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Book Review

From Polygamy to Peyote: What is the Proper Role of Religion in American Political Decision-Making?

Religion in Politics: Constitutional and Moral Perspectives
by Michael J. Perry
Oxford University Press (1997)

"*Thou shalt not lie with mankind, as with womankind: it is an abomination.*"[1]

"*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .*"[2]

I. INTRODUCTION

In the United States, in light of the Establishment and Free Exercise Clauses of the First Amendment to the Constitution, is it ever constitutionally proper for either a citizen or a legislator to make political arguments or decisions about homosexuality based exclusively upon the Bible's teachings? Beyond the constitutional context, is it ever morally proper to use the Bible as a basis for a political decision about homosexuality? In *Religion in Politics*, Professor Michael J. Perry attempts to answer these questions by addressing two general issues: (1) Given the Free Exercise and Establishment Clauses of the Constitution, what constitutionally permissible role, if any, may religious arguments play, "in the United States, either in public debate about what political choices to make or as a basis of political choice,"[3] and (2) What morally permissible role, if any, may religious arguments play in the United States, "either

1. *Leviticus* 18:22 (King James).

2. U.S. CONST. amend. I.

3. MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 31 (1997).

in public debate about what political choices to make or as a basis of political choice?"[4]

Perry concludes that while it is constitutionally permissible to present religious arguments in public debate, it is not constitutionally permissible to make a political choice based upon a religious argument in the absence of a plausible secular argument that supports the same conclusion.[5] Perry also addresses what he terms the "morally" proper role for religion to play in the United States. By morally proper role, Perry "mean[s] simply the role that, taking into account every relevant consideration (other than constitutionality), we should deem it permissible or proper for religious arguments to play in politics."[6] Perry argues that it is not only morally permissible, but important, that religious arguments be presented in public political debate, principally so that the religious arguments may be tested.[7] Further, Perry believes that it is morally permissible to rely on a religious argument that all human beings are sacred, even if no persuasive secular argument supports that claim.[8] In contrast, Perry concludes that in making a choice about the requirements of human well-being, it is morally impermissible to rely upon religious arguments unless a persuasive secular argument would reach the same conclusion.[9]

This Book Review discusses *Religion in Politics* and, particularly, Perry's treatment of the above stated issues. Part II discusses Perry's conclusion about the constitutionally permissible role of religious arguments in public debate or as a basis of political choice. Part III discusses Perry's conclusion about the morally proper role of religious arguments in the same fora. Part IV addresses the difficulty of applying Perry's theory in practice. Part V concludes that although Perry attempts to present a middle road between separationists and accommodationists, his book is nothing more than sugarcoated separationism.

II. CONSTITUTIONALLY PROPER ROLE OF RELIGION IN THE

4. *Id.* at 3.
5. *See id.* at 6, 33.
6. *Id.* at 43.
7. *See id.* at 6, 44-45.
8. *See id.* at 6, 66-70.
9. *See id.* at 6, 76.

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Perry concludes that it is constitutionally permissible to present religious arguments in public debate, but impermissible to make a political choice based upon a religious argument in the absence of a plausible secular argument in support of the same result.[10] In explaining this conclusion, Perry states that "free exercise forbids . . . tak[ing] prohibitory action disfavoring one or more religious practices as such," and "nonestablishment forbids . . . favor[ing] one or more religions as such."[11] Therefore, "to make a coercive political choice . . . that can be supported only by a religious reason or reasons is . . . to impose religion."[12] Nonetheless, Professor Perry concludes that "the [First Amendment] is good news not just for the atheists and agnostics among us; it is good news for us all."[13] This is because the First Amendment limits the imposition of religious belief, while at the same time protecting that belief.[14]

It is not at all clear, however, that the current state of First Amendment jurisprudence accords with Perry's assertion that the First Amendment truly "is good news for us all." Perry's theory that the First Amendment treats the religious and nonreligious equally assumes a "balanced" interpretation of the First Amendment: it is acceptable for the Establishment Clause to limit the religious believer's reliance upon religious arguments in support of political choices only if the exercise of the religious believer's beliefs is protected by the Free Exercise Clause. Ten years ago, one constitutional scholar expressed concern that the First Amendment was becoming unbalanced: "[T]he establishment clause seems to be on the verge of swallowing the free exercise clause; it is as though the neutrality commanded by the establishment clause constitutes a hostility toward the freedom protected by the free exercise clause," thus leading to the danger that "the establishment clause might be on the verge of becoming not anti-establishment, but simply

10. *See id.* at 6, 33.

11. *Id.* at 15.

12. *Id.* at 36.

13. *Id.* at 18.

14. *See id.* ("An important way to protect the freedom of those of us who count ourselves religious to follow our religious consciences where they lead—especially the freedom of those of us who are not politically powerful—is for the constitutional law of the United States to forbid the politically powerful among us to act, in large ways or small, in obvious ways or subtle, to privilege ('establish') their brand of religion.").

anti-religion."[15] As will be discussed, recent Supreme Court decisions have transformed that concern into reality.[16] Because there is no longer a "balanced" First Amendment, Perry's theory that it is impermissible to rely upon religious arguments to make political choices in the absence of an equally persuasive secular rationale is strong medicine to the religious believer, who becomes subjected to the full limitations of, but receives no corresponding benefits from, the First Amendment.

In 1990 the Supreme Court, in *Employment Division, Department of Human Resources of Oregon v. Smith*,[17] upheld against a free exercise challenge a generally applicable state law, which criminalized the use of peyote.[18] The law at issue was used to deny unemployment benefits to members of the Native American Church who lost their jobs because of their use of peyote during church services.[19] In *Smith*, the Court declined to apply the balancing test of *Sherbert v. Verner*,[20] which asks whether the law at issue substantially burdens a religious practice and, if so, whether there is a compelling government interest to justify the burden.[21]

The *Smith* Court wrote that "if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision," the Free Exercise Clause, without regard to whether the provision serves a compelling governmental interest, has not been violated.[22] Further, the Court held that any hardship suffered by religious believers under generally applicable laws is simply an "unavoidable consequence of democratic government."[23]

In so holding, the Court resurrected the *Reynolds v. United States*[24] belief-action doctrine that "[l]aws are made for the government of actions, and while they cannot interfere with mere

15. Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 937-38 (1989).

16. *See* City of Boerne v. Flores, 521 U.S. 507 (1997); Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

17. 494 U.S. 872 (1990).

18. *See id*.

19. *See id*. at 874.

20. 374 U.S. 398 (1963).

21. *See id*.

22. *Smith*, 494 U.S. at 878.

23. *Id*. at 890.

24. 98 U.S. 145 (1879).

religious belief and opinions, they may with practices."[25] This doctrine conveys the message that "you are free to believe as you like, but, for goodness sake, don't act on it!"[26] Further, the belief-action doctrine has been criticized for "not [being] a line that can provide real assistance" because if it were consistently applied, the result would be consistent infringement of unquestioned First Amendment rights.[27] The *Smith* Court concluded that "government may not compel *affirmation* of religious belief [or] punish the *expression* of religious doctrines it believes to be false";[28] it will protect one and only one religious act: the act of speaking.[29]

Perhaps recognizing the imbalance in the First Amendment caused by *Smith* and its effects upon his interpretation of the First Amendment, Perry feels that we should return to the "accommodationist" interpretation of the Free Exercise Clause.[30] This interpretation holds that the " 'free-exercise of religion' is such an important value that government must not only not discriminate against religious practice but must do what it can, short of compromising an important public interest, to avoid putting substantial impediments in the way of religious practice."[31] This "accommodation" would be accomplished by "exempting" religious believers from generally applicable laws, when the government's regulation interest is not very important.

The "accommodationist" view was essentially codified by the Religious Freedom Restoration Act of 1993 (RFRA), legislation that was enacted in response to *Smith*. RFRA prohibits "[g]overnment" from "substantially burdening" an individual's

25. *Id*. at 166.

26. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 130 (1993).

27. PHILLIP B. KURLAND, RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT 101-02 (1961); *see also* FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 40 n.37 (1995).

28. *Smith*, 494 U.S. at 877.

29. To justify the result in *Smith*, the Court grasped upon a previously popular idea: If the government were to allow exemptions from generally applicable laws for those who claimed a religious belief, then false claims would overwhelm the courts, and anarchy would follow. Interestingly enough, during the period from 1963 to 1990, when the Supreme Court generally followed the *Sherbert* balancing test, there was no remarkable problem with false claims for exemptions based upon religious belief. *See* GEDICKS, *supra* note 27, at 30, 40-41.

30. PERRY, *supra* note 3, at 30.

31. *Id*. at 28.

exercise of religion unless the burden "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that . . . interest."[32] RFRA applied to any branch of Federal or State Government, to all officials, and to other persons acting under color of law,[33] and its coverage extended to "all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA's enactment]."[34]

Religion in Politics was published before *City of Boerne v. Flores*, the 1997 decision wherein the Supreme Court found that RFRA unconstitutionally exceeded Congress's power.[35] *Flores* leaves the future of RFRA uncertain, and casts a shadow over the validity of the accommodationist interpretation of the First Amendment. After *Flores*, it appears that the holding of *Smith* constitutes the Supreme Court's interpretation of the First Amendment's religion clauses, thus leading to the conclusion that the First Amendment is currently "unbalanced." This demonstrates the weakness of Perry's argument that religion should not form the sole basis for political decision making. If religious believers must rely only upon persuasive secular rationales when making political decisions, then tens of millions of Americans will be prohibited from demanding government action in accordance with their consciences. At the same time, any hardship suffered by these religious people under generally applicable laws will simply be an "unavoidable consequence of democratic government,"[36] regardless of whether the law is supported by a compelling government interest.

Contrary to both the Supreme Court's holding in *Zorach v. Clauson*[37] and Perry's assumption, the First Amendment now favors those who do not believe in religion over those who do.[38] As Stephen L. Carter has written:

32. 42 U.S.C. § 2000bb-1 (1993).

33. *See* 42 U.S.C. § 2000bb-2(1) (1993).

34. 42 U.S.C. § 2000bb-3(a) (1993).

35. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

36. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 890 (1990); *see also* GEDICKS, *supra* note 27, at 38; Carter, *supra* note 15, at 938.

37. 343 U.S. 306 (1952).

38. *See id*. at 314 (holding that the constitution does not have a requirement of "callous indifference" to religious groups, and that the Court ought not to prefer those who do not believe in religion over those who do).

> In a nation that prides itself on cherishing religious freedom, it is something of a puzzle that a Communist or a Republican may try to have his world view reflected in the nation's law, but a religionist cannot; that one whose basic tool for understanding the world is empiricism may seek to have her discoveries taught in the schools, but one whose basic tool is scripture cannot; that one whose conscience moves him to doubt the validity of the social science curriculum may move to have it changed, but one whose religious conviction moves her to doubt the validity of the natural science curriculum may not.[39]

III. MORALLY PROPER ROLE OF RELIGION IN THE UNITED STATES

In addition to making a constitutional inquiry, Perry addresses the "morally" proper role for religion to play in the United States. Perry argues that it is not only morally permissible, but important that religious arguments be presented in public political debate, principally so that those arguments may be tested.[40] Further, Perry argues that, as a matter of political morality, it is permissible to "rely on a religious argument that every human being is sacred *whether or not any intelligible or persuasive or even plausible secular argument supports the claim about the sacredness of every human being*."[41] Why? Because "the proposition that every human being is sacred is a fundamental constituent of American moral culture" and it would therefore be "silly" to insist otherwise.[42] Because this value is fundamental in nature, it is not subject to the "demonstrated, ubiquitous human propensity to be mistaken and even deceive oneself about what God has revealed."[43]

In contrast, Perry concludes that in making a choice about the requirements of human well-being, it is morally impermissible to rely upon religious arguments unless a persuasive secular argument would reach the same conclusion.[44] Perry

39. Stephen L. Carter, *Evolutionism, Creationism and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 985-86.

40. *See* PERRY, *supra* note 3, at 6, 44-45.

41. *Id.* at 69.

42. *Id.*

43. *Id.* at 75.

44. *See id.* at 6, 76.

supports this limitation with the following line of reasoning: "The paradigmatic religious argument about the requirements of human well-being relies . . . on a claim about what God has revealed";[45] therefore, "[g]iven the demonstrated, ubiquitous human propensity to be mistaken and even to deceive oneself about what God has revealed,"[46] the absence of a persuasive secular argument in support of a claim about the requirements of human well-being fairly supports a presumption that the claim is probably false, and that it is probably the defective yield of that demonstrated propensity. If nothing else, it supports a presumption that the claim is an inappropriate ground of political choice, especially coercive political choice.[47]

Perry's theory is flawed for several reasons. First, rather than being narrowly defined, the concept of "American moral culture" is fluid and open to manipulation, depending upon what argument the concept is used to support. For instance, many would consider ideas about the traditional nuclear family as "fundamental constituent[s] of American moral culture,"[48] while others would consider those ideas "old-fashioned." Following Perry's reasoning, if one were endeavoring to support an argument against homosexual marriage, for instance, she would assert that the traditional nuclear family is fundamentally a part of American moral culture. Conversely, if one were endeavoring to support an argument in favor of homosexual marriage, she would assert that even if the traditional nuclear family were at one time a fundamental part of American moral culture, that is no longer the case.

Second, are we to interpret Perry's theory as advocating the

45. *Id*. at 73.

46. *Id*. at 75.

47. *See id*. at 75. ("Moreover, as the American philosopher Robert Audi (who identifies himself as a Christian) has explained, 'good secular arguments for moral principles may be *better* reasons to believe those principles divinely enjoined than theological arguments for the principles, based on scripture or tradition.' This is because the latter—in particular, scripture-based and tradition-based religious arguments—are 'more subject than the former to extraneous cultural influences, more vulnerable to misinterpretation of texts or their sheer corruption across time and translation, and more libel to bias stemming from political or other nonreligious aims.' (Christianity's acceptance of slavery comes to mind here—an acceptance that persisted for most of the two millennia of Christianity.) Audi's conclusion: '[I]t may be better to try to understand God through ethics than through theology.' ") (quoting Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677, 699 (1993)).

48. GEDICKS, *supra* note 27, at 17.

view that if a political choice is based upon what one believes to be a "fundamental constituent of American moral culture," then a persuasive secular argument in support of that political choice is unnecessary? Take, for instance, those individuals who cling for religious reasons, in the absence of persuasive secular support, to elements of what they believe to be the "American moral culture," like monogamous, heterosexual marriage. Are they not in the same posture as Perry with respect to his premise that all human beings are sacred?

Third, there is historical evidence that the "American moral culture" has its roots in religion, or in what man believes God has revealed. Perry's premise that all human beings are sacred grew in America from the religious belief that all humans are sons and daughters of God, and as such, are brothers and sisters.[49] As Frederick Mark Gedicks has observed, "nineteenth century Americans generally believed that [religious] values formed an important part of the moral foundation on which a free and democratic society is built."[50] Further, "the Supreme Court [has] quote[d] Chancellor Kent to the effect that 'we are a Christian people, *and the morality of the country is deeply ingrafted upon Christianity*' . . . ."[51] As Justice Douglas explained in *Zorach v. Clauson*, "We are a religious people whose institutions presuppose a Supreme Being."[52] If American moral culture has its basis in religion, then according to Perry's reasoning, American moral culture is "the defective yield" of man's "demonstrated, ubiquitous . . . propensity to be mistaken and even to deceive oneself about what God has revealed."[53] In light of these problems with Perry's theory, his exception should be generalized with each individual, legislator, or government official allowed to rely upon the argument that seems best to them, regardless of the existence or absence of an equally persuasive secular argument.

49. *See* PERRY, *supra* note 3, at 67.

50. GEDICKS, *supra* note 27, at 15 (citing 1 ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 306 (Phillips Bradley ed., Vintage Books 1990) ("[Americans] combine the notions of Christianity and of liberty so intimately in their minds that it is impossible to make them conceive the one without the other.").

51. GEDICKS, *supra* note 27, at 16.

52. 343 U.S. 306, 313-14 (1952) (emphasis added).

53. PERRY, *supra* note 3, at 75.

IV. SELF-ENFORCEMENT

Even if Perry's theory is sound, its application would be practically impossible. Perry states that his ideal that people refrain from relying on religious arguments in support of political choices, in the absence of an equally persuasive secular argument, "would have to be self-enforced."[54] But he concedes that "it is inevitable that some legislators, and some citizens participating in a referendum or an initiative election, will rely on—will put at least some weight on—religious arguments in voting for political choices."[55] Throughout his book, therefore, Perry couches his theory in terms of it being an "ideal matter," or as one under which citizens, legislators, and public officials should be "exceedingly wary" of relying on religious arguments in the absence of a persuasive secular argument.[56] By using these terms, Perry acknowledges that his theory will be difficult to apply. A statement by Mark Tushnet further demonstrates this difficulty: "As far as I can tell, I am a Jew down to the ground, and I cannot imagine a political decision that I could make without reference, at some level of my being, to my Jewishness."[57] It is likely that in the United States, where religious faith is more widespread than in any other nation in the Western world,[58] many individuals, legislators, and political leaders are, like Tushnet, Jews, Catholics, Baptists, Presbyterians, Methodists, Mormons, Muslims, Buddhists, or believers of an almost countless number of religious denominations, "down to the ground." When a Roman Catholic who believes and follows Vatican decrees concerning the Church's opposition to the legitimization of gay marriage, abortion, and the death

54. PERRY, *supra* note 3, at 37.

55. *Id.* at 44.

56. *Id.* at 33, 66, 76, 83.

57. Mark Tushnet, *Religion in Politics*, 89 COLUM. L. REV. 1131, 1131 (1989) (reviewing KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988)) ("People at all points on the political spectrum do in fact rely on their religious convictions in deciding to support or oppose expansion of public responsibility for the needy, increases in public responsibility for inculcation of moral values in the young, and a range of policies on abortion.").

58. *See* Carter, *supra* note 15, at 939. According to recent studies, 95% of Americans profess a belief in God and 70% of American adults are members of a church or synagogue. *See* PERRY, supra note 3, at 1; Book Note, 108 HARV. L. REV. 495, 498 n.21 (1994) (reviewing ELIZABETH MENSCH & ALAN FREEMAN, THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE? (1993)).

penalty[59] is asked to make political choices about these issues, is it reasonable to think that she would disregard her religious belief in making those choices? Steven L. Carter has addressed this issue, arguing that religious faith is not something that can be "shrugged off"; it is unreasonable to forbid those who are religious "down to the ground" from relying upon religious arguments for political choices just because they have no persuasive secular reason to support that argument:

> [This requirement] asks the devout citizen to become another person, to abandon the most important aspect of her life. No one would imagine asking her to leave behind an arm or a leg in order to join her fellow citizens in their deliberations over policy; no one would ask her even to abandon moral or political conviction. But if her source of her conviction is faith, and if the faith is of religious dimension, then she must transform herself into another person—one who is not religiously devout.[60]

V. CONCLUSION

At the outset, Professor Perry presents his book as one carving a path down the middle of the debate concerning the proper place for religion in politics.

> I have written this book as a Christian. In particular, I have written it as a Catholic Christian thoroughly imbued with the spirit of the Second Vatican Council (1962-65). But I have written this book as a Christian who is extremely wary of the God-talk in which most Christians (and many others) too often and too easily engage . . . . Moreover, I have written this book as one who stands between all religious nonbelievers on the one side and many religious believers—especially theological conservative believers—on the other.[61]

59. *See Pope Reiterates Stand Opposing Legitimization of Gay Marriages*, CHATTANOOGA TIMES & FREE PRESS, Jan. 22, 1999, at A10; Diego Ribadeneira, *Pope Exhorts America to 'Defend Life'; John Paul Urges U.S. to Reject Abortion, the Death Penalty*, BOSTON GLOBE, Jan. 28, 1999, at A3; Larry B. Stammer, *Cardinal Reiterates Opposition to Abortion, Homosexual Acts*, CONTRA-COSTA TIMES, Feb. 13, 1999, at A15.

60. Carter, *supra* note 15, at 940. ("Religious faith is not something that can be shrugged off like an unattractive article of clothing. The very idea of devotion suggests a way of ordering all life and all knowledge, including, although not exclusively, moral knowledge.").

61. PERRY, *supra* note 3, at 7.

Further, Perry's conclusion that it is acceptable to rely upon religious arguments in making political choices, when an equally persuasive secular argument exists in support of the political choice, seems to balance the ideas of both religious separationists and accommodationists.[62] Perry also attempts to demonstrate the neutrality of his rationale by explaining that the limitation on the use of religious arguments to make political choices has little "practical significance . . . because there will be plausible secular rationales for most such political choices."[63] But in reality, his theory is little more than sugar-coated separatism. According to Perry's theory, in the absence of a persuasive nonreligious rationale, it is *never* permissible to rely upon religious arguments when making a political choice.[64] Based upon the current debates surrounding abortion, homosexual marriage, euthanasia, and public responsibility for the needy, it is far from certain that plausible secular rationales exist for political choices concerning these issues.

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62. *See* Audi, *supra* note 47 (separationist); Carter, *supra* note 15 (accomodationist); Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13 (1984) (separationist); Douglas Laycock, *Freedom of Speech That is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793 (1996) (accomodationist); William Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) (separationist).

63. PERRY, *supra* note 3, at 36.

64. *See* Wendell L. Griffen, *The Case for Religious Values in Judicial Decision Making*, 81 MARQ. L. REV. 513, 517-18 (1998).