical claim for which there is no empirical support (e.g., Martians are threatening to invade if we do not pass the bill). The proper response to such a situation for one committed to rationality is not to exclude such a claim from the market place of ideas, but to address it with counter-arguments. We all hope that the totally irrational claims would be weeded out in such a process.

However, beyond such a situation, it is not clear in what sense "rationality" is involved in politics. John Rawls, while denying any overarching standard in terms of which competing concepts of societal good can be adjudicated, speaks of liberals' belief in a set of "ideals, principles and standards that all members of society can not only affirm but also mutually recognize before one another" when it comes to any social issue over which there is political dispute.<sup>119</sup> Rawls had earlier spoken of "evidence and ways of reasoning acceptable to all," and defined the standards as "common sense and science."<sup>120</sup> Liberals think that, given enough time, publicly-accessible reason will resolve political disputes. Concerning political problems on the more mundane end of the spectrum (e.g., how best to help victims of a hurricane), people with different religious and nonreligious points of views can usually form an "overlapping consensus" in which their diverging and incommensurable fundamental points of view do not matter (although differences may continue, e.g., over what in fact constitutes the best help).

The problem for the liberals' position arises with the more fundamental social issues and policies (e.g., civil rights, wars, abortion, pornography, homosexuality, or religion in the public

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sal rational civilization. For criticism of the very possibility of the Enlightenment project, see ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1984).

119 John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 4 n.5 (1987). Rawls, while a liberal, should not be included among the secularists since his idea of an overlapping consensus includes "all the opposing philosophical and religious doctrines likely to persist and to gain adherents in a more or less just constitutional democratic society." John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 225-26 (1985). This consensus does not involve a commitment to a specific conception of the good or a substantive worldview or ideal, as do the secularists' visions.

120 JOHN RAWLS, *A THEORY OF JUSTICE* 212, 240-41 (1971). See also PERRY, *supra* note 2, at 60.

schools). Here, science and common sense will not resolve the political dispute. The problem is the presence of conflicting fundamental premises over societal goals, the nature of a person, and so forth. Within our constitutional framework, reasons must be public, in the sense of not being theocratic—reasons based exclusively on revealed texts or private insights are not sufficient in political debates for the constitutional reasons discussed above. Liberals, however, would require a stronger, substantive sense of public reasons: only reasons grounded in principles of science and the supposed common sense of a culture would be permitted. Any other reasons not shared by all (which would include most religious beliefs, not merely theocratic ones) would be excluded.

But for political issues that touch upon basic beliefs, no shared beliefs and values will collectively suffice to overcome the conflict of premises.<sup>121</sup> Indeed, it is not clear how science would figure into determining the basic issues, such as social goals. Scientific knowledge may contribute to the determination of which values seem “reasonable” in light of particular theories, but science cannot resolve all the basic value questions. For example, we may all agree on a scientific account of the development of a human fetus and still disagree on when life begins or to what rights the fetus is entitled. Decisions over social goals are informed by science, but more encompassing sets of values than science’s are involved in resolving such issues. Political issues involving a conflict over basic values will remain moral crises precisely because of the intractable divergence of basic premises.

It is doubtful whether any neutral ground for arguing about value and belief premises can be proposed without begging the question against some of the participants. (Secularists, as most people would, propose standards for politics which implicitly permit themselves to rely upon their own premises and eliminate those groups which offend them.) But it is not obvious that a “common reason” or any neutral ground to resolve political disputes is in fact needed. As long as different religious and nonreligious participants can *understand* each other, no more commonality is needed. In science, progress has been possible even though the disputants over changing theories speak, in an important sense, different “languages” about

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121 See RELIGIOUS CONVICTIONS, *supra* note 3, at 87-172, for a strong case against believing that publicly accessible reason can resolve all political issues.

experiential data (e.g., Ptolemy and Copernicus meant quite different things by the word "sun"). Understanding each other without a common language is similar to comparing different map projections—the maps are incommensurable, but we can locate points in any projection. In such circumstances, scientific disputes have been resolved and science has progressed without the translation of different languages into some (nonexistent) neutral observation-language.

If scientists can resolve disputes and form a consensus without a common, neutral language, then disputants in a political dialogue should not be required to operate with a neutral language. The religious may use religious language, and the nonreligious may avoid such language. There is no need for only one language, even if a neutral language between religious and nonreligious discourse were possible. There is also no need for translating religious arguments into nonreligious ones (or vice-versa), even if this were possible.<sup>122</sup> The crucial requirement is that each of the disputants can understand the other's points. A genuine argument on the different political positions is then possible.

Many secularists appear to have a very unsophisticated faith in the power of reason and in an alleged "scientific method." They do not explore the issue of rationality at all. In using rationality as exemplified in science as their ideal, they seem to think that "rationality" is something obvious and unproblematic. But under the contemporary philosophical accounts of science, the very notion of "rationality" is seen as beset with difficulties. Indeed, it is not at all clear how exactly *reason*, in

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122 *Contra* PERRY, *supra* note 2, at 105-08; see also *Religious Convictions*, *supra* note 3, at 256-57. Religious participants may omit arguments which they think will not be persuasive to anyone outside their religious group; but this does not mean that the reasons the religious decide to present to opponents are "translations" of their fundamental beliefs into "public" terms. A true translation of religious language into a nonreligious language—a "publicly comprehensible" or "mediating" one—cannot be accomplished in any meaningful sense. Unlike simply translating, for example, English into French (which would keep the religious meaning), no translation of religious language into a nonreligious one could be done without, by definition, losing the religious elements. It would be comparable to treating a two-dimensional depiction of an object as the object's equivalent. The projection captures some of the object, but there is also loss and distortion. If secularists had to "translate" their fundamental beliefs into religious ones, distortion would also occur. Imposing a neutral language requirement would only encourage sham purposes and other deceptions on both sides, not full disclosure of real reasons. But if there is no need for a neutral language (as is the case with science), this problem does not exist.

the abstract, figures in the development of science. The physicist Max Planck gave this suggestive comment on how science changes: "A new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it."<sup>123</sup> Reason and an ideal "scientific method" as envisioned by the liberals do not seem to play a determinative role. Scientific argument is seen today more as a matter of persuasion—Thomas Kuhn even speaks of a "conversion experience"<sup>124</sup>—than of some neutral algorithm determining a decision between competing theories. Paul Feyerabend can say with all the seriousness that the self-proclaimed Dadaist of epistemology can muster that "anything goes" in science and "irrationality" reigns.<sup>125</sup> The title to one of his books clearly reflects his position—*Farewell to Reason*.<sup>126</sup>

Needless to say, not all philosophers follow such an extreme position on reason, but most have given up the empiricist ideal of neutral sense-experience or any encompassing decision-making mechanisms determining the selection of a theory. Scientists are seen as engaged in a more typical human enterprise, rather than simply mechanically reading objective truth off of nature. They must choose the best available theory from among currently competing theories by weighing such factors as fruitfulness, coherence with other ideas, simplicity, scope, and empirical fit. But, choices remain—reality does not uniquely determine one theory as better or more acceptable than the rest. No set of neutral sense-experiences compels the choice between competing theories in any simple manner. And no "scientific method" for devising hypotheses, testing them, and adding irrefutable facts to our storehouse of knowledge exists for any scientific inquiry. A role for the *non-rational* (in the sense of beliefs that are not demonstrable regardless of

123 MAX PLANCK, SCIENTIFIC AUTOBIOGRAPHY 33-34 (F. Gaynor trans., 1949), quoted in THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 151 (2d ed. 1970).

124 THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS, 151 (2d ed. 1970).

125 If we remove his rhetoric, Feyerabend means by "irrationality," the lack of any formal algorithm compelling rational agreement among scientists. See PAUL FEYERABEND, AGAINST METHOD: OUTLINE OF AN ANARCHISTIC THEORY OF KNOWLEDGE (1975).

126 See generally PAUL FEYERABEND, FAREWELL TO REASON (1978).

background beliefs) is made in scientific decision-making, and how agreement over a new theory emerges becomes a central problem.

Not only is there no one "scientific method" for determining "truth," even standards of rationality ("reasonableness") appear not to be timeless but in fact to vary with different theories.<sup>127</sup> Rationality involves not merely coherence of beliefs or holding one's beliefs open to criticism, but what is "plausible" in light of the underlying beliefs and values held at the time. The framework of what one takes to be the structure of reality—what is real—becomes intertwined in what is taken to be "rational," "natural," or "logical."<sup>128</sup> "Common sense" changes from era to era. In short, rationality is now seen as having a *substantive component*, dependent on what one believes about reality, not merely procedural features such as self-criticism or belonging to an on-going community of investigators.

Without going further into philosophy of science, the point here is simply that rationality is no longer seen as a simple concept, or as some abstract factor independent of our web of other beliefs and values. If rationality in an enterprise such as science is problematic, then surely secularists should not glibly invoke reason and scientific method as a cure-all in so chaotic an enterprise as politics.

When it comes to the issue of religion in politics, one particular aspect of reasoning which leads to the secularists' misconstrual of reason should be pointed out. What is missing from the liberals' view of reasoning is any role for the underlying *frameworks of values and beliefs* concerning the ultimate nature of reality, nature of a person, what is good, what can be expected, goals to be achieved, and so forth.<sup>129</sup> Arguments are only made within such frameworks—our most deeply-held

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127 See THOMAS S. KUHN, *Objectivity, Value Judgment, and Theory Choice*, in *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* 320 (1977).

128 Whether this view produces a cognitive relativism (each way of life internally setting up its own standards of truth and rationality, with no external standards by which to adjudicate among competing ways of life) will not be discussed here.

129 These fundamental frameworks could be referred to as "metaphysics," although the term has pejorative connotations. The frameworks are not beyond experience but are the most basic belief-commitments framing our experiences. They can be argued about and are open to change—they are deeply held, but not immutable. But while we may hold our frameworks up to criticism and revision, they are open to criticism only from within one or another such framework.

beliefs are the scaffolding holding our arguments together. Basic world views specify how things "really are" and what is "objective" for their holder. What is "reasonable" and who is being reasonable become normative issues. For example, Christian fundamentalists argue that if we do not accept the literal truth of the Bible and that Jesus is the Son of God, we are not seeing the way things really are and so are not being "reasonable" in its ultimate sense.

The anti-religious, on the other hand, think this is not being "reasonable"—indeed, accepting Biblical claims in spite of science is the epitome of irrationality. They give natural science a metaphysical interpretation: science exhausts our knowledge—it is the only way of knowing, and only what is known through science is real. The anti-religious' arguments make sense only within that framework.<sup>130</sup> However, the basic premises of their positions compete on the same level with those of the fundamentalists. That is, the dispute is not over empirical evidence for an empirical claim, but a contest over a metaphysics of naturalism versus a metaphysics in which a rational being (the god of classical theism) intervenes in nature.<sup>131</sup> Whether this conflict between such positions is resolvable through reasoning is unlikely, precisely because of the disputants' commitments to conflicting basic beliefs and values.

Secularists hope to eliminate reference to all such frameworks of belief, religious and nonreligious.<sup>132</sup> Indeed, they

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130 A limited but more direct example is how "theory" shapes "fact" in political scientists' study of American religion. Political theorists largely ignore the role of religion in human affairs because certain social theories dominating political science circles predict the inevitable decline of religion; these theories dictate what political scientists consider important, and what they consider irrelevant. Allen D. Hertzke, *American Religion and Politics: A Review Essay*, 41 W. POL. Q. 825 (1988). Religion as a social force is thereby filtered out of what these theorists consider causal factors. While religion may in fact decline someday, these theorists' persistence today in adhering to these theories as ways of explaining American society is truly amazing considering the continuing significance of religion in our culture and our political life.

131 At least some claims advanced by biblical fundamentalists can be defended in ways other than biblical literalism. See Alvin Plantinga, *When Faith and Reason Clash: Evolution and the Bible*, 21 CHRISTIAN SCHOLAR'S REV. 8 (1991). Whether or not we find Plantinga's arguments convincing, no one would consider him irrational in any usual sense of the term.

132 Not all secularists (e.g., Audi) are clear that nonreligious frameworks must be treated in the same way as religious ones. Edward Foley is clearer on equal treatment in his *Tillich and Camus, Talking Politics*, 92 COLUM. L. REV. 954 (1992) (book review). There would be a clear violation of the Establishment Clause if references to religious frameworks of belief are all to be treated differently and

would deny any appeal to *truth* in political argument.<sup>133</sup> No claim that advocated that values or goals reflect the nature of reality could be supported. But, for a reason to be convincing, it cannot be abstracted from a total argument. As with scientific disputes, reasons presuppose a background of belief. What is and is not taken to be a reason depends on such background, and it is impossible to extricate reasons from their context—if “*public reason*” is supposed to be something that will convince anyone regardless of their background beliefs, then no such reason concerning fundamental political matters exists. Since normally most people argue only with those who share a common framework of belief, there is usually no need to examine our background beliefs. But when disputes arise between participants with conflicting background belief-commitments, as happens in political disputes (e.g., over abortion on when life begins and on the rights of a fetus), the background beliefs often must be made explicit. Many arguments each participant advances often only make sense when seen within the context of a conflict of basic frameworks.

That all religious and nonreligious people reason only within such frameworks means that the frameworks cannot be eliminated. Of course, different religious and nonreligious persons may reach the same conclusions for different reasons—after all, one can reach only a limited number of final conclusions on any political issue. Also, as mentioned earlier, there is no one “religious” position on any political issue, past or present, or by contrast, one “secular” position. But this does not mean that religious people somehow reach their conclusions through some neutral considerations other than religious premises so that the frameworks within which they reason can somehow be jettisoned, or that there is a common abstract ground upon which they are in reality arguing. People only reason within their total framework; it provides their orientation of what makes sense. People advance what seem to them

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excluded, while references to nonreligious ones are permitted into the political arena. The same would hold if we forced all political arguments to be stated within one framework. Nonreligious frameworks for belief (e.g., science metaphysically interpreted as naturalism) are as much “beyond reason” as religious ones: people who have adopted any nonreligious fundamental beliefs about the way things really are cannot advance reasons that are neutral between all ways of life to defend their choice and to convince all “reasonable” opponents. All fundamental commitments, religious and otherwise, are in the same class in this regard.

<sup>133</sup> Nagel, *supra* note 1, at 229.

to be evidence or reasons only within that context. Even if their reasons, like their conclusions, converge with other people's reasons in an abstract sense, this does not mean that their framework of belief is somehow irrelevant to their thinking or that their reasons are actually nonreligious.

Consider the role of *morality* in ways of reasoning. Even if a theist and an atheist converge on exactly the same set of moral precepts, morality still is not independent of religion for a religious person, any more than it is really dependent upon a religious reality for the atheist. As a philosophical matter, we may argue that morality is not dependent for its value or justification on the existence of God or any other religiously-significant reality, but this does not mean that morality is really an independent, nonreligious value system which is merely tacked onto a religious way of life. For the religious, morality is not a nonreligious component of a religious way of life. Indeed, whether morality is an autonomous point of view independent of an arguer's interests or particular conceptions of what is good is open to question.<sup>134</sup>

Morality does not appear to be a universal layer of reasoning independent of every other belief and value in one's way of life.<sup>135</sup> Instead, beliefs of what is real affect what we determine to be valuable and what we should do or achieve. Thus, in moral religious ways of life, morality is integral to the thinking and acting of the religious persons, and basic religious beliefs and values form the foundation for their moral arguments. Trying, in the name of creating a common playing field for politics, to force religious persons to think morally without resorting to the other components integrated into their faith would be asking for either the impossible or something so arti-

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134 See JEFFREY STOUT, *THE FLIGHT FROM AUTHORITY: RELIGION, MORALITY AND THE QUEST FOR AUTONOMY* 218-55 (1981).

135 One cannot argue that all people actually hold the same moral beliefs by facily distinguishing the *content* of a moral code from the *reasons* or *motives* for holding it. To be deemed moral, a code of conduct must be based upon a concern for the well-being of others. But the assumption that the concrete prescriptions in all moral codes are the same is far from certain. For example, the scope of injunctions against murder vary widely: Buddhist and Jaina codes of conduct tend to condemn all killing of humans and animals; other codes limit their injunctions in different ways. It appears that the content of different codes of conduct shapes and is shaped by the other components of the total ways of life of which they are part. See RICHARD H. JONES, *MYSTICISM EXAMINED* 187-215 (1993). Any consensus reflected in a society's laws does not mean that the scope and content of the various religious codes of the society's members are similarly limited.

ficial as not to reflect their true position. The same holds true for trying to force nonreligious persons to genuinely think "religiously."

In such circumstances, all persons will rely on their most fundamental beliefs and values when they advance purposes, justifications, and conclusions in arguing about significant political issues. Reasoning is too complicated to be broken neatly into a publicly accessible or moral component and a separable belief component constituted by background beliefs. People do not argue with isolated abstract points while ignoring the rest of what appear reasonable to them. And any political theory which would attempt to require such artificiality cannot be acceptable. It is a fantasy to think religious people can delete the "religious" parts of their ways of life and still be left with any kind of meaningful whole from which to defend a position. People cannot compartmentalize their lives and beliefs in such a manner.

This also means that everyone relies on *non-rational* elements in their reasoning, i.e., beliefs which are not demonstrable regardless of background beliefs. We all have nonrational commitments which set the bounds within which reason operates. Only within those bounds do the issues arise of the rationality or irrationality, justification or lack thereof, of a particular belief.<sup>136</sup> We cannot verify all our beliefs within our web of beliefs by standards independent of those beliefs.

Most importantly, secularists are not in an epistemologically superior position in this regard to the religious. Religious people are not inherently irrational, nor secularists inherently rational. Contrary to the liberal image of religion, religion and reason are not opposing activities. Instead, the religious, like everyone else, can reason and argue within a framework of belief. Both the religious and the nonreligious have non-rational presuppositions setting up the framework within which they argue—everyone has unprovable elements in the body of their beliefs, no matter how informed by science their beliefs may be.

Calling ultimate belief-commitments "non-rational" may make such commitments sound arbitrary, unreasonable or irrational. However, the point is simply that no ultimate belief and value premises can be established by the reasoning we use

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136 See Thomas W. Clark, *Relativism and the Limits of Rationality*, HUMANIST Jan.-Feb. 1992, at 25 (giving an account of this position on a popular level).

once we adopt those premises, since we use the basic premises as a fundamental component of the arguments. The least changeable strands of our webs of belief are a substantive component to our rationality. As discussed above, reasons are advanced only within ways of life. There is no abstract reason disembodied from beliefs and values about what is real.<sup>137</sup> There is no neutral, universal, objective point of view—a privileged “view from nowhere” which portrays things as they really are independently of a particular human condition—from which we can disinterestedly judge different ways of life. This also means that we judge other ways of life (and criticize our own) only from within a framework to which we have made at least a tentative commitment. Secularists cannot merely wish away the deep beliefs that divide us by saying that they should not be part of our reasoning.

One consequence of this is that religious and nonreligious frameworks may become part of some political arguments. Indeed, whatever major political issues are at the time intractable will involve basic beliefs, and so may end up being more about the background commitments than the political actions alone. Such arguments will be frustrating and the possibility of agreement will be slim. All participants can state their position, their reasons for it, and address their opponents' arguments. People do reach the same political conclusion from a limited set of choices, although for different reasons. But as long as a wide pluralism of conflicting fundamental beliefs and values on many social issues remains in our society, there is little possibility of a reasoned resolution of those issues in the sense of all parties agreeing to one belief-framework and arguing with shared terms within that framework to an agreement.<sup>138</sup>

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137 See P. F. STRAWSON, *SKEPTICISM AND NATURALISM* 38 (1985).

138 Basic beliefs, values and codes of conduct do not always determine political positions in a simple manner. For example, if the value-component of a way of life is only a general ethos and the belief-component is only a general worldview, then the specifics necessary to make the ethos operative will have to come from factors other than the basic framework of belief. For example, Christians are commended to love their neighbors, but what specific actions are required to do this in each concrete situation is not always made clear in the basic religious texts; the role of continuous teaching and interpretations by religious authorities thereby becomes important. Where such interpretations are needed, political arguments may be able to proceed without concentrating on the basic values and beliefs; the disputes will deal more with the less deeply-embedded factors. But some religious beliefs and codes of rules are very detailed (e.g., the Old and New Testaments, if

Thus, there is no reason to expect a "rational" resolution of some significant political issues in the sense secularists hope for, and the faith of liberalism in the power of abstract reason is therefore misplaced. Secularists simply do not appreciate the high standard they are requiring. They are not demanding rationality in the sense of coherence of beliefs or reason understood instrumentally as determining the best means to an end. Instead, they are asking for the impossible—a reasoned justification of all of one's web of beliefs. Even earning a Ph.D. in philosophy would not enable one to participate in such a political ideal.

Of course, given enough time, a consensus on issues once in controversy will emerge, at least temporarily. But this only means that the consensus results from various social or political factors, not from reason alone as liberals envision the process. Max Planck's view of how science progresses, cited earlier, may be even more applicable, *mutatis mutandis*, to political solutions of fundamental social issues. Fortunately, the Establishment Clause requirements, not any ideal of publicly accessible reason or rational dialogue, are all that matter for our society in this area.

### C. *The Secularists' Visions of a Society as Ideals*

The last section argued that the secularists' visions for our society are not plausible because of an unrealistic faith in the power of reason disembodied from any fundamental beliefs and values to resolve disputes. The last point to be made is that, even if they were plausible, the secularists' visions are inconsistent with the constitutional foundations of this country as long as religion with any kind of public dimension continues to exist.

Although secularists may claim no hostility toward religion (but only neutrality by removing all references to both religious and nonreligious frameworks of belief), their ideal for good citizenship in a democratic society forces religion to be no more than a personal hobby or a private club without a role to play in the public arena.<sup>139</sup> At best, religious ministers would be

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read literally, contain specific condemnations of homosexuality). Thereby, political positions for those who opt for a theocratic political program (see discussion *supra* part I.B) are determined more directly from the basic religious framework. Conflicts among various religious and nonreligious basic commitments would be central in those cases.

139 Some secularists may be motivated by the belief that religion is a harm-

permitted to spout broad moral platitudes but nothing concrete—they can tell people “be good” or “do the right thing,” but not tell them how actually to do this with regard to any political issue.<sup>140</sup> Individuals would be left to decide on their own all political issues, since their leaders would not be permitted to advise them on this entire aspect of their lives. How this proposal could be implemented without the clergy losing all credibility with the religious, or without simply appearing silly to everyone, is not clear. Any voice of Christian or other ministers or institutional leaders on basic moral issues would be lost.<sup>141</sup> Religion under these circumstances would be totally without effect in the political realm, even indirectly—in short, religion under this vision should be totally privatized.

Such a vision is inconsistent with the role of religion envisioned by the Framers of the Establishment Clause for our society: ours is not a secular society, and politics is not secular (in sense of being anti-religious or nonreligious).<sup>142</sup> The time may have passed when someone would readily describe America as, in the words of G. K. Chesterson, “a nation with the soul of a church.”<sup>143</sup> But the Supreme Court has long recognized that “religious values pervade the fabric of our national life.”<sup>144</sup> By all social indicia, Americans are as religious as ever, and the social/political expression of that religiosity is

ful delusion, a superstition, or otherwise irrational. But, as with religious persons in politics, the secularists’ motives need not be explored—here, the effect of their program (to relegate religion to the purely private sphere) is what is important.

140 Cf. *The Separation of Church and State*, *supra* note 1, at 274-75; *Religious Commitment*, *supra* note 1, at 69 (clergy may encourage political activism but not specific political actions). The secularists’ restriction is broader than the tax-exemption restrictions noted above (n. 97) in that the latter only cover specific involvement in lobbying and political campaigns. See *supra* text accompanying note 97. For example, under Audi’s proposal, Roman Catholic priests could not recommend that Catholics vote against all candidates who support abortion rights.

141 If the religious are to provide no voice in public affairs, then the silence and complicity of the Lutheran Church under Nazi rule in Germany in the 1930’s may be the example that secularists want American churches to exemplify.

142 See discussion *supra* part II.A.

143 Quoted in Sidney E. Mead, *The “Nation with the Soul of a Church”*, reprinted in *AMERICAN CIVIL RELIGION* 45 (Russell E. Richey & Donald G. Jones, eds., 1974).

144 *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971). Some justices would go further. Justice William O. Douglas earlier said: “We are a religious people whose institutions presuppose a Supreme Being.” *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). Justice Robert Jackson said that “for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences.” *McCullum v. Board of Educ.*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring).

also as much alive. Our situation may change in the future, and religion may wither away through various social and economic forces. But until that occurs, the denial of any public role for religion is inconsistent with the vision of society embodied in the Establishment Clause. As the Supreme Court recently said: "A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution."<sup>145</sup> The requirement of a secular purpose and secular justification, along with other requirements, is imposed by the Establishment Clause, but not the secularists' requirements of secular (nonreligious) argumentation and motivation that would produce a religionless public arena.

Audi and others pay lip service to the Establishment Clause's separation of church and state but nothing in their writings indicate that their positions are informed by the clause's history or case law, or that they have any sense of its significance. (The same is true of our Free Exercise and Free Speech interests.) In speaking of "ideals" for our society,<sup>146</sup> the secularists give the appearance of arguing about church and state when in fact they conceive no public role for churches. Audi must realize that the Establishment Clause does not actually support his position, for he speaks of the "spirit" of the separation of church and state.<sup>147</sup> But he wants to use the Establishment Clause in a way it was never intended in order to create a secular public life (i.e., a society with no public religion). In short, he wants to separate religion from politics, not church from state. The Framers did not intend the Establishment Clause to do this.<sup>148</sup>

The explanation for the secularists' lack of interest in the Establishment Clause or other possible legal restrictions on the role of religion is very simple: they are not interested in American society as now constituted. The secularists' "ideals" are simply visions for *another* society, not proposals about the prop-

145 *Lee v. Weisman*, 112 S. Ct. 2649, 2661 (1992).

146 *The Separation of Church and State*, *supra* note 1, at 276, 283; *Religious Commitment*, *supra* note 1, at 76; PERRY, *supra* note 2, at 137.

147 *The Separation of Church and State*, *supra* note 1, at 283. This use of the idea of the "spirit" of the "separation of church and state" is disturbing. Would secularists use the "spirit" of the Free Speech Clause (which also restricts only governmental actions) to censor private speech? If the Establishment Clause does not apply, why do secularists speak of it at all, except intentionally or unintentionally to give the appearance of authority and credibility to a normative political position unrelated to the Constitution?

148 See discussion *supra* part II.A.

er interpretation of church/state relations within the existing framework provided by our Constitution. Therefore, an anchor in the legal foundations of this country in the Establishment Clause or other constitutional protections is unnecessary. The secularists' vision of a society in which religion is privatized (i.e., having no public function or influenced) becomes a vision of a society in which people who do not withdraw from society will have to hold a nonreligious worldview in some fashion. This is because a truncated form of religion—one that did not inform all of the faithful's life but only his or her private activity—is impossible. As discussed earlier, the source of meaning for the religious governs all of the religious person's life, not just selected portions of it.<sup>149</sup>

However, in dictating which parties may participate in the public life, the secularists' vision is not neutral but is based upon a substantive belief-system.<sup>150</sup> From a constitutional point of view, their visions become in effect the nonreligious equivalents of a theocracy. Since the secularists' visions entail a comprehensive belief-system, they must be defended as such. They are as ideological as theocratic visions for society, and indeed would compete with those and other visions for a society. In turn, this means that secularists' arguments must operate on the same level as those of theocrats arguing for a theocratic state. Thus, secularists must present arguments for the superiority of a nonreligious worldview.<sup>151</sup> Neither party can argue that the burden of proof is on the other—each must argue for the viability of a way of life on the fundamental level of a basic vision.

Thus, secularists should be clear in their arguments that they are proposing visions for another society and not proposing changes within the constitutional framework of our existing one. Part of the secularists' political agenda may be to establish a thoroughly religionless world. There is nothing wrong with

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149 See discussion *supra* part I.B.

150 Rawls' conception of an overlapping consensus is neutral (permitting all beliefs to compete) and is not a substantive requirement of "neutral discourse" or any comprehensive belief-system which would eliminate participants with religious commitments. See discussion *supra* note 119.

151 To be consistent, secularists cannot appeal to "truth," i.e., that their values reflect reality. Instead, they may attempt to show that nonreligious ideologies are socially more desirable, e.g., less divisive and volatile. Examples of 20th Century secular (nonreligious) ideologies that have gained political control—e.g., fascism, communism, and various nationalisms—may present problems.

such political advocacy, and their motives for it are irrelevant. But their complete program of proposed governmental actions and restrictions should be made explicit. Secularists would ask the same of theocrats and other religious participants in politics.

## V. CONCLUSION

Political philosophers have the reputation of spinning grand visions that are out of touch with the realities of our society. The work of most of the theorists discussed here only confirms that reputation. As a force for reform within our current constitutional system, the secularists' visions for a new society (even if they were plausible) are not very effective because they do not deal with religion as it actually functions, and they have no interest in the role of religion currently permitted in politics. Throughout the history of our country, liberal and conservative religious groups have been forces on all sides of political issues in ways that have been consistent with the Establishment Clause. Our Constitution has set up a framework within which we can assess the propriety of any public religious activities. We should remain vigilant in making such assessments and focus less on fabricating ivory tower fantasies of societies in which an unrealistic version of reason determines everything and in which no fundamental beliefs except those of the secularists play a role.