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UP AGAINST THE WALL OF SEPARATION: THE QUESTION OF AMERICAN RELIGIOUS DEMOCRACY

Bruce Ledewitz*

INTRODUCTION

Can religious democracy be a question for the United States? Are we not beyond such sectarianism? Are we not pluralistic and fundamentally secular in our laws? We are not Iraq, with its conflicting Shiite and Sunni communities. Nor are we the State of Israel, which grants benefits and preferences based upon the Jewish religion of most of its citizens. Surely in the United States, religious democracy is not a question.

Two recent events, however, suggest that religion now has a dominant place in American political life. The first event was the re-election of President George W. Bush in the November 2004 presidential election, along with somewhat enlarged Republican majorities in both houses of Congress. The second event was the March 2005 spectacle surrounding the death of Theresa Marie Schiavo. In both events, religion, including political organizing and influence by people who identify themselves as religious, played the key role.

Religion's newfound presence is not confined to politics. There was a time that mainstream television would not feature this society's majority religion, Christianity.¹ In 2005, however, ABC broadcast a respectful and serious examination of the resurrection of Jesus,² and NBC aired a show — *Revelations* — that seemed to imitate aspects of the well-known *Left Behind* book series³ by suggesting that the current age may be the biblically predicted end-times.⁴ A year earlier, ABC broadcast several hours examining the roots of early Christianity.⁵ Aside from these

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¹ See Darrell L. Bock, *Jesus and Paul: Looking at a Journalistic Approach to Christianity's Beginnings*, CHRISTIANITY TODAY, Apr. 6, 2004, available at <http://www.christianitytoday.com/ct/2004/114/21.0.html> ("The fact that network television would give three hours to such a topic shows how our times have changed.").

² See *The Resurrection: Searching for Answers*, May 20, 2005, <http://abcnews.go.com/2020story?id=772399&page=1>.

³ See Jónatas E. M. Machado, *Freedom of Religion: A View From Europe*, 10 ROGER WILLIAMS U. L. REV. 451, 465 n.60 (2005) (listing books in the series); see also Scott Collins, *NBC to air show on End of Days*, L.A. TIMES, Mar. 16, 2005, at E1.

⁴ See generally *Networks get religion in faith-based shows*, PITTSBURGH POST-GAZETTE, Apr. 11, 2005, at C8 (discussing new religious shows).

⁵ See Gretchen Passantino, *What Does Peter Jennings Tell Us about Jesus, Paul, and*

planned events, the three broadcast networks and really all of the media covered in great depth the death of Pope John Paul II and the election of Pope Benedict XVI. For two weeks, the Catholic Church dominated the airwaves. Liberals are viewing this religious surge with alarm.⁶

Other observers will say that this rumor of religion is a media creation⁷ and that political matters have not changed all that much. There is some truth in such denials. Religion has always played a large part in American political life. The 2004 Presidential election was hardly a complete break with the past. Conversely, the religiosity of the American people can easily be overstated, as the generally negative public reaction to the Relief of the Parents of Theresa Marie Schiavo Act⁸ suggested. America is not a theocracy.⁹ Nevertheless, religion is a political force

Christianity, Answers in Action (2004), available at http://answers.org/peter_jennings_and_jesus.html (last visited Sept. 11, 2005) (critiquing the alleged liberal and secular bias of the documentary).

⁶ Representative of the mood on the left were several articles in *Harper's Magazine's* May 2005 issue. See generally Gordon Bigelow, *Let There Be Markets: The evangelical roots of economics*, HARPER'S MAG., May 2005, at 33; Jeff Sharlet, *Soldiers of Christ: I., Inside America's most powerful megachurch*, HARPER'S MAG., May 2005, at 41; Chris Hedges, *Soldiers of Christ: II., Feeling the hate with the National Religious Broadcasters*, HARPER'S MAG., May 2005, at 55. Hedges's story ended with a warning from his ethics professor at Harvard Divinity School: "[He] told us that when we were his age, and he was then close to eighty, we would all be fighting the 'Christian fascists' . . . Homosexuals and lesbians . . . would be the first 'deviants' singled out by the Christian right. We would be the next." *Id.* at 61.

⁷ This was the view expressed by Mark Danner in *The N.Y. Review of Books*:

[A]n army of self-interested commentators, self-appointed spiritual leaders, and television pundits hot for a simple storyline had seized on the answers to a clumsily posed exit poll question . . . and used those answers to transform the results of the 2004 election into a rousing statement of Americans' disgust with abortion, promiscuity, R-rated movies, gay marriage, late-night television, and other "Hollywood-type" moral laxity.

Mark Danner, *How Bush Really Won*, N.Y. REV. BOOKS, Jan. 13, 2005; see also Dick Meyer, *The Moral Values' Myth*, PITTSBURGH POST-GAZETTE, Dec. 12, 2004, at J1. In Meyer's view, "one dodgy question in an exit poll wrongly became the story of how Bush won." *Id.*

⁸ Pub. L. No. 109-3, 119 Stat. 15, 15-16. A poll conducted in late March showed that 75 percent of those polled disapproved of federal intervention into the issue of continued nutrition and hydration for Terri Schiavo. See Daniel Eisenberg, *Lessons of the Schiavo Battle*, TIME, Apr. 4, 2005, at 22.

⁹ The Republican Party was criticized over the Schiavo intervention by Republican Representative Christopher Shays of Connecticut on just this point: "'This Republican Party of Lincoln has become a party of theocracy.'" Adam Nagourney, *G.O.P. Right Is Splintered on Schiavo Intervention*, N.Y. TIMES, Mar. 23, 2005, at A14.

The role of religion in American political life has changed since the mid-twentieth Century, but America has been more theocratic in the past. For example, today, a justice on the Supreme Court would not readily purport to speak for God, as Justice Bradley did in his

today in a way that it has not been during the past fifty years. Religion has made a cultural breakthrough that would have been hard to predict during the mid-twentieth century.¹⁰

America is now a religious democracy. As a provisional definition, by the term "religious democracy," I mean simply that a substantial number of voters in America now vote the way they do for what they consider to be religious reasons and that as a result of their voting, government policy is changed.¹¹ In other words, George Bush might just as well have said out loud during the 2004 campaign, "Vote for me because I am a Christian, and I will carry out policies that you and I believe are consistent with the Christian faith."¹² Now that he has been elected in that way, President Bush tries to carry out those promised policies. As Senator Rick Santorum says, "Elections have consequences."¹³ This is the political system we now have and, it appears, will have for the foreseeable future.

The questions that this article begins to address are the consequences of this event. How does a religious democracy function? How, if at all, does it differ from any other kind of democracy? Can there even be such a thing as religious democracy? What is the role of the secular voter in a religious democracy? For that matter, what is a secular voter?

This article proceeds in four parts. Part I examines the current political/religious landscape to indicate why America might be thought to have entered new terrain. Part II asks whether America has ever had something that could be called secular democracy, or even whether such a thing is possible. Part III asks the converse

concurrence in *Bradwell v. Illinois*, in which the Court upheld a statute denying women the right to practice law. 83 U.S. 130 (1873). Justice Bradley wrote, "The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." *Id.* at 141 (Bradley, J., concurring).

¹⁰ One has only to look at what mainstream media now cover. *See, e.g.*, David Van Biema et al., *The 25 Most Influential Evangelicals in America*, TIME, Feb. 7, 2005.

¹¹ Richard John Neuhaus described religion in the public sphere similarly some years ago: "Religion is merely the public opinion of those citizens who are religious." Richard John Neuhaus, *A New Order of Religious Freedom*, 60 GEO. WASH. L. REV. 620, 621 (1992).

¹² *See generally* David D. Kirkpatrick, *Battle Cry of Faithful Pits Believers Against Unbelievers*, N.Y. TIMES, Oct. 31, 2004, at 24. According to Kirkpatrick, it would be more accurate to portray the overall message as "Vote for me because I believe in God." An attempt was made to reach Christians and Jews but, given the war in Iraq, probably not Muslims. Nevertheless, the Republican effort to reach Orthodox Jews was only a very small piece of their religious strategy.

In the third televised debate during the primaries in 2000, candidate George Bush responded, "Christ," when asked what political philosopher had most influenced him. *See* Davison M. Douglas, *Religion in the Public Square*, 42 WM. & MARY L. REV. 647, 647 n.1 (2001) (citation omitted). The response was not insincere vote mongering, but it was a sign to the faithful.

¹³ Terence Samuel & Dan Gilgoff, *At the Brink*, U.S. NEWS & WORLD REP., May 30, 2005, at 32, 33.

question — whether something that could be called religious democracy is possible. Finally, Part IV proposes a new direction for religion in American political life — progressive religion that is biblical but not exactly Jewish or Christian. Religious democracy has become divisive because of a mischaracterized secularism that dominates the Democratic Party. This so-called secularism creates a false, unified direction in religious democracy. It also needlessly creates division between religious and non-religious voters.

This article, by indirection, also asks who ultimately controls the interpretation of the Constitution. Larry Kramer has argued persuasively that popular constitutionalism used to be a prevalent model in the United States.¹⁴ Dean Kramer suggests that this period is over and that we are now bound by a theory of judicial supremacy.¹⁵ But what if he is wrong? What if we are living through a real “constitutional moment,” as Bruce Ackerman has termed fundamental changes in constitutional understanding?¹⁶ What if this moment is one in which the American people have reclaimed the right to decide what their fundamental political arrangements will be?¹⁷ What if they have decided that these political arrangements will be religious, thus horrifying the liberal and secular law professors who, ironically, have championed their right to modify constitutional understanding? What if the people are abolishing the secular assumptions of American law, secular assumptions that most lawyers, conservatives as well as liberals, hold? I think something like this is just what is going on in America today. I am not sure where it will lead.

I. RELIGION AND PUBLIC LIFE AFTER THE 2004 ELECTION

Right after the 2004 Presidential election, Thomas L. Friedman, a liberal *New York Times* columnist, described the election in dramatic fashion. He had been on his way to vote when a “Constitutional Convention broke out.”¹⁸

¹⁴ LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 207 (2004); see also Shannon D. Gilreath, *The Technicolor Constitution: Popular Constitutionalism, Ethical Norms, and Legal Pedagogy*, 9 TEX. J. C.L. & C.R. 23 (2003) (discussing the theme of popular constitutionalism).

¹⁵ This is a development he opposes. See Kramer, *supra* note 14, at 249–53. Dean Kramer believes that to reverse this supremacy would require extraordinary measures, such as impeaching justices. In fact, a giant reversal may be occurring now without any such drama.

¹⁶ See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1993) (discussing his theory of “constitutional moments”).

¹⁷ This kind of popular constitutionalism is an end run around the Court’s insistence that only it can interpret the Constitution. See, e.g., Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003). Even if the Court no longer defers to Congress, through changes in personnel and in the general political and cultural climate, constitutional interpretation changes in the direction the public wishes.

¹⁸ Thomas L. Friedman, *Two Nations Under God*, N.Y. TIMES, Nov. 4, 2004, at A25.

What was there about the 2004 Presidential election that felt so different? There were objective markers in the election's aftermath that suggested an important role played by religion in the voting. An exit poll reported that 22 percent of the voters ranked moral values as their top voting issue, and of those voters, 80 percent voted for President Bush.¹⁹ If accurate, that would mean that almost 18 percent of the voters overall voted for President Bush on this basis. This would seem an important role for religion, which many people associate with moral values.

The Presidential election also reflected institutional religious preferences by the voters. In a dramatic divide, given such a close election, weekly churchgoers — 41 percent of the 2004 Presidential voters — voted for President Bush, 61 percent to 39 percent.²⁰ 78 percent of white evangelical voters — 23 percent of the electorate — and 52 percent of Catholic voters — 27 percent of the electorate — voted for President Bush.²¹ In other words, though the nation was politically closely divided in the 2004 Presidential election, those who could be termed religious voters²² were not nearly so divided. They supported President Bush.²³

There were other issues on various state ballots in 2004 that also sounded religious and moral themes. Adding to the perception of the election as a kind of moral/religious referendum, eleven states adopted proposals banning gay marriage.²⁴ Every state where the issue was on the ballot adopted an anti-gay state constitutional amendment.²⁵

Even before the voting began, there was a feeling in America that the election might be decided along a national religious divide. Before the election, David Domke

¹⁹ CNN.com Election 2004, CNN.com [hereinafter Election 2004], at <http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html> (last visited Sept. 12, 2005). This information was widely reported. See, e.g., Editorial, *Election Results: Whose Morality?*, SEATTLE POST-INTELLIGENCER, Nov. 7, 2004. ("Exit polls indicate that for 22 percent of voters in Tuesday's election, moral values ranked as the top issue — above Iraq, the economy, taxes or terrorism. And among those voters, nearly 80 percent said they voted to re-elect President Bush.").

²⁰ Election 2004, *supra* note 19.

²¹ *Id.*

²² I use the term "religious voters" to denote those voters who voted for President Bush on religious grounds, and other voters who share this political orientation. Of course, the term "religious voter" is tendentious. It assumes that these voters are religious, whereas other, and opposing, voters are not. There were probably many voters who voted for Senator Kerry for what they would say were religious reasons, but I am not including them in the term. My only defense is that I am using terms in the popular sense, for the purpose of identification and analysis.

²³ The converse, of course, was also true. Kerry led the group of "occasional" churchgoers, 53 percent to 47 percent and dominated in the group who "never" go to church, 62 percent to 36 percent. Election 2004, *supra* note 19.

²⁴ *Id.*

²⁵ See Same-sex marriage bans winning on state ballots, CNN.com, Nov. 3, 2004, at <http://www.cnn.com/2004/ALLPOLITICS/11/02/ballot.samesex.marriage>.

criticized President Bush for promoting his identification as more pious than his political opponents.²⁶ And the weekend before the election, both candidates went to the churches.²⁷

The political importance of religion in the 2004 election lay not in the mere existence of these voting patterns, for patterns like them had existed before. The change lay in the intention of the Bush campaign to win the Presidential election by using these religious patterns — an apparently successful strategy. It was widely reported that Karl Rove, President Bush's main election strategist, considered the goal of turning out four million more evangelical voters in 2004 than in the 2000 Presidential election to be a key to winning for President Bush.²⁸

A changed national political mood after the voting reinforced the impression of a new role for religion in American political life. Religious groups on the political right were emboldened.²⁹ Ed Vitagliano, for example, asked in the *American Family Association Journal*, "Will the Church see the results of the 2004 election as a vindication of power politics, or as a window of opportunity to impact a morally degenerating culture with the gospel?"³⁰ And, in the aftermath of the election, evangelical groups in Ohio began planning a sort of takeover of the Ohio Republican Party.³¹

Liberals, on the other hand, engaged in a kind of secular retreat after the election. The most powerful such post-election symbol was the announcement by Senator Hillary Rodham Clinton that she has "always been a praying person."³²

²⁶ See Michael McGough, Op-Ed, *Mission Critical*, PITTSBURGH POST-GAZETTE, Oct. 24, 2004, at B1 (interviewing David Domke and noting that "David Domke says Bush is unique in offering himself as God's prophet for America.").

²⁷ John Kerry went to two churches on the Sunday before the election. "In remarks at Shiloh Baptist Church in Dayton, Kerry quoted the Bible to frame the election in spiritual terms. 'It's ultimately a choice about whether we're going to keep faith with the faith that we profess,' he said." Jill Lawrence, *Senator makes pitch in N.H. buttressed by Red Sox brass*, USA TODAY, Nov. 11, 2004, at 4A.

²⁸ "Mr. Rove thought four million evangelical Christians — probable Bush supporters — stayed at home in the 2000 election. If they had cast ballots, he reckoned, the president might have carried an extra state, or at least won the popular vote that would have given his first term more legitimacy." Rachel Clarke, *Drawing up blueprints for Bush victory*, BBC NEWS, Nov. 6, 2004, at <http://news.bbc.co.uk/1/hi/world/americas/3987237.stm>.

²⁹ See Neela Banerjee, *Conservative Christians Target States*, PITTSBURGH POST-GAZETTE, Dec. 13, 2004, at A6 ("Energized by electoral victories last month that they say reflect wide support for more traditional social values, conservative Christian advocates across the country are pushing ahead state and local initiatives on thorny issues, including same-sex marriage, public education and abortion.").

³⁰ Ed Vitagliano, *Now What?*, AM. FAM. ASS'N J., Feb. 2005, available at http://www.afa-journal.org/2005/february12.05now_what.asp (last visited Sept. 13, 2005).

³¹ See James Dao, *Movement in the Pews Tries to Jolt Ohio*, N.Y. TIMES, Mar. 27, 2005, at 14.

³² Michael Jonas, *Sen. Clinton Urges Use of Faith-Based Initiatives*, BOSTON GLOBE,

It may very well be that Senator Clinton has always been such a person, but it does not seem likely that she would have made this announcement except for the results of the 2004 election. Other liberal icons were also in retreat.³³

There were denials that the election turned on religious lines. Among those who denied that much, if anything, had changed politically were columnists David Brooks³⁴ and Charles Krauthammer.³⁵ But this minority view may result from discomfort by Jewish neo-conservatives at being part of a political coalition driven by a conservative Christian agenda.

One surprising piece of evidence for the conclusion that religion now dominates politics is the reaction to the new interest by some evangelical Christians in the issue of global warming. In April 2005, *The New York Times Magazine* reported growing concern in the Evangelical movement about global warming and growing support for taking action against it.³⁶ This interest has clear theological resonance grounded in respect for God's creation.

The political aspect of this new environmental concern is that if the Evangelical movement were to put its political weight behind any sort of legislative initiative to stem global warming, such an initiative would enjoy great success. There is a great deal of political support in general behind efforts to deal with global warming. A change in stance by part of the religious right would doubtless create a majority in Congress supporting legislative action.

The most persuasive demonstration of the political power of religious voters was the large congressional majority that supported the Terri Schiavo legislation.³⁷ President Bush rather publicly returned to Washington from vacation to sign the Schiavo bill.³⁸

Jan. 20, 2005, at B1.

³³ See, e.g., Burt Neuborne, *Courting Trouble*, AM. PROSPECT, Jan. 2005, at A16. Neuborne sounded ready to abandon public prayer cases altogether: "[S]eriously, as long as all religions are treated equally, do you really view such exercises in religious symbolism as a threat to our way of life?" *Id.* at A18.

³⁴ See David Brooks, *The Values-Vote Myth*, N.Y. TIMES, Nov. 6, 2004, at A19.

³⁵ See Charles Krauthammer, *Moral Values' Myth*, WASH. POST, Nov. 12, 2004, at A25.

³⁶ See Deborah Solomon, *Earthly Evangelist*, N.Y. TIMES, Apr. 3, 2005, § 6 (Magazine), at 17 (interviewing Richard Cizak); see also Laurie Goodstein, *Evangelical Leaders Swing Influence Behind Effort to Combat Global Warming*, N.Y. TIMES, Mar. 10, 2005, at A16.

³⁷ The vote in the House was 203 to 58. Anita Kumar, David Karp, & Chris Tisch, *Congress Votes: Keep Schiavo Alive*, ST. PETERSBURG TIMES, Mar. 21, 2005, at 1A. In the Senate, Democrats literally disappeared. The bill passed without objection on a voice vote with only three Senators, all Republican, present. See Larry Lipman, *Democrats AWOL for Senate's Vote*, ST. PAUL PIONEER PRESS, Mar. 23, 2005, at 6A. This remarkable piece of intimidation illustrates the political power of religious voters.

³⁸ President Bush "ordered his staff to awaken him so he could sign the bill." Kumar, *supra* note 37.

Certainly the politicians who voted for the bill had reasons for doing so in addition to gaining the support of religious voters. Some of them presumably agreed that Schiavo was not in a vegetative state and/or that her husband could not be trusted to protect her interests.

But the federal legislation was remarkable and its passage surprising. The bill reversed the usual assumptions of American federalism by allowing a federal judge in a civil context³⁹ to revisit issues already decided by a judge in state court.⁴⁰ Even more surprising, after it became clear that a majority of the American people opposed the federal intervention, the Republican congressional leadership continued to urge federal judicial intervention.⁴¹ All in all, the Schiavo episode, especially the absence of organized opposition to the bill, suggests enormous influence, maybe dominance, by religious voters.

The political consequences of this power will depend on what religious voters want. Certainly such voters want to elect persons who, like themselves, are religious. This explains the strong support for President Bush, a self-identified born-again Christian. This political support should not be thought of as necessarily Christian. An orthodox Jew like Senator Joseph Lieberman might have done very well with these voters in 2004.

Nor should it be thought that political support for candidates like President Bush is only a matter of religious identification. That was the interpretation put forward, for example, by the magazine, *The New Yorker*, which wrote about the 2004 election result as if religious voters did not quite know what they were doing:

[The 80% of evangelical voters who supported President Bush did so] against their own material (and, some might imagine, spiritual) well-being. The moral values that stirred them seem not to encompass botched wars or economic injustices or environmental depredations; rather, moral values are about sexual behavior and its various manifestations and outcomes, about family structures, and about a particularly demonstrative brand of religious piety. What was important to these voters, it appears, was not Bush's public record but what they conceived to be his private soul. He is a good Christian, so his policy failures are forgivable.⁴²

³⁹ This is compared with federal habeas corpus, which applies to state prisoners and thus a criminal context. See 28 U.S.C. § 2241(c) ("The writ of habeas corpus shall not extend to a prisoner unless . . . (3) He is in custody in violation of the Constitution . . .").

⁴⁰ *Id.* § 2254(a) (noting that a federal judge "shall entertain on application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court").

⁴¹ Popular opposition to federal intervention was plain by the Sunday that Congress acted. See Andrew Kohut, *A political victory that wasn't: The Schiavo Case*, INT'L HERALD TRIB., Mar. 24, 2005, at 7 (referring to ABC poll taken on March 20, 2005).

⁴² Hendrik Hertzberg, *Blues*, NEW YORKER, Nov. 15, 2004, at 33.

What this analysis mistakes is that among some of these religious voters, ending the Estate Tax and anti-government and anti-tax and anti-welfare rhetoric are not inconsistent with religious values. So these matters were not policy failures to be overcome or disfavored policies to be overlooked, but were additional reasons to support President Bush. These voters thought President Bush had a pretty good public record.

Another issue that arises in large part because of the concerns of religious voters is the role of judges in American life. As Burt Neuborne has written, “The 2004 election saw the Democrats’ 50-year practice of successfully advancing Enlightenment values through the courts instead of through the political process come home to roost.”⁴³ After the election, National Public Radio did a story about the continuing culture war in America. The point that repeatedly emerged in the story was the hostility of religious voters to “judges” and the way judges are running the country, making decisions at odds with the wishes of the majority of the American people.⁴⁴ More recently, in a story by Russell Shorto in *The New York Times Magazine* about anti-gay marriage organizers in Maryland, the same point was made by Laura Clark, a typical apolitical parent turned anti-gay activist: “She believed that what happened in Massachusetts could happen in Maryland. ‘My first reaction was frustration,’ she said, ‘knowing that this is a legislative issue and the court in Massachusetts had overstepped their bounds.’”⁴⁵

The filibuster fight in the United States Senate in the spring of 2005 stemmed in large part from the concern of religious voters over the judiciary. The end of the judicial filibuster would allow President Bush to select candidates for the federal judiciary who would change the way judges act — at the very least, overruling *Roe v. Wade*⁴⁶ and preventing judicial endorsement of gay marriage. The religious hostility to the judiciary explains why the Family Research Council program supporting an end to filibusters in judicial nominations described Democrats conducting these filibusters as “against people of faith.”⁴⁷ It also explains the strong reaction to the federal judicial decisions that, in effect, dismissed the *Schiavo* case.⁴⁸ Senate Majority Leader Tom DeLay practically threatened the federal judges involved.⁴⁹

⁴³ Neuborne, *supra* note 33, at A17.

⁴⁴ See Barbara Bradley Hagerty, *Analysis: Frustration of Americans Who Want Laws and Other Aspects of Public Life to Reflect Their Particular Values* (NPR radio broadcast Dec. 23, 2004) (transcript on file with author).

⁴⁵ Russell Shorto, *What’s Their Real Problem With Gay Marriage? It’s the Gay Part*, N.Y. TIMES, June 19, 2005, § 6 (Magazine), at 36.

⁴⁶ 410 U.S. 113 (1973).

⁴⁷ See Bruce Ledewitz, *The End of American Democracy?*, PITTSBURGH POST-GAZETTE, Apr. 24, 2005, at J1 (quoting Senator Bill Frist).

⁴⁸ Comm. on Gov’t Reform of the U.S. House of Reps. v. *Schiavo*, 125 S. Ct. 1622 (2005).

⁴⁹ “[T]he time will come for the men responsible for this to answer for their behavior.”

Religious voters are also, no doubt, committed to seeing more religious symbolism in public life and more religious instruction in public schools. This means more symbolic religious expression cases and more issues around prayer in the public schools. The Supreme Court's decision in *Elk Grove Unified School District v. Newdow*,⁵⁰ essentially ducking the case in a supreme example of Alexander Bickel's "passive virtues,"⁵¹ may have reflected the dilemma that upholding the words "under God" in the Pledge of Allegiance was inevitable in the current political climate, but that there was no doctrinal way to do so without substantially reducing the reach of the Establishment Clause. On the last day of the 2004 term, the Court divided 5–4 in two Ten Commandments cases, upholding a display in Texas⁵² and striking down courthouse displays in Kentucky⁵³ — as close as the Court can get to splitting the difference.

On other issues, the influence of religious voters has not been as focused. There has been support for the rights of Christians in Africa⁵⁴ and abstinence-only sex education programs in schools.⁵⁵ But the major focus of religious voters thus far has been the courts and the issues the courts have influenced.

Of course I am writing about what religious voters support as religious issues. Presumably they also support President Bush on issues that are not seen primarily as religious — such as the war in Iraq, although that issue does have religious fallout.⁵⁶

Does the new influence of religious voters mean that agnostics and atheists cannot be considered viable candidates for national and, in many places, statewide offices? Of course it means that. That much should have been clear when Howard Dean's candidacy for president unraveled in part because he was considered too

Mike Allen, *DeLay Wants Panel to Review Role of Courts*, WASH. POST, Apr. 2, 2005, at A9.

⁵⁰ 124 S. Ct. 2301 (2004) (dismissing the case for lack of standing).

⁵¹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111–98 (1962) (discussing the Court's "passive virtues," through which the Court refuses to hear a case out of a concern for its political legitimacy).

⁵² *Van Orden v. Perry*, 125 S. Ct. 2854, 2856–57 (2005).

⁵³ *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2727 (2005).

⁵⁴ See, e.g., *Islam Review*, <http://www.islamreview.com/articles/catholicchurchandislam.shtml> (last visited Oct. 13, 2005).

⁵⁵ See PLANNED PARENTHOOD FED'N. OF AM., INC., *ABSTINENCE ONLY 'SEX' EDUCATION*, at <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/teensexualhealth/fact-abstinence-education.xml> (last visited Oct. 13, 2005) ("Abstinence-only education is one of the religious right's greatest challenges to the nation's sexual health."). Of course, the report is critical of this concern by religious voters, but it does demonstrate that religious support for such education has been politically significant.

⁵⁶ Unfortunately, religious voters also support the President's non-religious policies with which they might not agree. Religious voters cannot possibly be pleased with the federal budget deficits that are weakening America's economic foundation. In our political system, however, you have to join a "side."

unreliable in religious matters.⁵⁷ It is not at all certain that an Abraham Lincoln, who did not belong to any denomination,⁵⁸ could be a serious contender for the Presidential nomination today, certainly not for the Republican nomination.

But isn't that reality totally at odds with the Establishment Clause? Does not the fact that atheists and agnostics cannot win national, or even state-wide, elections "send[] a message to nonadherents that they are outsiders, not full members of the political community"?⁵⁹ Does it not establish a de facto religious test for federal office in violation of the Constitution?⁶⁰ Yes, but that is precisely the point. The unreviewable actions of religious voters have created religious democracy in America.

It might be objected that, for years, voters voted in racial patterns that gave the lie to the national commitment against racism, but this failure did not undermine the constitutional meaning of equal protection. Why should the voters' patterns now change the constitutional understanding of religion and political life?

The difference between race and religion is that racial pattern voting was and remains a dirty and discredited reality. Even politicians who use racist appeals deny they are doing so. Certainly no one suggests that racist voting is normative. Religious voters, on the other hand, vote in the light and claim to represent a new and better understanding of democracy and the Constitution.

How is American politics changed by all this? It seems to me that the transformation to religious democracy is more fundamental than a particular election result. What was repudiated in the 2004 election was secular leadership itself.⁶¹ This is a cultural as much as a political matter. The political left is associated with disdain for ordinary people, including disdain for matters religious, and this is what

⁵⁷ "[F]aith avowals are all but requisite on the campaign trail—with hell to pay for anyone who demonstrates biblical illiteracy, as did former Vermont Gov. Howard Dean when he described Job as his favorite book of the New Testament and was promptly pronounced a heathen." Carol Eisenberg, *Reawakening Pop culture says Americans more religious, but stats tell different story*, J. GAZETTE (Fort Wayne, Ind.), May 1, 2004, at 1C.

⁵⁸ See Andrew Delbanco, *Lincoln and Modernity*, in KNOWLEDGE AND BELIEF IN AMERICA: ENLIGHTENMENT TRADITIONS AND MODERN RELIGIOUS THOUGHT 247, 267 n.38 (William M. Shea & Peter A. Huff eds., 1995) [hereinafter KNOWLEDGE AND BELIEF IN AMERICA] (quoting Lincoln, Delbanco writes that "it was every where [*sic*] contended that no christian ought to go for me, because I belonged to no church . . .") Delbanco says of Lincoln that he was "[n]ever a churchgoer." *Id.* at 267.

⁵⁹ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

⁶⁰ See U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

⁶¹ This is very much how religious conservatives saw the election. Bob Jones III, for example, read to the student body at Bob Jones University these words from his letter of congratulations to President Bush on the occasion of his re-election: "You owe the liberals nothing. They despise you because they despise your Christ." Peter Carlson, *Taking the Bob Out of Bob Jones University*, WASH. POST, May 5, 2005, at C1.

lost in the 2004 election.⁶² Popular resentment of secular leadership now seems to have blossomed into a narrow, but dependable, Republican Party national governing majority. Of course, there will be electoral setbacks to the Republican coalition, and, presumably, poor performance in economics and foreign policy will cost votes in future elections. Nevertheless, religious voting that favors the Republican Party is now a settled feature of American political life, giving the Republicans a constant electoral edge.

The significance and dramatic nature of this political change is hard to overstate. In the course of a few decades, America has gone from Richard John Neuhaus's "naked public square," hostile to religion,⁶³ through Stephen Carter's description of the public square as "formally open,"⁶⁴ with religion treated as a hobby,⁶⁵ to the practical exclusion from the public square of arguments grounded on non-belief — on atheism or agnosticism. This latest exclusion from the public square admittedly has the democratic advantage that the reason atheists do not get a hearing is simply that most Americans disagree with them on religious matters. But it is still exclusion, in a sense, of the secular. Political and constitutional analysis should acknowledge today's changed political reality and not repeat arguments about exclusion of religion that no longer apply.⁶⁶

⁶² See Thomas Frank, *What's the Matter with Liberals?*, N.Y. REV. BOOKS, May 12, 2005.

For more than thirty-five years, American politics has followed a populist pattern as predictable as a Punch and Judy show as conducive to enlightened statesmanship as the cycles of a noisy washing machine. The antagonists of this familiar melodrama are instantly recognizable: the average American, humble, long-suffering, working hard and paying his taxes; and the liberal elite, the know-it-alls of Manhattan and Malibu, sipping their lattes as they lord over the peasantry with their fancy college degrees and their friends in the judiciary.

Id. Later in the article, Frank quotes Republican Senator Sam Brownback, who, at the 2004 Republican convention, spoke at a private meeting of evangelical Christians, a meeting that received a great deal of publicity despite being billed as media free:

[H]e took on the tone of affronted middle-American victimhood, complaining to a roomful of Christian conservatives that "the press beats up on you like there's something wrong with faith, family and freedom" and exhorting them to "win this culture war." For the conservative rank and file, this election was to be the culture-war Armageddon, and they were battling for the Lord.

Id. (footnote omitted).

⁶³ See generally RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984).

⁶⁴ STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 54 (1993).

⁶⁵ *Id.* at 51.

⁶⁶ Political rhetoric has not caught up with this change. See *infra* text accompanying note 69 (quoting Senator Rick Santorum).

Does this political change mean that fundamental constitutional arrangements concerning religion also will change? If the Constitution prohibits the establishment of religion, why does it matter what a majority of the American people think about it? A mere majority of voters may be able to elect candidates based on religious affiliation, but they cannot amend the Constitution.⁶⁷

The image of the Constitution as unchanging may be a reassuring rhetorical device, but it in no way describes how the Constitution actually has been interpreted. In practice, the Constitution comes to mean what the people want it to mean.⁶⁸ So if there has been a revolution of sorts about the role of religion in American political life, there has been or will soon be a similar revolution in constitutional interpretation of the Establishment and Free Exercise Clauses of the Constitution.

It is impossible to say now how much of a change in case law and doctrine there will turn out to be. It does not appear that the religious voters have really thought through a model for religion in the public square. They still speak as if the public square were “naked,” in Neuhaus’s phrase. For example, in 2005, Senator Rick Santorum was quoted in a *New York Times Magazine* feature article, speaking as if religious voters were still on the outside of political life: “How is it possible that there exists so little space in the public square for expressions of faith and the standards that follow from belief in a transcendent God?”⁶⁹ On one level, this protest makes no sense, since the Republican Party coalition now controls the entire federal government, in large part because of religious voters. There is, therefore, as much space for faith in the public square as Senator Santorum says there is, since he now in effect makes the rules.⁷⁰ Assuming that Senator Santorum is sincere and

⁶⁷ “Though ‘We the People’ established the Constitution and may amend it, the people themselves are not the arbiters of the Constitution’s meaning. The Constitution does not establish a People’s Court or a People’s Committee by which the people definitively decide the Constitution’s meaning.” Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1542 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES, POPULAR CONSTITUTIONAL AND JUDICIAL REVIEW* (2004)).

⁶⁸ See generally Bruce Ledewitz, *Justice Harlan’s Law and Democracy*, 20 J.L. & POL. 373 (2004). Justice Scalia, for example, explains the Court’s willingness to accept government encouragement of religion that appears to violate the neutrality principle by referring to the Court’s “instinct for self-preservation.” *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2752 (2005) (Scalia, J., dissenting). Indeed, Scalia contends that “the Court . . . cannot go too far down the road of an enforced neutrality that contradicts both historical fact and current practice without losing all that sustains it: the willingness of the people to accept its interpretation of the Constitution as definitive” *Id.* Though Justice Scalia would not approve, he, in fact, is describing one kind of popular control of Supreme Court decision-making.

⁶⁹ Michael Sokolove, *The Believer*, N.Y. TIMES, May 22, 2005, § 6 (Magazine), at 56, 59.

⁷⁰ These sorts of statements about discrimination against religion abound, and, given the political realities, one has to wonder what they are really about. Columnist Burt Prelutsky wrote in the *Los Angeles Times* in 2004 that his fellow Jews were pushing an anti-Christian

that his comment is not just habit, it may be that he and his fellow religious voters have not decided, even in their own minds, what the public square should look and sound like. All Americans may share the view that religion should not dominate the public square, even if a majority of voters feels that the role of religion should be larger than it lately has been. This is part of the reason why religious democracy in America is a question.

It is not even clear that the role of religion was ever in eclipse. Certainly religion plays a more prominent role in public life today than it has at any time since the Second World War, but was American political life ever actually secular? Bruno Latour once wrote a book about the meaning of modernity.⁷¹ Latour concluded that we have never been modern.⁷² By the same token, in asking about the change from secular democracy to religious democracy, we may conclude that we have never been secular.

Before addressing the subject of secular democracy, a word must be said about the theological implications of religious political power. H. Jefferson Powell has argued that the most appropriate political response for a Christian living in the democratic West, and in America particularly, is a strong anti-Constantinianism: "The equation of constitutional with theological ethics repeats the ancient Constantinian error of confusing Caesar with God . . ."⁷³ Speaking theologically, Professor Powell would say, there can be no Christian constitutionalism, nor Christian State, nor even any Christian domestic policy. Probably, in theory, few Christians would disagree with Professor Powell. What has occurred, however, is that a sizeable group of religious voters, primarily and almost exclusively Christian, have achieved an impressive degree of political/governmental power in America. They have achieved this power self-consciously as Christians, that is, as the Church. It is therefore not possible for the rest of America to think in anti-Constantinian terms. The rest of us, including myself, outside this new Christian power, must decide whether we are rivals or allies of this Christian attainment. It is not for the rest of us to decide for Christians whether their political power is theologically legitimate. It is not for the rest of us to say whether Christians should have done what they did. Fellow Christians must debate that issue within the Church. In the political realm, there is no debate. Events have left anti-Constantinianism behind. The rest of us must regard

agenda: "The dirty little secret in America is that anti-Semitism is no longer a problem in society — it's been replaced by a rampant anti-Christianity." Julia Duin, *Faithless: God Under Fire in the Public Square*, WASH. TIMES, Apr. 13, 2005, at A1. What can this mean? A political coalition influenced if not dominated by Christians now controls the federal government. It is a strange time to claim to observe a national, rampant anti-Christianity.

⁷¹ BRUNO LATOUR, *WE HAVE NEVER BEEN MODERN* (Catherine Porter trans., 1993).

⁷² See generally *id.*

⁷³ H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION* 11 (1993).

the Church — the Church universal and not any one church, of course — as wholly involved in the exercise of profane political power in America.

II. IS SECULAR DEMOCRACY POSSIBLE?

Recently, a friend of mine, upon hearing that I was writing about religious democracy, asked, “Isn’t that an oxymoron?” This question reflects a general assumption in certain educated American circles that secular democracy is the norm, at least in America,⁷⁴ and that religious democracy is the phenomenon that must be analyzed and justified. As David Dow flatly stated, “[R]eligious ideology, *any* religious ideology, is inherently undemocratic.”⁷⁵ Yet, Richard John Neuhaus argued that it is secular democracy that is in question.⁷⁶ He explained that in this society, with its biblical tradition, “[t]he state . . . cannot be ‘strictly secular’ and still be deemed morally legitimate.”⁷⁷ So, the assumption that democracy must be secular, even that democracy can be secular, is itself subject to question and critique.

A. *The Dominance of the American Secular Consensus*

I don’t know when the secular consensus became conventional wisdom, at least among the coastal elites. But that consensus certainly had formed by the time I entered law school in 1974. I know this mostly by the absence of the topic of religion during my law school experience. I cannot remember even a single discussion of religion in any course during my years at Yale. In fact, I cannot remember any discussion of religion outside of class. We understood, without really thinking about it, that in accordance with John Rawls’s *Theory of Justice*,⁷⁸ the overwhelmingly

⁷⁴ Thus Rabbi David Novak did not sense any controversy in referring to “a secular constitutional democracy like ours.” David Novak, *Religion, Faith, and Elections*, in ONE ELECTORATE UNDER GOD?: A DIALOGUE ON RELIGION AND AMERICAN POLITICS 159, 162 (E.J. Dionne Jr., Jean Bethke Elshtain, & Kayla M. Drogoz eds., 2004). It is obvious to Rabbi Novak, beyond any serious possibility of contradiction, that the Constitution requires secularism.

⁷⁵ David R. Dow, *The End of Religion*, 16 J.L. & RELIGION 877, 881 (2001) (emphasis in original) (reviewing RONALD F. THIEMANN, *RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY* (1996)). Cf. Lee A. Tavis, *Corporate Governance and the Global Social Void*, 35 VAND. J. TRANSNAT’L L. 487, 498 (2002) (“The core issue is whether a religious democracy is possible.”).

⁷⁶ NEUHAUS, *supra* note 63, at 175.

⁷⁷ *Id.*

⁷⁸ See JOHN RAWLS, *A THEORY OF JUSTICE* 195–251 (1971). Rawls contends that “government has neither the right nor the duty to do what it or a majority . . . wants to do in questions of morals and religion. Its duty is limited to underwriting the conditions of equal moral and religious liberty.” *Id.* at 212. While these words do not sound anti-religious, they banish religion and religious sentiment from the public square completely. See also *id.* at 554 (contending that to choose God as our one “end” is irrational); *id.* at 365 (arguing that civil

dominant political theory at the time, religious arguments were not permitted in public discourse.

Strangely, all this was happening while the modern political phenomenon of the religious right was already beginning to emerge. That coming political change did not matter to us secularists at Yale. Even conservative students were business-oriented and secular in orientation. Of course, some law students practiced their religion. But religion had no relationship to law and government. It was a private matter.

This appearance of a secular consensus was either false at the time or did not last very long.⁷⁹ Even in law, by the early 1980s, the situation was markedly different. In 1983, Robert Cover published his famous article, *Nomos and Narrative*,⁸⁰ which examined the political/legal crises inherent in conflicts of conscience, especially conflicts of religious conscience. Cover's article led to what Susan Stone called a "startling increase of citations to Jewish sources" over the following decade.⁸¹ Then in 1984, Richard John Neuhaus published *The Naked Public Square*, which directly challenged the assumptions of the secular consensus.⁸²

This intense engagement of law and government with religion had been building throughout the 1970s. Robert Cover's book, *Justice Accused*, published in 1975,⁸³ raised the same sorts of issues concerning the conflicts of conscience in terms of anti-slavery judges, as *Nomos and Narrative* did later. Similarly, Neuhaus was writing in part in reaction to the victory of the religious right associated with the election of Ronald Reagan in 1980.⁸⁴

We are concerned here, however, with the content of the secular consensus, even if it did not attain lasting political/legal dominance. The two major assumptions behind the secular consensus were, politically, that religion and religious doctrine could not serve as the ground of public action⁸⁵ and, historically, that religion

disobedience is not to be justified by religious reasons in the liberal state).

⁷⁹ Religion at Yale apparently occupies a different role today. The May/June 2005 edition of the *Yale Alumni Magazine* featured a cover photo of a minister, a priest, a Buddhist, and a rabbi, highlighting the feature story, *Gods & Man at Yale*, YALE ALUMNI MAG., May/June 2005, at 32, available at http://www.yalealumnimagazine.com/issues/2005_05/religion.html.

⁸⁰ Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

⁸¹ Suzanne Last Stone, *In Pursuit of the Counter-Text: the Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 816 (1993).

⁸² NEUHAUS, *supra* note 63.

⁸³ ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

⁸⁴ NEUHAUS, *supra* note 63.

⁸⁵ As Kathleen Sullivan put it, religious questions have been "privatized" by the Constitution, by which she presumably meant the Establishment Clause of the Constitution. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 211 (1992) ("True, abortion, like religion, is divisive and controversial, but not all divisive and controversial questions have been privatized by the Constitution; only religious questions

was a sort of vestigial matter that was destined to pass away.⁸⁶ The legal manifestation of the secular consensus was the Wall of Separation of Church and State, understood as the unconstitutionality of any attempt by government to promote religion or religious belief.⁸⁷

The secular consensus attempted to ground the legal system in non-religious sources. On the political left, this effort meant finding a ground for rights in liberal values.⁸⁸ For example, David Douglas, exemplifying the secular consensus, responded as follows to *The Naked Public Square*: “The Christian, Jew and traditional Native American cannot be united by religion, but only by America’s fierce and longstanding adherence to the fundamental principles of liberalism — the ideology of individuals’ freedom and inherent worth — and democracy — the philosophy of self-governance and majority rule.”⁸⁹

On the political right — the secular consensus was in law as pervasive on the right as on the left — the non-religious ground was the Constitution, treated as a historical and linguistic “given,” without regard to underlying issues of right and wrong or truth and falsehood. Thus, in the most obvious example of secular conservative thought, there is said to be no constitutional right to abortion because abortion is not “in” the Constitution, rather than because there could not be a right to kill a fellow human being.⁹⁰ This positivist mode of constitutional analysis is associated with Justice Antonin Scalia as well as former federal judge Robert Bork.⁹¹

have.”); *see also id.* at 201 (discussing “the establishment of the secular public order” under the United States Constitution).

⁸⁶ The latter point is rarely said explicitly, but it is candidly stated in Dow, *supra* note 75. Two primary forces will stand in the way of the creation of a single world, and what is peculiar is that while one of these forces is on the wane, the other has of late attracted articulate and thoughtful defenders. These two forces, of course, are nationalism and religion. But the days for both of these counter-revolutionary forces are numbered.

Id. at 879.

⁸⁷ *See infra* text accompanying notes 175–76.

⁸⁸ *See, e.g.,* ALAN M. DERSHOWITZ, *RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGIN OF RIGHTS* (2004); Edward B. Foley, *Jurisprudence and Theology*, 66 *FORDHAM L. REV.* 1195 (1998) (grounding rights in reciprocity without reference to God).

⁸⁹ David S. Douglas, *Holding America Together*, 21 *HARV. C.R.-C.L. L. REV.* 325, 338–39 (1986) (reviewing RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984)).

⁹⁰ As Justice Scalia once noted in arguing against recognition of a constitutional right to die, “the Constitution says nothing about the matter.” *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 293 (1990) (Scalia J., concurring). *See also* *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 520 (1990) (Scalia, J., concurring) (referring to “the nonjusticiable question of when human life begins”).

⁹¹ *See* Bruce Ledewitz, *Could the Death Penalty Be a Cruel Punishment?*, 3 *WIDENER J. PUB. L.* 121, 122–25 (1993) (providing an analysis of conservative constitutional jurisprudence).

It yields results that many religious voters desire, such as overruling *Roe v. Wade*.⁹² But it is a thoroughly secular mode of analysis.⁹³ The contingent and temporary alliance of religious voters with conservative constitutional jurisprudence is thus an unholy one.

In terms of the Constitution, the secular consensus reads the constitutional founding as establishing, if not a "Godless Constitution,"⁹⁴ at least a Constitution with a clear distinction between the sacred and the secular spheres of life.⁹⁵ Public life falls into the secular sphere, both as wise policy and as constitutional imperative.

The doctrinal operationalizations of the secular consensus in Establishment Clause cases were the so-called *Lemon* test⁹⁶ and the endorsement test.⁹⁷ The *Lemon* test requires, inter alia, that the government have a secular purpose for its actions rather than a religious purpose,⁹⁸ so that a government program that sought to convince schoolchildren to believe in God or putting the phrase "In God We Trust" on legal tender, to express a national commitment to do God's will, would be unconstitutional. Under the endorsement test, government may not endorse religion, but rather, as then-Associate Justice William Rehnquist described in dissent in

⁹² 410 U.S. 113 (1973).

⁹³ It is not even a mode of analysis historically faithful to its object — the founding of the Republic: "For the modern positivist, there is truly no rational way to discuss what the American founders thought could be discussed rationally — the good life, the call to happiness, the need for meaning in history and time." David Tracy, *Modernity, antimodernity, and postmodernity in the American setting*, in KNOWLEDGE AND BELIEF IN AMERICA, *supra* note 58, at 328, 329–30.

⁹⁴ Of course, some scholars do view the founding as one of godlessness. See, e.g., ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* (1995).

⁹⁵ See Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9 (2004).

⁹⁶ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

⁹⁷ *Lynch v. Donnelly*, 465 U.S. 668, 688–92 (1984) (O'Connor, J., concurring). "Endorsement 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." *Id.* at 688. See generally James M. Lewis & Michael L. Vild, *A Controversial Twist of Lemon: The Endorsement Test as the New Establishment Clause Standard*, 65 NOTRE DAME L. REV. 671 (1990).

⁹⁸ The secular legislative purpose portion of the *Lemon* test was the determining factor in striking down the Ten Commandments displays in *McCreary*. See *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005). "Ever since [*Lemon*] summarized the three familiar considerations for evaluating Establishment Clause claims, looking to whether government action has 'a secular legislative purpose' has been a common, albeit seldom dispositive, element of our cases." *Id.* at 2732–33 (quoting *Lemon*, 403 U.S. at 602).

Wallace v. Jaffree,⁹⁹ “the Establishment Clause requires government to be strictly neutral between religion and irreligion.”¹⁰⁰

The secular consensus is obviously under attack today from a variety of sources.¹⁰¹ Nevertheless, some law professors have shown a remarkable ability to regard the secular consensus as unchallengeable and self-evident. I was very surprised to read, for example, in the constitutional law casebook that I use in the basic Constitutional Law course at Duquesne Law School, that “[i]t is generally agreed that the establishment clause seeks to assure the separation of church and state in a nation characterized by religious pluralism.”¹⁰² Even if this description of the purposes of the Clause were correct, the description of consensus would still be false because this conclusion is not “generally agreed” to. In addition, the book’s description of the purposes of the Establishment Clause may well be substantively incorrect. For one thing, at the time of the adoption of the Establishment Clause, the United States could not have been described as religiously plural in the sense we use the term today. Rather, the United States at the time was overwhelmingly Protestant. For another, the purpose of the Clause may not have been separation of church and state at all. The late Chief Justice Rehnquist had argued that the entire purpose of the Establishment Clause was “to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects”¹⁰³ — and many observers agree with him. In the face of all this, for a textbook to adopt such a bland and confident tone is not only misleading to students but demonstrates an inability on the part of the authors to acknowledge and understand the fundamental controversy that exists today over religion and the Constitution.

Even those voices in American law that argue in favor of a larger role for religion in the public square do so grudgingly, with an eye on the secular consensus. For example, Kent Greenawalt has written that “[w]hen issues cannot be settled on rational secular grounds, it is hard to see why legislators should give weight to non-religious judgments of value and not to religious ones.”¹⁰⁴ Putting the matter that way suggests that religious views are a second-class ground of government policy,

⁹⁹ 472 U.S. 38 (1985) (striking down a period of silence statute for prayer in public schools).

¹⁰⁰ *Id.* at 113 (Rehnquist, J., dissenting). *See also id.* at 113–14 (“Nothing in the Establishment Clause of the First Amendment, properly understood, prohibits any such generalized ‘endorsement’ of prayer.”).

¹⁰¹ *See, e.g.*, Steven D. Smith, *Recovering (From) Enlightenment?*, 41 SAN DIEGO L. REV. 1263 (2004).

¹⁰² JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW 1033 (9th ed. 2001).

¹⁰³ *Wallace*, 472 U.S. at 98 (Rehnquist, J., dissenting) (discussing James Madison’s understanding of the purpose of the Amendment).

¹⁰⁴ Kent Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352, 396 (1985).

though not totally prohibited from public debate. Michael J. Perry, in defending a position taken by Senator Joseph Lieberman in 2000, suggested that although

political reliance on religiously grounded morality is neither illegitimate in a liberal democracy nor unconstitutional in the United States . . . some religious believers — Christians — have good reason to be wary about relying on one kind of religiously grounded morality — biblically grounded morality — in deciding whether to oppose laws or other public policies that grant official recognition to same-sex unions.¹⁰⁵

Professor Perry also has argued that resorting to such religious decision-making does not violate the Establishment Clause, a position he had previously rejected.¹⁰⁶ Ronald Thieman, whose book, *Religion in Public Life*,¹⁰⁷ was meant to open up space for religion in public life, can only bring himself to say that religious voices should be free to participate in political life insofar as they embrace the values of freedom, equality, and mutual respect.¹⁰⁸ This is not only a test we would never impose on anyone else, but it is also one that many non-religious political participants would have a hard time satisfying.

The final component of the secular consensus was the supposed superiority of reason and rationality over the non-rational, over the emotional, and over matters of faith and spirituality. This superiority can be affirmed even in the face of the acknowledged burdens of a society purporting to be organized around such rationality. Thus in 2005, Francis Fukuyama, in the *New York Times* Book Review section, criticized Max Weber's famous portrayal of modernity as an iron cage as follows: "One must wonder whether it was not Weber's nostalgia for spiritual authenticity — what one might term his Nietzscheanism — that was misplaced, and whether living in the iron cage of modern rationalism is such a terrible thing after all."¹⁰⁹ In other words, even if we live in an iron cage, it is at least a rational and secular one. Fukuyama attributes Nazism and Communism to religion because they "were based on passionate commitments to ultimately irrational beliefs."¹¹⁰ Considering the weight

¹⁰⁵ Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality is not Illegitimate in a Liberal Democracy*, 36 WAKE FOREST L. REV. 217, 222 (2001) [hereinafter Perry, *Political Reliance*]. See also Michael J. Perry, *Christians, the Bible, and Same-Sex Unions: An Argument for Political Self-Restraint*, 36 WAKE FOREST L. REV. 449 (2001).

¹⁰⁶ See Perry, *Political Reliance*, *supra* note 105, at 221 n.14.

¹⁰⁷ RONALD F. THIEMAN, *RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY* (1996).

¹⁰⁸ *Id.* at 173.

¹⁰⁹ Francis Fukuyama, *The Calvinist Manifesto*, N.Y. TIMES, Mar. 13, 2005, at 35 (reviewing MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (1905)).

¹¹⁰ *Id.*

of blaming religion for those calamities, it must follow that, for Fukuyama, anything would be better than to be subject to religion and religious authority.

B. The Collapse of the American Secular Consensus

The secular consensus is collapsing even as I write these words. It is collapsing as political reality for the obvious reason that religious voters have attained a great deal of political power. It is collapsing doctrinally in constitutional law and, theoretically, in political thought as well.

The condition of the secular consensus in 2005 may turn out to be similar to the due process limits of the *Lochner* Era¹¹¹ and limits on Congress's Commerce Power¹¹² on the eve of the revolution of 1936–1937.¹¹³ Prior to 1936–1937, the Court acted out of a private property/economic liberty consensus.¹¹⁴ There had been growing popular dissatisfaction throughout the early twentieth century with these Court-imposed restrictions on the power of government to regulate the economy.¹¹⁵ These restrictions were effectuated through the doctrine of liberty of contract and interpretations of the concept of interstate commerce. The public dissatisfaction began to come to a head with the election in 1932 of a president who wanted strongly to take the country in a different economic direction. In the period before the 1936 election, the Court wavered.¹¹⁶ Then, in 1936, the president received a strong re-election

¹¹¹ *Lochner v. New York*, 198 U.S. 45 (1905). See generally David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003).

¹¹² See Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause after Lopez and Morrison*, 11 WM. & MARY BILL RTS. J. 403, 409–12 (2002); see also *id.* at 425 (noting that in the 1930s, “it was still possible to say that the Commerce Clause was one of several limited and enumerated federal regulatory powers”).

¹¹³ See generally William Lasser, *Justice Roberts and the Constitutional Revolution of 1937 — Was There a “Switch in Time”?*, 78 TEX. L. REV. 1347, 1347 (2000) (reviewing BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998)). As Lasser notes, laissez-faire jurisprudence disappeared as a result of the “[t]win pressures of the 1936 election and the President’s subsequent ‘Court-packing’ plan.” *Id.*

¹¹⁴ Cf. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 388 (1990) (noting that “the classical vision viewed economic transactions as involving exercises of individual rights and only local relations. This vision underlies the *Lochner* Court’s commerce clause decisions as well as its due process decisions.”).

¹¹⁵ See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 65, 65–67, 99–103 (contending that the American people began to reject the laissez-faire jurisprudence).

¹¹⁶ By the 1936 presidential election, the Court had invalidated six New Deal provisions, some by close votes: The Railway Pension Act in *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935) (5–4 decision); an industrial code under the National Industrial Recovery Act in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495

endorsement by the voters.¹¹⁷ Afterward, the Court changed its due process and Commerce Clause approaches.¹¹⁸ Somewhat later, new personnel on the Court finalized the change.¹¹⁹

Much the same pattern might be occurring now with regard to the secular consensus. For the last thirty-five years, there has been popular and theoretical dissatisfaction with the notion that our democracy should be, and must be, secular.¹²⁰ Just as the private property/economic liberty consensus was not a product merely of judicial decisions,¹²¹ so too the secular consensus was also a cultural phenomenon. In both instances, the country as a whole began to move in a different direction. For a long time, the Court maintained the earlier view, continuing to require government religious neutrality and secular purposes.¹²² With the election of President George W. Bush in 2000, the Court's decisions began to change.¹²³ Now that President Bush has been re-elected, in large part running on the issue of judicial resistance to an expanded role for religion in public life, we might expect a radical reformulation

(1935); the Farm Mortgage Act in *Louisville Joint Stock Land Bank v. Redford*, 295 U.S. 555 (1935); the Agricultural Adjustment Act in *United States v. Butler*, 297 U.S. 1 (1936) (6–3 decision); and the Bituminous Coal Act in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (5–4 decision). During this period, the Court upheld one New Deal measure, the Gold Clause legislation, in *Norman v. Baltimore & Ohio Railroad Co.*, 294 U.S. 240 (1935) (5–4 decision).

¹¹⁷ President Roosevelt received 61 percent of the popular vote and 523 out of 531 electoral votes, losing only in Vermont and Maine. See Wikipedia, U.S. Presidential Election, 1936, at http://en.wikipedia.org/wiki/U.S._presidential_election_1936 (last visited Oct. 13, 2005).

¹¹⁸ “In a rapid succession of cases, the Supreme Court altered its interpretation of liberty of contract, rejected the authority of federal courts to construe state common law, abandoned nondelegation doctrine, and began to construct a new framework for protecting the individual rights listed in the first eight amendments.” Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 689 (2005) (footnotes omitted).

¹¹⁹ See generally Michael Arians, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620 (1994); see also G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000) (providing a general historical account).

¹²⁰ See generally Smith, *supra* note 101; see also NEUHAUS, *supra* note 63.

¹²¹ The *laissez faire* foundations of the *Lochner* era were protested at the start in Justice Holmes's celebrated dissent in *Lochner v. New York*:

This case is decided upon an economic theory which a large part of the country does not entertain The Fourteenth Amendment does not erect Mr. Herbert Spencer's Social Statics [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*.

198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

¹²² See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985).

¹²³ See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (expanding government aid to religion).

from the Court. Additional personnel changes, which are also coming,¹²⁴ will finalize the change.

We will return below to the content of constitutional doctrine concerning religion and state and the extent to which the above scenario may be playing out. For now we are interested in the popular and theoretical changes that have set the stage for the end of the secular consensus.

No one explanation can account for such a significant political event as the collapse of the secular consensus. No doubt some would say that there has been no collapse, just a few electoral setbacks. On the other side, it would be said that there never really was a secular consensus, a position with which I sympathize. Nevertheless, certain assumptions used to carry political weight and concomitant confidence, which they no longer do. We can at least identify these assumptions in a general way and see that they no longer seem to apply to the American political landscape as they once did.

The major historical assumption of the secular consensus is that the United States would become less religious as it became wealthier and better educated.¹²⁵ This trend can be identified in Europe, so the idea is not fanciful.¹²⁶ Nevertheless, by most measures, the United States has not become less religious since World War II.¹²⁷ Numbers fluctuate, but there is no noticeable drop in how many people go to church, believe in God, or say that God is important to them.¹²⁸

An attempt can be made to explain away the resistance of religion to the pressures of modernity in the United States. Perhaps religious commitment is just talk. For example, more people say they go to church, but do they? More people get divorced,¹²⁹

¹²⁴ See *infra* note 215.

¹²⁵ This is known as the secularization thesis. See Laurence R. Iannoccone, *Introduction to the Economics of Religion*, 36 J. ECON. LITERATURE 1465, 1468–72 (1998) (criticizing the assumptions of the secularization thesis).

¹²⁶ See God and Foreign Policy: The Religious Divide Between the U.S. and Europe, July 10, 2003, at <http://pewforum.org/events/index.php?EventID=49>.

¹²⁷ See Rebecca French, *Shopping for Religion: the Change in Everyday Religious Practices and its Importance to the Law*, 51 BUFF. L. REV. 127, 192 (2003) (“Church membership is up over the past century, attendance and belief in God have remained stable, religious contributions have stayed at their 1955 level and the rate of belief and activity has generally increased with education.”).

¹²⁸ See Religion(2), PollingReport.com, at <http://www.pollingreport.com/religion2.htm> (last visited Sept. 9, 2005). A CNN poll reports that affirmative responses to the question, “Did you, yourself, happen to attend church or synagogue in the last seven days, or not?” was up slightly from 1939 to 2002, though church membership was down. *Id.* Belief in God in a 2000 *Newsweek* poll was at 94 percent. *Id.*

¹²⁹ See Jeremy Greenwood & Nezih Guner, *Marriage and Divorce Since World War II: Analyzing the Role of Technological Progress on the Formation of Households* (Economie d’Avant Garde, Research Report No. 8, 2004), available at <http://www.econ.rochester.edu/Faculty/GreenwoodPapers.manddww.2.pdf> (last visited Oct. 13, 2005). See PETER G. FILENE, *HIM/HER/SELF: SEX ROLES IN MODERN AMERICA* 211, 251 (2d ed. 1986); ARLENE SKOLNICK,

gamble,¹³⁰ and have premarital sex than prior to World War II as well.¹³¹ These are not behaviors usually associated with religious commitment.

Furthermore, everyone would probably agree that American culture as a whole is far coarser and more violent than ever before. If we are more religious, where is the religious effect?

These are reasonable objections, but they go to the kind of religious resurgence that is occurring, rather than whether there is resurgence. For evidence of resurgence, we have to take the climate as self-authenticating. Religion is in the air. It has not gone away or lessened its hold on the consciousness of the American people.

Nor does religious political argumentation engage in the “cut-flower” approach of covering the roots of religious concerns with purely secular language.¹³² This point is subtle because there is often no clear delineation between religious concerns and non-religious concerns in American policy issues.¹³³ But certainly the invocation of God in public debate is common. For that matter, even before 2000, President Clinton invoked God regularly.¹³⁴ *The Naked Public Square* seems to be fully clothed.¹³⁵ Despite all expectations, religion is publicly vibrant.

A related assumption of the secular consensus is that religion is a private matter, one that primarily concerns an individual’s personal relationship with God rather than influencing the outcome of policy debates.¹³⁶ Until the rebirth of evangelical political involvement, this was the view of many notable religious leaders, as well. Jerry

EMBATTLED PARADISE: THE AMERICAN FAMILY IN AN AGE OF UNCERTAINTY (1991).

¹³⁰ See History of Gambling in the United States, at <http://www.library.ca.gov/CRB/97/03/Chapt2.html> (last visited Oct. 13, 2005).

¹³¹ Numerous sources have reported that levels of premarital sexual relations in America increased during the 1960s and remained at pre-war levels in the decades that followed. See, e.g., ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA* 114–32 (1988); cf. SKOLNIK, *supra* note 129, at 160.

¹³² See Rachel Mariner, Note, *Burdens Hard to Bear: A Theology of Civil Rights*, 27 HARV. C.R.-C.L. L. REV. 657, 669–70 (1992).

¹³³ *U.S. News & World Report*’s description of the spring 2005 stem cell debate in Congress illustrates this tendency: “In the debate, both sides talked about valuing human life.” Helen Fields, *Reigniting the Stem Cell Debate*, U.S. NEWS & WORLD REP., June 6, 2005, at 22.

¹³⁴ See Melissa A. Dalziel, *The Tension Between a Godless Constitution and a Culture of Belief in an Age of Reason*, 1999 B.Y.U. L. REV. 861, 872 n.50 (1999) (reviewing ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* (1997)).

¹³⁵ Jay D. Wexler, *Preparing for the Clothed Public Square: Teaching about Religion, Civic Education, and the Constitution*, 43 WM. & MARY L. REV. 1159, 1163 (2002) (“[T]oday at least the public square is substantially clothed with religion.”).

¹³⁶ See Jeffrey Hart, *The Evangelical Effect*, PITTSBURGH POST-GAZETTE, Apr. 17, 2005, at J1. (“Jesus teaches little or nothing about politics. His focus is inward, to the purity of the soul.”).

Falwell, for example, criticized Protestant ministers for their involvement in the civil rights movement in 1965.¹³⁷

This attitude toward religion — that it is a private orientation — is certainly not the dominant understanding of religion in America today. Jim Wallis's book, *God's Politics*,¹³⁸ for example, argues strongly for what would be considered left-wing public policies on the basis of his understanding of the Christian tradition. Wallis never even bothers to argue that religion is not merely a private matter.¹³⁹ He takes it as a given that religion matters in American policy debate today.¹⁴⁰

It was also significant to the collapse of the secular consensus that important cultural figures could be seen to be taking religion seriously. The most important such event in intellectual terms was Jacque Derrida's famed turn to religion.¹⁴¹ Far less important internationally, but influential in the insular world of American law, was the consistent use of religious history, language, and metaphor by admired liberal law professor Robert Cover¹⁴² and others.

The Supreme Court also contributed to the collapse of the secular consensus. While the Court has limited the protections of the Free Exercise Clause,¹⁴³ thus in some sense weakening religion vis-à-vis government, the Court has also in recent years been much more accepting of government aid to religious schools,¹⁴⁴ indeed overruling several precedents that had interpreted the Establishment Clause in a way

¹³⁷ NEUHAUS, *supra* note 63, at 40.

¹³⁸ JIM WALLIS, *GOD'S POLITICS: WHY THE RIGHT GETS IT WRONG AND THE LEFT DOESN'T GET IT* (2005).

¹³⁹ Wallis calls those on the left who want to restrict religion to the private sphere "secular fundamentalists." *Id.* at xviii. This term has been used to describe militant resistance to religious institutions in general. See Daniel O. Conkle, *Secular Fundamentalism, Religious Fundamentalism, and the Search for Truth in Contemporary America*, 12 J.L. & RELIGION 337 (1995–1996).

¹⁴⁰ *Id.*

¹⁴¹ See, e.g., JOHN D. CAPUTO, *THE PRAYERS AND TEARS OF JACQUES DERRIDA: RELIGION WITHOUT RELIGION* (1997); see also Stanley Fish, *One University, Under God?*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 7, 2005, at C1 ("When Jacques Derrida died I was called by a reporter who wanted to know what would succeed high theory and the triumvirate of race, gender, and class as the center of intellectual energy in the academy. I answered like a shot: religion.").

¹⁴² See, e.g., Robert M. Cover, *Bringing the Messiah through Law: A Case Study*, in RELIGION, MORALITY AND THE LAW: NOMOS XXX 201 (J. Roland Pennock & John W. Chapman eds., 1988).

¹⁴³ *Employment Div. v. Smith*, 494 U.S. 872 (1990) (overturning use of compelling state interest test to measure constitutionality of generally applicable laws that interfere with religious practices).

¹⁴⁴ See *Mitchell v. Helms*, 530 U.S. 793 (2000) (upholding Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965); *Agostini v. Felton*, 521 U.S. 203 (1997) (upholding Title I of the Elementary and Secondary Education Act).

that more narrowly constricted the aid government could give to religious schools.¹⁴⁵ The Court also approved education vouchers that can be used at religious schools,¹⁴⁶ thus probably ushering in a new era of indirect government aid to religion. When the Court dismissed the challenge to the words “under God” in the Pledge of Allegiance because of a lack of standing by the plaintiff,¹⁴⁷ the Court sidestepped an opportunity to clarify whether this new judicial willingness to allow Government-religion institutional interaction also will apply to symbolic religious expression cases. The Court’s split in the Ten Commandments cases¹⁴⁸ certainly does not reinvigorate Establishment Clause limits on what government can do. Given all this, the Court has at least contributed to the weakening of the secular consensus in recent years.

Although the matter is not yet free from doubt, since the secular consensus still has important political and cultural support, the fundamental reason that the secular consensus is collapsing is that it did not “take” in a democratic sense. The idea of democratic “taking” is how Richard John Neuhaus described the national reaction to *Dred Scott*.¹⁴⁹ He writes of *Dred Scott*: “That decision did not ‘take’ democratically; it did not resolve but only exacerbated the issue it intended to settle.”¹⁵⁰ Justice John M. Harlan describes a more general, but similar, sort of democratic control over judicial decision-making in his dissent in *Poe v. Ullman*.¹⁵¹

In this organic sense, the secular consensus was unable to convince the American people that the role of religion in public life should be severely restricted. We can see in the fallout of the 2004 Presidential election that, at least for now, whoever controls the religious high ground in American public life will dominate politically.

What is the meaning of this democratic rejection of the secular consensus? Was it merely a political failure to be remedied by better candidates or more effective public relations? Or, are the American people simply superstitious and easily captured by religious imagery from the dark ages? Or, is the meaning of this event more complex? Perhaps there is a religious element embedded in American democracy that the secular consensus overlooked.

¹⁴⁵ *Mitchell*, 530 U.S. at 797, overruled *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977). *Agostini*, 521 U.S. at 203, overruled *Aguilar v. Felton*, 473 U.S. 402 (1985), and partially overruled *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

¹⁴⁶ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

¹⁴⁷ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

¹⁴⁸ *Compare* *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (upholding a display on the Texas Capitol grounds), *with* *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005) (striking down displays in Kentucky courthouses). Each case was decided by a 5–4 vote.

¹⁴⁹ *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

¹⁵⁰ NEUHAUS, *supra* note 63, at 26.

¹⁵¹ *See* 367 U.S. 497, 522–55 (1961) (Harlan, J., dissenting); *see generally* Ledewitz, *supra* note 68.

C. Religious Elements in American Constitutional Democracy

I am only lightly touching here a field that has received serious recent scholarly attention — the shared grounds of democracy and religion.¹⁵² I am suggesting that, given the religious themes clearly present in our political life, the instability of the secular consensus may have been inevitable. Our major political commitments, even if they can be derived outside any religion, were not so derived originally, but came to us from the Jewish and Christian traditions. The religious origins of these themes do not disappear simply because religion and democracy diverged. Even just a few examples of such themes make the point.

1. All Human Beings Are Created Equal

This concept, stated in the Declaration of Independence as a self-evident truth,¹⁵³ is not self-evident at all. Indeed, in the period prior to the Civil War, Senator John C. Calhoun denied that this assertion was true,¹⁵⁴ as did other supporters of slavery.¹⁵⁵

The equality principle is clearly foundational to democracy, which treats each citizen as formally equal in political life. The equality principle is now, albeit belatedly, written into the constitutional text.¹⁵⁶ Constitutional democracy is impossible without this principle.

¹⁵² This body of work ranges from arguments in the approaches to the relationship between democracy and religion. *See, e.g.*, ROBERT AUDI, *RELIGIOUS COMMITMENT AND SECULAR REASON* (2000) (arguing for a necessary, but limited, separation and noting that citizens in a liberal democracy must rely, at least in part, on secular rationale when considering coercive legislation); FRANKLIN I. GAMWELL, *DEMOCRACY ON PURPOSE: JUSTICE AND THE REALITY OF GOD* (2000) (suggesting a necessary relationship between democracy and religion); Paul F. Campos, *Secular Fundamentalism*, 94 COLUM. L. REV. 1814 (1994) (noting that certain forms of purported secular liberalism represent religious arguments); Marci A. Hamilton, *Direct Democracy and the Protestant Ethic*, 13 J. CONTEMP. LEGAL ISSUES 411 (2004) (suggesting a range of theologically limited democratic forms); Paul E. Salamanca, *The Liberal Polity and Illiberalism in Religious Traditions*, 4 BARRY L. REV. 97 (2003) (supporting limited interaction); Sullivan, *supra* note 85 (suggesting a sort of ban on public religious commitments in liberal democracy).

¹⁵³ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal . . .”).

¹⁵⁴ Calhoun stated that there was “not a word of truth” in the Declaration’s claim that all men are created equal. CONG. GLOBE, 30th Cong., 1st Sess. app. at 872 (1848).

¹⁵⁵ David Thelen, *Reception of the Declaration of Independence*, in THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT 191, 207 (Scott Douglas Gerber ed., 2002).

¹⁵⁶ The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

The equality principle has its roots in the Old Testament creation story: "So God created man in his own image, in the image of God he created him; male and female he created them."¹⁵⁷ All humans are created in the image of God; thus all humans are, in principle, equal.¹⁵⁸

I am not suggesting that belief in the equality of humankind requires belief in the Bible. Certainly this principle can be justified in other ways. But Western democracy did learn this principle from the Bible. Equality is as religious a principle as "God created the heavens and the earth."¹⁵⁹ Insofar as it is a principle necessary for democracy, a strict separation between democracy and religion is bound to be unstable.

2. The Sinful Nature of Humankind

The Framers' familiarity with the biblical understanding of human sinfulness¹⁶⁰ is the bedrock of the constitutional commitment to checks and balances. Daniel Dreisbach summarizes this relationship as follows: "The framers, convinced of man's fallen nature (and of the concept of original sin), eschewed pure majority rule; enshrined individual liberties; and devised a system of civil government committed to the diffusion and separation of powers, checks and balances, and limited, enumerated, and strictly delegated powers only."¹⁶¹

Perhaps the fullest statement of the Framers' view of the link between the constitutional system and the nature of man is contained in *Federalist No. 51*:

It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to

¹⁵⁷ *Genesis* 1:27. Unless otherwise noted, all quotations to the Bible in this article are to the Revised Standard version.

¹⁵⁸ Despite the traditional rendering in male dominant language, the Bible does not presume that the male is the image of God, rather than the female. The last part of the verse, stating "male and female he created them," was interpreted by some of the rabbis to mean that the original human form was hermaphroditic. See Theodore Y. Blumoff, *An Essay on Liberalism and Public Theology*, 14 J.L. & RELIGION 229, 259–60 (1999–2000).

¹⁵⁹ *Genesis* 1:1.

¹⁶⁰ See *Genesis* 6:5 ("The LORD saw that the wickedness of man was great in the earth, and that every imagination of the thoughts of his heart was only evil continually.").

¹⁶¹ Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 994 (1996).

control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.¹⁶²

As Madison's reference in *Federalist No. 51* to mankind's "experience" shows, the Framers did not look to the Bible alone or even in detail for a framework of government. The Framers had other models, including of course, their political history on this continent. Nevertheless, the starting point of the Constitution — its political anthropology so to speak — is biblical.¹⁶³

The view that humans are prone to corruption is as accepted in this culture as is the commitment that all are created equal. The agreement on these principles encompasses both the religious and the secular. In the instance of equality, one might say that our fundamental law teaches, indeed requires, this commitment. In the case of sinfulness, however, how does one explain this general agreement? Why should we feel that checks and balances are a necessary limitation on government power? Is this so obvious just from the experience of living? Or does this understanding of the nature of human beings come specifically from revelation?

I think Americans as a whole have learned about human nature either from the Bible directly or from our societal atmosphere, which itself derives from the Bible. Since democracy must operate from some sort of anthropological understanding,¹⁶⁴ this biblical borrowing suggests that our democracy remains tied to a religious understanding.

3. "The World Was Made for Man"¹⁶⁵

The foundation not only for American constitutional law, but also for our entire political/economic/social system, is that the world was made for man. This is why, when we have a debate about whether we should drill for oil in the Arctic National

¹⁶² THE FEDERALIST No. 51, at 356 (James Madison) (Benjamin Fletcher Wright ed., 1961).

¹⁶³ Cf. HANNAH ARENDT, ON REVOLUTION 190 (Viking Press 1970) (1963) (noting that even though the substance of the American Constitution has Roman origins, the model of authority is "Hebrew in origin and represented by the divine Commandments of the Decalogue").

¹⁶⁴ Cf. NEUHAUS, *supra* note 63, at 53.

Democratic discourse, as Reinhold Niebuhr tirelessly insisted, depends not so much upon our agreement about righteousness as upon our agreement about sin — our own sin, and thus our own fallibility, as well as the sin and fallibility of others. Democratic discourse requires that no party fashion itself as the moral majority in order to imply that others belong to an immoral minority.

Id.

¹⁶⁵ DANIEL QUINN, ISHMAEL 63 (1992).

Wildlife Refuge, we ask whether our economic need for oil outweighs our aesthetic concerns about keeping the wilderness pure for our grandchildren to see and enjoy. We do not ask about the rights of nature.

We do talk about protecting "the environment," but for most of us that does not mean that the natural world has, in principle, an independent claim not to be used as a resource for humans. Protecting the environment really means keeping environmental harms from affecting humans, either physically or psychologically. There are some deep environmentalists for whom the natural world is not a resource for humans, but they are a small minority of the American people. Deep environmentalists do not have much democratic influence.¹⁶⁶

Like equality and human sinfulness, our culture learned this lesson originally from the Bible. In Genesis, God says to the male and the female,¹⁶⁷ "Be fruitful, and multiply, and fill the earth and subdue it; and have dominion over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth."¹⁶⁸

The important implication of the religious source of our relationship to the environment is that secularism now also knows that the world was made for man, even though secular thought presumably lacks any understanding of why it thinks so. If the creator of the world did not give the world to us as our resource, because there is no creator, then it would just be tyranny on the part of humans to take the world and use

¹⁶⁶ The current sad truth is stated by Jay Michaelson, in the context of materialism and global warming:

[A]n environmentalist's distaste for the materialistic ideals that undergird the root causes of climate change does not make attempting to thwart those ideals either practical or morally justified. Conspicuous consumption is deeply entrenched in American self-conceptions, and in conceptions of Americans by people in the developing world who want to be like them.

I suggest it is both unwise and counter-democratic to tell billions of consumers that "We Know Better," and set about changing deep structures without regard to the life-defining goals of the consumers themselves. Such action is unwise because it pins the biosphere's integrity on the hope of overcoming something deeply ingrained in Western culture. And it is counter-democratic because, until the members of that culture change its constitutive forces, overcoming them in the name of a paternalistic deep environmentalism thwarts their clearly expressed preferences.

Jay Michaelson, *Geoengineering: A Climate Change Manhattan Project*, 17 STAN. ENVTL. L.J. 73, 132-33 (1998) (emphasis in original).

¹⁶⁷ Not Adam and Eve. Adam and Eve are the characters of the creation story of Genesis 2. The creation story in Genesis 1 appears to be a separate and different account of creation.

¹⁶⁸ *Genesis* 1:28.

it without according to the world any independent status.¹⁶⁹ We go on doing this, but we lack any secular justification.

In Daniel Quinn's book, *Ishmael*, the gorilla teacher tries to help the basically secular student see the power and depth of the cultural assumption that the world was made for man and to see as well how this originally religious understanding has now become a cultural one.¹⁷⁰ It is difficult for the student to see this assumption as an assumption, because the assumption that the world is made for man is so well-accepted as to appear self-evident:

"Look, the world wasn't made for jellyfish, was it?"

"No."

....

"Of course not. The world was made for man."

"That's right."

"Everyone in your culture knows that don't they? Even atheists who swear there is no god know the world was made for man."

....

"Think of the consequences of taking that as your premise: If the world was made for you, *then what?*"

"Okay, I see what you mean. I think. If the world was made for us, then it *belongs* to us and we can do what we damn well please with it."¹⁷¹

According to Daniel Quinn, humans have been doing what they want with the world for 10,000 years, with consequences we now are beginning to fear. The student sees very well that atheists know this too, even though they do not believe in God.

4. The United States as Light to the World

James Gordon explains the religious sense of American exceptionalism that motivated Justice John M. Harlan, the elder, in Harlan's nineteenth century constitutionalism:

¹⁶⁹ Only a few legal voices have called for independent standing for the natural world. See generally CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS* (1974). Fittingly, in a collection of the writings of Justice Douglas, Justice Douglas's dissent in *Sierra Club v. Norton*, 405 U.S. 727 (1972), is presented under the heading "Standing for the Natural World." NATURE'S JUSTICE 293 (James O'Fallon ed., 2000). Justice Douglas wrote: "Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation." *Sierra Club*, 405 U.S. at 741-42.

¹⁷⁰ See generally QUINN, *supra* note 165.

¹⁷¹ *Id.* at 63 (emphasis in original).

Civic religion involved the belief that Providence had chosen the United States to be a Christian example to the world, and it promoted confidence in, and love of, all things American. If the United States was not yet perfect, it was working toward perfection under the guidance of Providence. Through the United States, God's plan for humankind was unfolding. In short, Harlan still believed with his Calvinist forebears that America was a city on a hill, intended to be a light to the world.¹⁷²

By using the term "civic religion," Gordon nicely bridges the gap between Christianity *per se*, that is, the use of Christian imagery in a national context, and the more secular use of religious terms that comes later in American political discourse.

Of course, the original biblical people who, like the Americans, were to be a blessing to the world are the Jewish people, as promised by God to Abram (Abraham): "I will make of you a great nation, and I will bless you, and make your name great, so that you will be a blessing. I will bless those who bless you, and him who curses you I will curse; and by you all the families of the earth shall bless themselves."¹⁷³ Professor Gordon is describing a later interpretation, although still a Christian one in his view, in which the American system is the same sort of gift from God to the people of the world.¹⁷⁴

By the time we get to President George W. Bush's Second Inaugural Address, the imagery has changed a little, but the message is similar: "So it is the policy of the United States to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world" and "[a]dvancing these ideals is the mission that created our Nation."¹⁷⁵

It is not unusual for American presidents to describe American policy as inspired by God.¹⁷⁶ In the case of President Bush's language, God is an absent presence, perhaps directing affairs, perhaps not,¹⁷⁷ but clearly there is something beyond ourselves

¹⁷² James W. Gordon, *Religion and the First Justice Harlan: A Case Study in Late Nineteenth Century Presbyterian Constitutionalism*, 85 MARQ. L. REV. 317, 342–43 (2001).

¹⁷³ *Genesis* 12:2–3.

¹⁷⁴ Gordon, *supra* note 172, at 342–43.

¹⁷⁵ Press Release, Office of the Press Secretary, President Sworn-In to Second Term (Jan. 20, 2005), available at <http://www.whitehouse.gov/news/releases/2005/01/20050120-1.html> [hereinafter Inaugural Address] (providing a transcript of President George W. Bush's Second Inaugural Address).

¹⁷⁶ See generally Michael M. Maddigan, Comment, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CAL. L. REV. 293, 322 (1993) ("Public acknowledgment of the existence of God has been part of American civil religion from the beginning. Every President has mentioned God in his inaugural address, although none has used sectarian references.").

¹⁷⁷ President Bush's stated theology is a little surprising. He does not claim that God is on our side:

and our own wishes that is present. The American belief in the American mission, just as our belief in equality, constitutional government, and human use of the world, cannot be understood without regard to religion and religious meaning.

When I look back at Robert Bellah's well-known chapter nine in *Beyond Belief*,¹⁷⁸ where he applied Rousseau's term "civil religion" to American public political rhetoric, it is surprising just how genuinely and traditionally religious Bellah's understanding of American civil religion is.¹⁷⁹ Bellah did not regard references to God on public occasions as secular, or cynical, or meaningless.¹⁸⁰ Bellah argued that these references — he uses President Kennedy's inaugural address as his model for then-current civil religion¹⁸¹ — are understood to mean that though our political system is based on majority rule, "[t]he will of the people is not itself the criterion of right and wrong. There is a higher criterion in terms of which this will can be judged; it is possible that the people may be wrong."¹⁸²

This description of American civil religion is religious by almost any understanding.¹⁸³ Bellah acknowledges this and worries about it, asking whether America could have an agnostic President.¹⁸⁴ He is asking whether the language of our civil

We go forward with complete confidence in the eventual triumph of freedom. Not because history runs on the wheels of inevitability; it is human choices that move events. Not because we consider ourselves a chosen nation; God moves and chooses as He wills. We have confidence because freedom is the permanent hope of mankind, the hunger in dark places, the longing of the soul. When our Founders declared a new order of the ages; when soldiers died in wave upon wave for a union based on liberty; when citizens marched in peaceful outrage under the banner "Freedom Now" — they were acting on an ancient hope that is meant to be fulfilled. History has an ebb and flow of justice, but history also has a visible direction, set by liberty and the Author of Liberty.

Inaugural Address, *supra* note 175.

President Bush sounds like President Lincoln in his Second Inaugural Address. Both assert that we do not know God's choices. The difference is that Lincoln would be suggesting that, though we could not understand it, God might be on the side of the Islamic radicals opposing our policies.

¹⁷⁸ ROBERT N. BELLAH, *BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD* 168 (1970).

¹⁷⁹ This is precisely where some later commentators differed from Bellah, arguing that American civil religion is secular in content, however religious its trappings might seem. See Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2098 n.71 (1996).

¹⁸⁰ BELLAH, *supra* note 178.

¹⁸¹ The chapter was first delivered by Bellah as a talk in 1966. *Id.* at 168.

¹⁸² *Id.* at 171.

¹⁸³ Cf. Ledewitz, *supra* note 68, at 457–60 (comparing Justice Harlan's and the Bible's understanding that the people may be wrong).

¹⁸⁴ BELLAH, *supra* note 178, at 183.

religion is not too religious for such an event. Bellah's asking that question back in 1966 suggests that the whole idea of the naked public square, and the concomitant assumptions of the secular consensus, were never solidly embedded in American political life.

The above examples of the religious foundations of important themes in American public life, which easily could be multiplied, suggest why no secular consensus could have endured in America. The secular consensus aimed at beginning anew without the domination of religious modes of understanding. To be secular means to have starting points independent of religious language and worldview. If, instead, our democracy always depended on principles borrowed from religion, so that one could not say with confidence whether these principles are religious or secular in orientation, then the secular consensus had already failed. The subsequent loss of popular support for secularism, though noticeable as the political collapse of the secular consensus, was not that significant. There never really was a secular consensus in America in the first place.

But is this recognition just something unique about America? Americans regard European public life as genuinely secular, so it cannot be that the political is inherently religious in some obvious way.¹⁸⁵ Nevertheless, the American experience suggests that there is something deep about political life that at least lends itself to religious expression. We have to take seriously the possibility that political life cannot be secular in any fundamental sense.

D. Religion and Deep Political Life

Up to this point, I have assumed that there is an intelligible distinction between religious and political life. From that perspective, the mixing of religious and political life in America manifests something particular about this society rather than anything general about the relationship of religion and politics. If religion and politics can be distinguished, then America's failure to attain secular democracy, if we have failed, would only say something about America. Even if America had not practiced secular democracy, in principle, secular democracy could still exist.

But this assumption concerning the distinction between religion and politics is at least questionable. The distinction between the political and the religious may be ambiguous. Claude Lefort suggests that religious and political life might be competitors, or even partners, in the same social space: "[B]oth the political and the religious bring philosophical thought face-to-face with the symbolic, not in the sense in which the social sciences understand that term, but in the sense that, through their internal articulations, both the political and the religious govern access to the world."¹⁸⁶

¹⁸⁵ Some are of the view that the American mix of religion and politics is now invading Europe. See Cristina Odone, *Culture Wars*, NEW STATESMAN, Nov. 25, 2004, at 10.

¹⁸⁶ CLAUDE LEFORT, DEMOCRACY AND POLITICAL THEORY 222 (David Macey trans., 1988).

In what Fred Dallmayr calls the "depth dimension of political life,"¹⁸⁷ Lefort describes the philosophical/political task as the disclosure of truth:

What philosophical thought strives to preserve is the experience of a difference which goes beyond differences of opinion . . . the experience of a difference which is not at the disposal of human beings, whose advent does not take place *within* human history, and which cannot be abolished therein; the experience of a difference which relates human beings to their humanity, and which means that their humanity cannot be self-contained, that it cannot set its own limits, and that it cannot absorb its origins and ends into those limits. Every religion *states* in its own way that human society can only open on to itself by being held in an opening it did not create. Philosophy says the same thing, but religion said it first, albeit in terms which philosophy cannot accept.¹⁸⁸

What is unique about democracy as a type of political system has nothing to do with secularism. In democracy, the sovereign power of political life has no concrete, corporate manifestation. "The People," although not a nullity, is not a specifiable entity. The People are not "there" like a king.¹⁸⁹ This is an important distinction about democracy, but it says nothing about the relationship of politics and religion. Every democracy might be thought "religious" in Lefort's sense.

If the political is understood in these terms, it is inherently religious, or perhaps I should say that political and religious understandings are encountering the same reality. When President Bush asserted in his Second Inaugural Address that history "has a visible direction,"¹⁹⁰ he offended no secular sensibility. Marxists, for example, believe the same thing.¹⁹¹ Nevertheless, such an assertion is not secular. It is an echo of what Walter Brueggemann considered the core biblical understanding of God.¹⁹² "The Old Testament insists that there is a moral shape to the public process that curbs the raw exercise of power. It equally insists that there is a hidden cunning in the

¹⁸⁷ FRED DALLMAYR, *THE OTHER HEIDEGGER* 90 (1993) (discussing LEFORT, *supra* note 186, at 222–23).

¹⁸⁸ LEFORT, *supra* note 186, at 222–23 (emphasis in original). For Lefort, the difference between political philosophy and theology is the non-acceptance by philosophy of the specifically Christian revelation that "Jesus is the Son of God." *Id.* at 223.

¹⁸⁹ DALLMAYR, *supra* note 187, at 91–94.

¹⁹⁰ Inaugural Address, *supra* note 175.

¹⁹¹ Secularists, however, would object to how this direction is set. For President Bush, the visible direction of history is "set by liberty and the Author of Liberty." *Id.* My point is that the understanding that history has a direction is itself religious, regardless of how one imagines this takes place.

¹⁹² WALTER BRUEGGEMANN, *THEOLOGY OF THE OLD TESTAMENT: TESTIMONY, DISPUTE, ADVOCACY* 113 (1997).

historical process that is capable of surprise and that prevents the absolutizing of any program or power.”¹⁹³

If we see things this way — understanding that history has a moral shape — what would a truly secular democracy look like? The political arguments that Americans think of as secular as opposed to religious might look very different. They might look, from this vantage point, like internal, “religious” disputes over the right understanding of the moral shape of history. The believer might say, for example, that God forbids abortion and gay marriage. The non-believer would reject the word “God,” of course, but more fundamentally would deny that the moral shape of history is against abortion and gay marriage. The non-believer would also reject, in principle, the claims by ministers, rabbis, and priests to have some special and reliable access to the moral shape of history. But the non-believer, in America at least, usually does not reject the claim that history has a moral shape. If that understanding is religious, then our political arguments appear to be religious disputes rather than disputes between religion and secularism.

I do not mean to arrogantly impose the word “religious” on persons who self-identify as atheists, humanists, or agnostics. There are important differences between loving and obeying God, on the one hand, and rejecting such comportments as meaningless, on the other. Believers and non-believers are not interchangeable. But, as far as American political life is concerned, those real differences between believers and non-believers are not at issue. No one in America is suggesting that the role of political office holders is actually to lead American worship of God.¹⁹⁴ In our actual disputes, there may be little difference between religious and political assumptions.

Despite the close connection between politics and religion, Lefort does describe a kind of secular political orientation that he regards as an exception to this connection.¹⁹⁵ Lefort says that “liberal thought encourages us to” regard belief in *the people* as “a sign of pure illusion . . . a fiction,” and regards “only individuals and coalitions of interests and opinions as real.”¹⁹⁶ In other words, there is in this understanding no common good. Lefort says that this “liberal thought,” with its radical absence of

¹⁹³ *Id.*

¹⁹⁴ The closest any Justice has come to such an assertion is the dissent by Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, in *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722 (2005), which upheld government religious expression, including presumably statements by political leaders, on the basis of “the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors.” *Id.* at 2756 (Scalia, J., dissenting) (emphasis in original). This does come close to envisioning the inauguration of a President, for example, as a worship service. I do not think, however, that Justice Scalia meant exactly that. Invocation of God at ceremonial occasions, no matter how sincere, is not truly worship.

¹⁹⁵ LEFORT, *supra* note 186, at 232.

¹⁹⁶ *Id.*

community, “den[ies] the very notion of society.”¹⁹⁷ All forms of politics are reduced to an instrumental grab for advantage. All shared meaning disappears.

Lefort may be accurately describing the thinking of some political theorists. But such radical individualism need not detain us. For if the separation of church and state requires this kind of liberal thought and thus ends up undermining political life itself, that would be a critique of secularism, not secularism’s goal. Americans who argue for limits on religion in public life are not aiming at pure individualism. They are aiming at a healthy political life. They do not intend to abolish the political. Indeed, by restricting religion, secularists aim to make room for political life. Secularists do not have the option of an apolitical, radical individualism.

Even secular political thought, if it is really in touch with political life, sees a connection between the political and the religious. John Rawls, for example, recognized that religious and other comprehensive frameworks form the root of political orientation.¹⁹⁸ Disagreement occurs over whether religious views may come forward independently into politics.¹⁹⁹

If there is any validity to the suggestion that religion and politics are closely related, the contested fault line between them will become visible where insistence upon distinction is greatest. That place in our political system is constitutional law and, in particular, the relationship of church and state as prescribed by the Establishment and Free Exercise Clauses of the First Amendment.²⁰⁰ If religion and politics are as closely related as I am suggesting, the job of separating them, which the secular consensus assigned to the Supreme Court, was an unsolvable, inseparable dilemma. The separation of religion and politics failed because it had to fail.

E. The Separation of Church and State, and the Secular Consensus, in Principle

People have different ideas about the desirability of a separation between church and state. So, Justice Scalia reportedly asserted that the Jews were safer in the United States than in Europe during World War II because of the stricter separation of

¹⁹⁷ *Id.* Or, as Margaret Thatcher once said, “There is no such thing as society, there are individual men and women.” Mavis Maclean, *From Advocacy to Management in Divorce, A Women’s Issue?*, 2 CARDOZO WOMEN’S L.J. 53, 58 (1995).

¹⁹⁸ John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 784–85 (1997) (“[T]he roots of democratic citizens’ allegiance to their political conceptions lie in their respective comprehensive doctrines, both religious and nonreligious.”).

¹⁹⁹ Rawls adds, however, that such comprehensive doctrines may only come into political debate when reasons given for public action are given that are “not reasons given solely by comprehensive doctrines.” *Id.* at 784.

²⁰⁰ U.S. CONST. amend. I. (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

church and state in Europe.²⁰¹ Commentator Thom Hartman responded that Hitler in fact used the blending of church and state to accomplish his goals.²⁰²

Whatever our view of separation, however, we assume that such separation is possible in principle. Depending on just what is being separated, that assumption is not necessarily reliable. The separation of church and state in constitutional principle suffers from the same conceptual problem as does the attempt to separate religion and politics discussed above.

We can see the conceptual problem in examining the author of the most extreme formulation of the separation of church and state in our constitutional tradition: Thomas Jefferson's metaphor of the "wall of separation between Church and State."²⁰³ This metaphor has become an important concept in constitutional understanding. Ironically, this metaphor was first used by the Supreme Court to describe the reach of the Establishment Clause in a case upholding, rather than striking down, government aid to religious schools.²⁰⁴

There is a great deal of controversy today concerning whether Jefferson should be considered in the interpretation of the Establishment Clause, since he was not in

²⁰¹ See *Scalia Escalates Attacks on Church-State Separation at New York Conference*, 58 CHURCH & ST. 16 (2005) ("Did it turn out that, by reason of the separation of church and state, the Jews were safer in Europe than they were in the United States of America? . . . I don't think so." (quoting Justice Scalia)). This statement was supposedly made by Justice Scalia at a conference on religious freedom at Shearith Israel Synagogue in November, 2004. *Id.* I do not know that Justice Scalia actually said this, but it does sound like him, and I do not remember any official denial from his office over what was a fairly widespread report at the time.

²⁰² *Id.*

²⁰³ Letter of Thomas Jefferson to Nehemiah Dodge and Others, A Committee of the Danbury Baptist Association, in the State of Connecticut (Jan. 1, 1802), reprinted in THE PORTABLE THOMAS JEFFERSON 303 (Merrill D. Peterson ed., 1975).

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.

Id.

²⁰⁴ *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"). The Court later held, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here." *Id.* at 18. Jefferson's wall metaphor had been cited earlier in *Reynolds v. United States*, 98 U.S. 145, 164 (1879), but the issue in *Reynolds*, and the point for which Jefferson was quoted, was the interpretation of the Free Exercise Clause rather than the Establishment Clause. *Id.*

any sense a framer either of the original constitutional text or of the First Amendment,²⁰⁵ and his views on the subject of church-state relations were not widely shared.²⁰⁶ In addition, the criticism has been made that whatever “separation” was contemplated by the First Amendment owes as much or more to Roger Williams’s belief that the wall of separation was needed to protect the churches against corruption than to any fear of churches dominating the State.²⁰⁷

Whether Jefferson’s understanding accurately reflects the original intention and meaning of the Establishment and Free Exercise Clauses, or indeed whether Jefferson’s understanding of church and state can be easily stated, are not our concern here.²⁰⁸ We are considering whether something like secular democracy is possible. The important aspect of Jefferson’s metaphor for us is that the wall of separation, whatever it is taken to mean, is between *church* and state, not between religion and state, nor between God and state.²⁰⁹

I am not referring here to the question whether religion is needed to instruct the people in morality and is therefore necessary to a healthy republic.²¹⁰ Rather, I am referring to the meaning of the God of history. Consider Jefferson’s famous words on the future of slavery contained in the Jefferson memorial — words every American schoolchild might once have known: “Indeed, I tremble for my country when I reflect that God is just, that his justice cannot sleep forever. Commerce between master and

²⁰⁵ See B.L. RAYNER, *LIFE OF THOMAS JEFFERSON* 213, 265 (1834).

²⁰⁶ It has been noted that Jefferson does not deserve the degree of attention he has received in interpretation of the religion clauses. See generally David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 MD. L. REV. 94 (2002); see also Michael W. McConnell, *The Origins and Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1449–50 (1990). Indeed, some have contended that Jefferson’s view was non-representational. See Michael C. Dorf, *Interpretative Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 846 (2004) (noting that Madison and Jefferson “were probably at the extreme end of secularist sentiment of the day”). This had been Chief Justice Rehnquist’s view. See *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (noting that Jefferson was in France at the time Congress passed the First Amendment and concluding that “[h]e would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.”).

²⁰⁷ MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS* 6 (1965); see also TIMOTHY L. HALL, *SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY* (1998).

²⁰⁸ See, e.g., A. JAMES REICHLEY, *FAITH IN POLITICS* 92 (2002) (“During the course of his life, Jefferson’s personal religious beliefs underwent considerable change.”).

²⁰⁹ See generally CARTER, *supra* note 64, at 106–23.

²¹⁰ There is dispute about whether Jefferson viewed religion as important in this way. Compare HALL, *supra* note 207, at 131, with REICHLEY, *supra* note 208, at 93–94.

slave is despotism. Nothing is more certainly written in the book of fate than that these people are to be free.”²¹¹

Why would Jefferson tremble about the consequences of the injustice of slavery? Because, as Jefferson saw it, when liberty, which is the gift of God, is violated by a nation, the result is the wrath of God:

And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when I reflect that God is just: that his justice cannot sleep for ever: that considering numbers, nature and natural means only, a revolution of the wheel of fortune, an exchange of situation, is among possible events: that it may become probable by supernatural interference! The Almighty has no attribute which can take side with us in such a contest.²¹²

This is a statement of the moral shape of history. Obviously, however one describes the shape of history — whether as God, or destiny, or fate — it would be ridiculous to speak of a separation of this from the state. The position of the United States in 1787, in Jefferson’s view, was much like that of the Pharaoh in relation to the slaves in the book of Exodus.²¹³ These people were destined to be free and public policy to the contrary threatened civil catastrophe.

In the end, it does not matter that the believer says that God demands freedom and that the non-believer says that justice demands freedom. Both the believer and the non-believer expect consequences of the direst kind from the perpetration of national injustice. Neither the politician nor the citizen can be indifferent to justice/God’s will.

Was the end of slavery an accident? A mere contingency? Can we imagine humankind going back to slavery? If reality is such that the choices that men and women make are constrained, and if, in the end, certain outcomes necessarily occur in history, and if those outcomes are morally irresistible, then secularism is impossible. If it can be said that freedom is written in the book of fate, then the Bible

²¹¹ Jefferson — Quotations on the Jefferson Memorial, *available at* <http://www.monticello.org/reports/quotes/memorial.html> (last visited Sept. 29, 2005) (quoting the inscriptions on the Memorial and quoting original passages from which the quotations were derived).

²¹² *Notes on the State of Virginia, Query XVIII*, reprinted in THE PORTABLE THOMAS JEFFERSON, *supra* note 203, at 214.

²¹³ See BELLAH, *supra* note 178, at 188 n.5 (quoting 1 ANSON P. STOKES, CHURCH AND STATE IN THE UNITED STATES 467–68 (1950)).

is to that extent a reliable guide. Who in this culture sincerely denies that reality is like this?²¹⁴

This is not a matter of overall human progress. Humans invent new injustices all the time. But when they do so, these new injustices are then subject to the judgment of history. We can call this judgment, as Jefferson does, the wrath of God. We can call it whatever we like. The point is, it is real. As Jefferson, the author of the metaphor, knew, the wall of separation has no possible application here.

This insight says little or nothing about the precise relationship of church and state or religion and state. There might be prayer in the public schools, or not. There might be government aid to private schools, or not. Money might carry the message "In God We Trust," or not. That is all the subject of constitutional doctrine. These details are not essential to Jefferson's point about the wrath of God. All nations are subject to that wrath, depending on their conduct.

F. The Separation of Church and State and the Secular Consensus in Doctrine

Up to this point, we have considered the comprehensive shape of the secular consensus. I have suggested that there is no overall way to distinguish religion and politics. Nevertheless, it certainly is possible to assign different roles in public life to political and religious organizations and themes. This division of roles is the well-known subject of constitutional separation in the United States. In constitutional doctrine, a strict separation is possible between religious language and life and political language and life. As we shall see, the secular consensus is collapsing here as well, in the details of constitutional doctrine, and is likely to continue to do so.

Constitutional disputes about establishment of religion can be grouped in roughly four modes: government aid to religious institutions, public invocation of God and religious themes, teaching religion in the public schools, and the role of religious organizations in public life. In all of these fields, constitutional doctrine already has blurred the line of separation or is a vote or so away from doing so. Given the political realities adverted to above, the additional justices needed to restrict the prohibitions of the Establishment Clause are very likely to be appointed to the Court.²¹⁵ Thus, religious democracy will probably lead to more expression of religion in all these fields. On the other hand, there is the apparent anomaly of *Employment Division v. Smith*,²¹⁶ which narrowed the protection of the Free Exercise Clause for religious

²¹⁴ This understanding is also a basis for reinterpreting the supposed secularism of most "secular" voters. See *infra* Part IV (discussing this theme).

²¹⁵ On July 1, 2005, Justice O'Connor announced her retirement from the United States Supreme Court. Judge Samuel Alito has been nominated to replace her. On September 3, 2005, Chief Justice Rehnquist died. He has been replaced as Chief Justice by Judge John Roberts, Jr. Considering the health and age of other justices, these are likely to be the first of several such changes.

²¹⁶ 494 U.S. 872 (1990).

practice. *Smith* appears to be a high achievement of the secular consensus, though that interpretation is not the only one possible.

The general position of the secular consensus in terms of constitutional doctrine would be, on these issues, that there should not be government aid to religious institutions, that neither God nor religion should be invoked on public occasions, that public schools should not teach or encourage religious practice, and that private religious groups and people should not be permitted to influence public policy in accordance with religious belief. In terms of free exercise of religion, the secular consensus might agree with the holding in the *Smith* case that government interference with religious practice is constitutional unless the government action is aimed at religion.²¹⁷ Even a short summary of these areas suggests that the secular consensus fading.

1. Aid to Religious Institutions

The most significant recent aid-to-religious institutions case is *Zelman v. Simmons-Harris*,²¹⁸ which upheld the Cleveland school voucher program²¹⁹ in a 5–4 vote.²²⁰ The relevant aspect of the program was that it provided tuition aid to students who attended participating private or public schools of their parents' choosing.²²¹

The Cleveland voucher program provided a clear example of substantial, indirect aid to religious schools.²²² Only private schools actually participated in the program.²²³ Of these private schools, forty-six out of fifty-six had a religious affiliation.²²⁴ Even more dramatically, 96 percent of the 3,700 students receiving tuition assistance were enrolled in religiously affiliated schools.²²⁵

Justice Souter's dissent convincingly demonstrated that the Cleveland voucher program was a boon to the Catholic school system, which overwhelmingly was the recipient of these public funds.²²⁶ A cap of \$2,500 on the amount of tuition that could be charged to low-income students "ha[d] the effect of curtailing the participation of

²¹⁷ See *id.* at 885 ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.").

²¹⁸ 536 U.S. 639 (2002).

²¹⁹ The program was not technically limited to Cleveland, but applied to any Ohio school district that operated under federal court order. Cleveland was the only such school district. *Id.* at 644–45.

²²⁰ Chief Justice Rehnquist wrote the majority opinion, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. Justices Stevens, Souter, Ginsburg, and Breyer dissented.

²²¹ The program also provided assistance for tutoring for students remaining in the Cleveland public school system. *Id.* at 645.

²²² See *id.* at 655.

²²³ *Id.* at 647.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 704–07 (Souter, J., dissenting).

nonreligious schools.”²²⁷ The result of the cap was that the Cleveland voucher system was “paying for practically the full amount of tuition for thousands of qualifying students” at private religious schools, thus “systematically underwriting religious practice and indoctrination.”²²⁸

The scale of the aid in the Cleveland system was unprecedented in constitutional doctrine, but for the Court majority, the amount of aid was irrelevant. Chief Justice Rehnquist’s majority opinion upheld the Cleveland program because it was neutral: The money in the program went to religious schools only insofar as that is where parents sent their children.²²⁹ As the government did not prevent participation in the voucher program by non-religious schools, the actual religious outcome of parental choice was constitutionally irrelevant.²³⁰

Although the majority in *Zelman* strongly emphasized parental choice, the majority’s emphasis on neutrality and its disinterest in the amount of public money that religious schools received²³¹ suggests a broader rationale in the future. Substantial government provision of services and materials to all private schools, including religiously affiliated schools, would seem likely to be the next acceptable step.²³²

It might be asserted that the narrow vote in *Zelman* shows that the Court could change course. That is possible but unlikely. As Justice Souter noted in his dissent, the Court has been moving unmistakably in the direction of judging governmental aid to religious schools more leniently under the Establishment Clause since 1968.²³³ Given the result of the 2004 election and the prospect of personnel changes on the Court, that trend is more likely to accelerate than to reverse.

Justice Thomas’s concurrence deserves special mention, for it proposes a more significant change in Establishment Clause doctrine. Justice Thomas argued in *Zelman*,²³⁴ and he has argued since,²³⁵ that the Establishment Clause should not be incorporated, that is, should not be applied to the states.

The arguments in favor of Justice Thomas’s position are complex, and the position is not unpersuasive, but it is not likely to be the trajectory of Establishment

²²⁷ *Id.* at 705.

²²⁸ *Id.* at 710, 711.

²²⁹ *Cf. id.* at 658–59.

²³⁰ *Id.* at 659 (“The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.”).

²³¹ *Id.* at 658–59.

²³² Actually, it was also the prior step, since the plurality opinion in *Mitchell v. Helms*, 530 U.S. 793 (2000), which upheld governmental supply of “‘services, materials, and equipment’” to private schools, including religious schools, anticipated *Zelman*. *Id.* at 861 (O’Connor, J., concurring in the judgment) (quoting 20 U.S.C. § 7372(a)(1)).

²³³ *Zelman*, 536 U.S. at 688–89 (Souter, J., dissenting).

²³⁴ *Id.* at 678–79 (Thomas, J., concurring).

²³⁵ *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2330–31 (2004) (Thomas, J., concurring in the judgment).

Clause interpretation. In the first place, only Justice Thomas takes this position on the Court. Second, Justice Thomas's position leads to the conclusion that the states are actually free to reestablish state churches, as long as they do not use tax money or in any other way practice "actual legal coercion."²³⁶ This is not a position other justices are likely to adopt.

Nor does Justice Thomas's position resolve the central issues under the Establishment Clause. The Court will eventually have to decide, for example, whether the words "under God" amount to a federal establishment of religion. If they do not, is the reason simply that no one is forced by federal law to say the Pledge of Allegiance? Or, is the reason that the Pledge is not an establishment of religion the fact that "under God" does not have the religious force of the words, for example, "under Jesus Christ"? We will return to this subject below. For now, it is enough to note that Justice Thomas's position does not resolve such questions. He is able to sidestep them because states are free to establish religion.

2. Public Invocation of God and Religion

While the doctrine of the Establishment Clause in the area of public invocation of God and religion is incoherent, the results are fairly clear. The results demonstrate that, increasingly, government is free to acknowledge religion, and even to utilize religion, in government expression. Indeed, it could be argued that, increasingly, government is not free to not do so.

The Court has rather routinely accepted public religious — often specifically Christian or Judeo-Christian — symbols, themes, and language, by claiming that these religious usages have, through historical legitimation or rote repetition, lost their specifically religious meaning. Thus, in *Marsh v. Chambers*,²³⁷ the Court upheld the practice of legislative prayer for reasons of history. In *Lynch v. Donnelly*,²³⁸ the Court upheld the display of a crèche as part of a publicly sponsored Christmas display, with Justice O'Connor's swing concurrence noting the many non-religious, Santa-like aspects of the display.²³⁹ It was in her well-known *Lynch* concurrence that Justice O'Connor wrote of the non-religious use of religious language — to show "confidence in the future" and to "solemniz[e] public occasions."²⁴⁰

²³⁶ *Id.* at 2331.

²³⁷ 463 U.S. 783 (1983).

²³⁸ 465 U.S. 668 (1984).

²³⁹ *Id.* at 692 (O'Connor, J., concurring).

²⁴⁰ *Id.* at 693.

These features combine to make the government's display of the crèche in this particular physical setting no more an endorsement of religion than such governmental "acknowledgments" of religion as legislative prayers of the type approved in *Marsh v. Chambers*, government declaration of Thanksgiving as a public holiday, printing of "In God We Trust" on coins, and opening court sessions with "God save

The Court's acceptance of religious imagery and its redefinition of this imagery as non-religious was both reaffirmed and undermined in *County of Allegheny v. American Civil Liberties Union*,²⁴¹ which disallowed a manger scene in the Allegheny County courthouse but permitted a Menorah and a Christmas tree outside a nearby public building. The manger scene was just too clearly religious.²⁴²

Is certain religious language really not religious? In *Elk Grove Unified School District v. Newdow*,²⁴³ Justice O'Connor described her acceptance of these official references to "God" as justified either by what she called "ceremonial deism" or by "an extremely long and unambiguous history."²⁴⁴ But, as Justice Thomas noted in *Elk Grove*, "[i]t is difficult to see how [the pledge] does not entail an affirmation that God exists."²⁴⁵ Upholding the Pledge of Allegiance with the words "under God" in it,

the United States and this honorable court." Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.

Id. at 692-93 (citation omitted). Justice Brennan expressed similar sentiments in *Lynch*:

[T]hese references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely non-religious phrases. The practices by which the government has long acknowledged religion are therefore probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essentially secular meaning.

Id. at 717 (Brennan, J., dissenting) (citation omitted).

In *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), Justice Kennedy criticized this notion of secular solemnization through religious language, though he did not mean that such language is prohibited by the Establishment Clause:

I fail to see why prayer is the only way to convey these messages; appeals to patriotism, moments of silence, and any number of other approaches would be as effective, were the only purposes at issue the ones described by the *Lynch* concurrence. Nor is it clear to me why "encouraging the recognition of what is worthy of appreciation in society" can be characterized as a purely secular purpose, if it can be achieved only through religious prayer. No doubt prayer is "worthy of appreciation," but that is most assuredly not because it is secular.

Id. at 673. (Kennedy, J., concurring in part and dissenting in part).

²⁴¹ 492 U.S. 573 (1989).

²⁴² *Id.* at 598 ("[N]othing in the context of the display detracts from the crèche's religious message.").

²⁴³ 124 S. Ct. 2301 (2004).

²⁴⁴ *Id.* at 2324 (O'Connor, J., concurring).

²⁴⁵ *Id.* at 2329 (Thomas, J., concurring).

which the late Chief Justice Rehnquist stated he was ready to do, which Justices O'Connor and Thomas have stated they are ready to do, and which Justices Kennedy and Scalia probably are ready to do, allows the government to proclaim that we are a nation under God.

The Ten Commandments cases split on the public display of the Commandments, demonstrating the basic divisions in the Court. In *Van Orden v. Perry*,²⁴⁶ the Court permitted a six-foot tall display on the state capitol grounds in Texas, along with numerous other historical markers and monuments. In *McCreary County v. American Civil Liberties Union of Kentucky*,²⁴⁷ the Court struck down the display of the Commandments on the walls of two courthouses.²⁴⁸ Essentially, the lineup in the two cases was the same, with Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas voting to uphold displays in both cases, and Justices Stevens, O'Connor,²⁴⁹ Souter, and Ginsburg voting to prohibit displays in both cases. Justice Breyer provided the swing vote, upholding the Texas display as predominantly secular,²⁵⁰ whereas the legislative history in Kentucky demonstrated a "governmental effort substantially to promote religion."²⁵¹ The upshot of the two cases seems to be that government is free to include religious symbols in displays that emphasize their historical significance and include other non-religious symbols. Under this standard, there is very little limit on what a determined and clever government can do. Whatever this case law means, it does not reflect the secular consensus.

Even more uniformly pro-religion have been Court decisions requiring non-discrimination against private religious expression. From time to time, lawsuits are brought against school districts for allegedly not allowing schoolchildren to read from Bibles during show-and-tell or during free time.²⁵² Such cases and situations naturally

²⁴⁶ 125 S. Ct. 2854 (2005).

²⁴⁷ 125 S. Ct. 2722 (2005).

²⁴⁸ In 1980, the Court struck down a Kentucky statute requiring the posting of the Ten Commandments in each public classroom in the State. *Stone v. Graham*, 449 U.S. 39 (1980).

²⁴⁹ Justice O'Connor's position was surprising. Justice O'Connor indicated in *Elk Grove* that she would vote to uphold religious language based on either "ceremonial deism" or a long and unambiguous acceptance. See *supra* note 244 and accompanying text. Her concurrence in *McCreary* did not distinguish the Ten Commandments from the "under God" language in the Pledge.

²⁵⁰ See *Van Orden*, 125 S. Ct. at 2871.

²⁵¹ *Id.* (Breyer, J., concurring) (distinguishing the display in *Van Orden* from the displays in *McCreary*).

²⁵² See Michael Stokes Paulsen & Steffen N. Johnson, *Scalia's Sermonette*, 72 NOTRE DAME L. REV. 863, 881 (1997).

There are literally scores of similar cases . . . : students being hauled to the principal's office for praying in the cafeteria or publicly stating a belief in God, student Bible study groups being refused permission to meet on the school lawn or an empty classroom during lunch hour or before or after school, religious groups being excluded from privileges solely on account of their religious identity.

become political fodder on the Internet.²⁵³ The secular consensus would like to ban even private religious references from public school.

The Court, however, has been clear in a number of cases since 1990 that where private speech is permitted in a public school, or in a university, or on public property, religious speech may not be discriminated against and that such non-discrimination does not violate the Establishment Clause.²⁵⁴ This protection of private religious speech probably will have more effect in nurturing a religious tone in public life than anything government does. The private attachment of the citizenry to religion will ensure that religion becomes a dominant theme in much of the public square.

3. Teaching Religion in the Public Schools

The central question for the future of religion and state in religious democracy is whether government may encourage religion. The highest accomplishment of the secular consensus was that public schools could neither offer official prayers²⁵⁵ nor conduct classroom reading of the Bible.²⁵⁶ *Engel* and *Schempp* established the essential principle of the secular consensus — that government could not encourage the citizenry, or at least not schoolchildren, to be religious — to believe in God as revealed in the Bible or to pray to God. At least government could not do so directly.²⁵⁷

Id. A recent such case was filed against the Marple-Newtown School District in Pennsylvania, by the Rutherford Institute on behalf of a parent who was barred from reading a passage from the Bible to an elementary school class. See Press Release, Rutherford Inst., Rutherford Institute Responds to Marple-Newtown Superintendent's Remarks About Lawsuit over Bible-Reading Mother (May 16, 2005), available at http://www.rutherford.org/articles_db/press_release.asp?article_id=555.

²⁵³ See Bible Reading Banned, at http://forums.crosswalk.com/bible_reading_banned/m_124428/tm.htm (last visited Sept. 29, 2005) (discussing the Marple-Newtown case).

²⁵⁴ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (holding that the exclusion of a private Christian club for children from school classrooms after school violates free speech and the failure to exclude would not violate Establishment Clause); *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (holding that the decision to allow a Ku Klux Klan Latin cross on public property, where unattended displays are generally allowed, does not violate the Establishment Clause); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (holding the refusal to subsidize religious speech where non-religious student speech is routinely subsidized violates free speech); *Lamb's Chapel v. Ctr. Morishes Union Free Sch. Dist.*, 508 U.S. 384 (1993) (providing that while the school's refusal to allow a church group access to school property after school, where other groups were permitted, violates free speech, permitting such access does not violate the Establishment Clause); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (upholding as not violative of the Establishment Clause the federal Equal Access Act, which requires equal meeting access for a student Bible study club).

²⁵⁵ See *Engel v. Vitale*, 370 U.S. 421 (1962).

²⁵⁶ See *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

²⁵⁷ When the Court, per Justice Douglas, upheld release time for religious instruction in *Zorach v. Clausen*, 343 U.S. 306 (1952), Justice Douglas's opinion did appear to allow

This is the sense of government neutrality toward religion that the Establishment Clause was said to require. In the words of Justice Black, government may not pass a law that “aid[s] one religion, aid[s] all religions, or prefer[s] one religion over another.”²⁵⁸ This core secular principle later became embedded in the first part of the *Lemon* test — that government action must have a “secular legislative purpose” in order to satisfy the Establishment Clause.²⁵⁹

The difference between religious democracy and the secular consensus concerns most clearly this question of government encouraging religion. The Court has never repudiated the principle from *Engel* and *Schempp* that the government may not see it as the State’s job to encourage schoolchildren or anyone else to be religious. Although the government may accommodate religion, by making Christmas a national holiday, for example, the government may not encourage religious belief. In the words of Justice Jackson, America must be “free for irreligion.”²⁶⁰

The late Chief Justice Rehnquist began his challenge to the secular consensus on this central point in 1985, as an associate justice in *Wallace v. Jaffree*,²⁶¹ which struck down an Alabama statute that essentially added the words “or voluntary prayer” to an existing period of silence in public schools “for meditation.”²⁶² The Court, in an opinion delivered by Justice Stevens, struck down this additional wording under the purpose prong of the *Lemon* test because “the State intended to characterize prayer as a favored practice,”²⁶³ which it surely did. *Wallace* is a perfect example of the secular consensus in action.

Justice Rehnquist’s dissent argued that government could constitutionally treat prayer as a favored activity: “It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution . . . prohibits the Alabama Legislature from ‘endorsing’ prayer.”²⁶⁴

government to “encourage[] religious instruction.” *Id.* at 314. But in context, this appeared to mean only that government could accommodate efforts of parents to arrange religious instruction for their children and that government did not have to feign disinterest in that endeavor.

²⁵⁸ *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1946). It is not clear that Justice Black meant that government could not teach or encourage religion. He wrote that government could not “influence a person to go to or to remain away from church against his will.” *Id.* The opinion did not state that government could not influence a person to go to church, only that it could not do so against his will — a principle of noncoercion rather than neutrality toward religion.

²⁵⁹ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

²⁶⁰ *Zorach*, 343 U.S. at 325 (Jackson, J., dissenting).

²⁶¹ 472 U.S. 38 (1985).

²⁶² *Id.* at 40.

²⁶³ *Id.* at 60.

²⁶⁴ *Id.* at 113 (Rehnquist, J., dissenting).

The current Court lineup is unlikely to abandon the principle that government may not favor religion over irreligion. In *Mitchell v. Helms*,²⁶⁵ Justice Souter, joined by Justices Stevens and Ginsburg, repeated the principle that the Establishment Clause prohibits “any government act favoring religion.”²⁶⁶ Although Justice Breyer did not join the Souter dissent in *Mitchell*, Justice Breyer’s dissent in *Zelman* approvingly cited Justice Goldberg’s concurrence in *Schempp* to the effect that “government efforts to impose religious influence on ‘young impressionable [school] children’” violates the Establishment Clause.²⁶⁷ In 1994, in *Board of Education of Kiryas Joel Village School District v. Grumet*,²⁶⁸ Justice O’Connor joined the portion of the majority opinion that referred to “a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion.”²⁶⁹ The principle of government nonpreference for religion was strongly reaffirmed in *Santa Fe Independent School District v. Doe*,²⁷⁰ in which Justices O’Connor and Kennedy joined with Justices Souter, Ginsburg, and Breyer in an opinion by Justice Stevens, to strike down a school district policy of student election to decide whether and what invocation to deliver at varsity football games.²⁷¹ The majority opinion revitalized the “unconstitutional purpose” prong of the *Lemon* test and held that the district “policy was implemented with the purpose of endorsing school prayer.”²⁷²

²⁶⁵ 530 U.S. 793 (2000).

²⁶⁶ *Id.* at 868 (Souter, J., dissenting).

²⁶⁷ *Zelman v. Simmons-Harris*, 536 U.S. 639, 719 (2002) (Breyer, J., dissenting).

²⁶⁸ 512 U.S. 687 (1994).

²⁶⁹ *Id.* at 703.

²⁷⁰ 530 U.S. 290 (2000).

²⁷¹ *Id.*

²⁷² *Id.* at 315. Even assuming that Chief Justice Roberts and any replacement for Justice O’Connor take Establishment Clause positions close to that of the late Chief Justice Rehnquist, it would seem there would still be five votes on the Court to prohibit direct government encouragement of religion.

Meanwhile, prior to the Ten Commandments cases, only Justice Thomas had indicated potential agreement with Chief Justice Rehnquist’s argument that the Establishment Clause does not prohibit the government from favoring religion over irreligion. In *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), Justice Thomas indicated general agreement with the view that the Establishment Clause requires government neutrality among religious views rather than between religion and irreligion:

Legal commentators have disagreed about the historical lesson to take from the Assessment Controversy. For some, the experience in Virginia is consistent with the view that the Framers saw the Establishment Clause simply as a prohibition on governmental preferences for some religious faiths over others. . . . Other commentators have rejected this view, concluding that the Establishment Clause forbids not only government preferences for some religious sects over others, but also government preferences for religion over irreligion.

I find much to commend the former view.

The Ten Commandments cases, although not involving public schools, sharpened and clarified the Court's division on the principle of government neutrality in favoring religion over non-religion. In *McCreary*, Justice Souter's five-justice majority reaffirmed that "[t]he touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'"²⁷³ Justice Scalia's dissent, joined by Chief Justice Rehnquist and Justice Thomas,²⁷⁴ not only disputed the neutrality principle in general, but specified that when government does favor religion, "the Establishment Clause permits . . . disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists."²⁷⁵ Accordingly, these three Justices endorsed government encouragement of traditional monotheism.²⁷⁶

Despite *Santa Fe* and the Ten Commandments cases, it seems to me that the view of Justice Scalia's dissent is likely to prevail in the long run. I say this in part simply because of the recent changes in personnel on the Court. In addition, the current doctrine actually leaves religious minorities more at the mercy of religious majority practice than would a frank acknowledgement of government endorsement of, and preference for, religion.

Id. at 855 (Thomas, J., concurring) (citations omitted).

In retrospect, even before his dissent in *McCreary*, it is obvious that Justice Scalia had been saying that government is free to promote and encourage religion. It was not quite clear, however, because Justice Scalia did not confront the issue in quite those terms. In his dissent in *Edwards v. Aguillard*, Justice Scalia's agreement with the chief justice was primarily that any attempt to discover legislative motive would be incoherent and illegitimate. 482 U.S. 578, 636–40 (1987) (Scalia, J., dissenting). In his dissent in *Lee v. Weisman*, Justice Scalia's main thrust was the nature of unconstitutional coercion. 505 U.S. 577, 642 (1992) (Scalia, J., dissenting) ("I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty — a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud.").

What was behind Justice Scalia's thinking, though, and what came to the fore in his dissent in *McCreary*, is that "[r]eligious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals." *Id.* at 645. Cf. *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2748–64 (2005) (Scalia, J., dissenting). Justice Scalia added in *Lee* that the Establishment Clause allows the government to "accommodate" this religious necessity. 505 U.S. at 642 (Scalia, J., dissenting). But "accommodate" is not the right word. Given the collective nature of what Justice Scalia is describing, government must organize and lead such public prayer. This is the issue that Justice Scalia began to face in *McCreary*, and it is the key future issue for religious democracy.

²⁷³ *McCreary*, 125 S. Ct. at 2733 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (opinion of Souter, J., joined by Stevens, O'Connor, Ginsburg, and Breyer, JJ.)).

²⁷⁴ Justice Kennedy did not join this portion of the dissent. *Id.* at 2748 (Scalia, J., dissenting).

²⁷⁵ *Id.* at 2753.

²⁷⁶ See *id.* ("Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion.").

Ever since *Lee v. Weisman* invalidated the attempt by a school district to give guidelines for high school graduation invocation prayers that would reflect a kind of nonsectarian, "civic religion,"²⁷⁷ the practice has emerged for students who are selected to speak for other than religious reasons, to pray to God at their high school graduation ceremonies.²⁷⁸ I attended a public high school graduation in 2004 in which at least five graduating seniors thanked Jesus Christ for His help and inspiration. Such invocations represent private student speech and are protected by the Free Speech and Free Exercise Clauses.²⁷⁹

The Court continued down the road of distinguishing private and public speech in *Santa Fe*. All a school district needs to do to avoid invalidation is to authorize the student body president to speak before football games and to give this student no guidelines at all as to what should be said. The student eventually will figure out that a prayer is expected. Once established, future elections for student body president will ensure that the majority religion is the one expressed. The Court has not eliminated religion in public high schools. It has only eliminated adult leadership.

Nor is it possible to undo this tendency by looking to a school district's motivation in allowing a student to speak before a football game or at graduation. The possible motivations that the Court has regarded as secular, including solemnizing events, are so indistinguishable from religion that as long as a district does not use the term "prayer,"²⁸⁰ the policy of student speech will be upheld. Justice Stevens attempted to prevent just such future subterfuges in *Santa Fe* by pointing out that "invocation[s]" and "solemnizing" sound like prayer.²⁸¹ But a school district can certainly authorize the student body president to welcome players and families from the other school, thus avoiding any religious purpose.

²⁷⁷ See *Lee*, 505 U.S. at 589.

There may be some support, as an empirical observation, . . . that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.

Id. (citations omitted).

²⁷⁸ This likelihood has long been recognized. See Alan E. Brownstein, *Prayer and Religious Expression at High School Graduations: Constitutional Etiquette in a Pluralistic Society*, 5 NEXUS 61, 65–76 (2000); John C. Eastman, *We are a Religious People, Whose Institutions Pre-suppose a Supreme Being*, 5 NEXUS 13, 20–22 (2000).

²⁷⁹ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) ("[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday.").

²⁸⁰ As the district foolishly did in *Santa Fe*. *Id.* at 310.

²⁸¹ *Id.* at 309.

The insurmountable problem in these cases is precisely the one recognized by the Court in *Santa Fe* — the community wanted public prayer. “We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions so as to mark those occasions’ significance.”²⁸² Where that social desire is strong and well-organized, the Court’s decisions will be a mere paper barrier. Unfortunately, those communities are precisely the situations in which school district involvement, which the Court has proscribed, would help protect minority religious interests.

The odd aspect to current doctrine is that the same “civic religion” language that cannot be delivered at high school graduations and football games is likely to be upheld in the Pledge of Allegiance. It can be said that one is prayer and the other is not, but this distinction is not very convincing. If the nation can be said, constitutionally, to be “under God,” it cannot hurt to say so at a football game.

I think the Court will end up just where Chief Justice Rehnquist indicated and where Justices Scalia and Thomas have suggested — that government may permit and encourage a kind of generic religious expression and belief, even monotheism dependent on a Creator.²⁸³ I do not think we will maintain the distinction that permits government officials to do this around adults but not around students.

The change in doctrine that I anticipate will not necessarily change the outcomes of the core Establishment Clause cases. It may not prove possible for government to conduct prayer or Bible reading in public schools in a way that does not violate the Court’s continuing concern with government preference for a particular religion and with government coercion of religious belief. But those legitimate concerns can be served without requiring government neutrality about religion itself.

4. Free Exercise of Religion

The failure of the Court to accord much protection to the free exercise of religion permits a different understanding of the Court’s reinterpretation of the reach of the Establishment Clause. I have been suggesting that the Court is moving away from the secular consensus in the Establishment Clause cases. But the Free Exercise cases, which grant wide latitude to the government’s interference with religious practice, even to the point of discrimination against religion, require consideration of alternative explanations. Perhaps the Court simply wishes to accord the government greater discretion in its actions. Or, perhaps the Court in the Establishment Clause cases is

²⁸² *Id.* at 307.

²⁸³ *Cf. Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2326 (2004) (O’Connor, J., concurring) (describing the pledge as “a simple reference to a generic ‘God’”). Presumably, though Justice O’Connor did not say so, the Ten Commandments did not represent for her just such a simple reference, which is why she voted against the displays in both *Van Orden* and *McCreary*.

protecting majoritarian religion, rather than recognizing a broad place for faith in America.

The important recent case law in the free exercise area consists of four cases. *Employment Division v. Smith*²⁸⁴ set forth a new understanding of the Free Exercise Clause, and this understanding was applied in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*²⁸⁵ and *Locke v. Davey*.²⁸⁶ Congress unsuccessfully attempted to overturn *Smith* in *City of Boerne v. Flores*.²⁸⁷

Smith changed the prevailing constitutional test in free exercise cases when generally applicable government policies substantially burden religious practice. Prior to *Smith*, such cases were governed by strict scrutiny — the compelling state interest test.²⁸⁸ Justice Scalia's majority opinion in *Smith* concluded that generally applicable laws would not be subject to such exacting scrutiny but would apparently be given the normally deferential review applied to arbitrary government conduct.²⁸⁹ Government action that was "aimed at the promotion or restriction of religious beliefs" would receive a different level of review.²⁹⁰

The surprising aspect of the *Smith* opinion is its recognition — and seeming approval — that the Court had applied strict scrutiny against generally applicable law in "hybrid" cases, in which not only freedom of religious practice but also freedom of speech or of the press was involved.²⁹¹ Thus, *Smith* created a hierarchy of rights, in which Free Exercise was accorded less protection than other First Amendment rights.

The two cases applying *Smith* manifested different degrees of deference to the legislature. In *Lukumi Babalu Aye*, every justice agreed that the City's ban on ritual animal sacrifice violated the Free Exercise Clause.²⁹² On the other hand, in *Davey*, where discrimination against the free exercise of religion was express,²⁹³ only Justices Scalia and Thomas dissented from Chief Justice Rehnquist's majority holding that there was no violation of the Free Exercise Clause.²⁹⁴

²⁸⁴ 494 U.S. 872 (1990).

²⁸⁵ 508 U.S. 520 (1993).

²⁸⁶ 540 U.S. 712 (2004).

²⁸⁷ 521 U.S. 507 (1997).

²⁸⁸ *Smith*, 494 U.S. at 882–83.

²⁸⁹ There was actually no explanation in the *Smith* opinion about the test to be applied short of strict scrutiny.

²⁹⁰ 494 U.S. at 879 (quoting *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594 (1940)).

²⁹¹ *Id.* at 881.

²⁹² *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 520 (1993).

²⁹³ Pursuant to the state constitution, Washington excluded the pursuit of a devotional theology degree from the state's scholarship program. *Locke v. Davey*, 540 U.S. 712, 718 (2004).

²⁹⁴ *Id.* at 726.

Boerne rejected the attempt by Congress essentially to reverse *Smith* by passing the Religious Freedom Restoration Act of 1993.²⁹⁵ Justice O'Connor, joined by Justice Breyer, challenged the historical understanding behind *Smith*,²⁹⁶ which was defended by Justices Scalia and Stevens.²⁹⁷ Justice Kennedy's majority opinion rested primarily on the role of the Court as arbiter of the Constitution.²⁹⁸

These free exercise cases confound the Establishment Clause conclusions reached above. For example, Justice Stevens, perhaps the staunchest secularist on the Court today, strongly supported *Smith*.²⁹⁹ Yet Justice Scalia, who wrote the majority opinion in *Smith*, does not readily find establishment of religion but rather allows substantial government support for religion. More surprisingly, the late Chief Justice Rehnquist, who had been foremost on the Court in protecting religion (in the sense of allowing government preference of religion over irreligion) wrote the majority opinion in *Davey*, which allowed a facial discrimination against religion to stand. On the other hand, Justice Thomas, who is perhaps closest to the late chief justice on Establishment Clause issues, was one of only two dissenters in *Davey*.

Without pretending to understand how the justices view the relationship of free exercise and establishment,³⁰⁰ it should be noted that the clauses work differently. Limiting the reach of the Establishment Clause will presumably lead to more expression of majoritarian religion, since that is the religious practice government is always more likely to encourage and support. Weakening the Free Exercise Clause, on the other hand, will tend to harm minority religious interests, although that was not evident in *Davey* itself.

In any event, since *Smith* allows as much or as little accommodation of religion as democratic political life wishes to grant, the case stands as no serious support for the secular consensus.³⁰¹ None of these cases inhibit the development of religious democracy.

²⁹⁵ Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)).

²⁹⁶ *City of Boerne v. Flores*, 521 U.S. 507, 544 (O'Connor, J., dissenting).

²⁹⁷ *Id.* at 537 (Scalia, J., concurring in part).

²⁹⁸ See Ledewitz, *supra* note 68, at 440-46 (discussing the democratic aspects of the case).

²⁹⁹ Justice Stevens alone, for example, found that RFRA violated the Establishment Clause as a "governmental preference for religion, as opposed to irreligion." *Boerne*, 521 U.S. at 537.

³⁰⁰ In *Davey*, it may have been the desire to allow government to "play in the joints" between what the Establishment Clause permits and what the Free Exercise Clause forbids that led Chief Justice Rehnquist to uphold the Washington exemption. *Locke v. Davey*, 540 U.S. 712, 718 (2004) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)).

³⁰¹ Justice Scalia noted in *Smith* that several states grant peyote exemptions. *Emp. Div. v. Smith*, 494 U.S. 872, 890 (1990).

5. Religious Involvement in Government

Recently there was a flurry of comment about Texas Governor Rick Perry's plan to sign a parental consent abortion bill at a private Christian academy and to discuss a proposed state constitutional amendment banning gay marriage there as well.³⁰² Governor Perry was quoted as saying of his choice of location that "[a] church is an appropriate place to come together and celebrate a victory for the values of the people of Texas."³⁰³ The story also reported that the choice of location "is being praised by conservative Republicans as a major victory."³⁰⁴

A similar media event erupted over a comment by Democratic National Committee Chairman Howard Dean characterizing the Republican Party as "pretty much a white, Christian party."³⁰⁵ Dean meant this as a criticism.

These comments and situations reflect the viewpoint of the secular consensus — and, of course, the opposite reaction by critics of the secular consensus³⁰⁶ — that the mix of religion and political life is unhealthy not just when government involves itself in religion, but also when private religious persons and institutions involve their religious views in public life.

The secular consensus regards such intrusions as inherently worse than the expression of the same views by non-religious voices. For example, Andrew Greeley criticized the impeachment of President Clinton as instigated by a cabal of religious groups:

The most dangerous intrusion of religion into American politics in the last hundred years was the effort of a largely southern, largely Evangelical, largely Calvinist cabal to cancel the election of an American presidency by a gross intrusion into the private life of that president. . . . The attempt to burn Bill Clinton did not need a John Winthrop to light the fire.³⁰⁷

Why does Greeley think that religious motivation is important in this context? What difference does it make where a political position comes from? Some people

³⁰² See *Bill-Signing at Religious School Is at Issue*, N.Y. TIMES, June 5, 2005, at 34.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ See Shailagh Murray, *Dean's Words Draw Democratic Rebukes*, WASH. POST, June 9, 2005, at A6.

³⁰⁶ The predictable response to Dean's comment in my local newspaper was an invitation to join the GOP: "[W]ho does that leave for the Democrats? Atheists. And Islamic fanatics." Letters to the Editor, *Join Us, The GOP*, PITTSBURGH POST-GAZETTE, June 23, 2005, at B6.

³⁰⁷ Andrew Greeley, *The Puritans and American Politics, in ONE ELECTORATE UNDER GOD?: A DIALOGUE ON RELIGION AND AMERICAN POLITICS*, *supra* note 74, at 106.

wanted President Clinton impeached simply because he acted immorally. Others wanted him impeached because he lied under oath. And some, as Greeley says, wanted him impeached because President Clinton violated God's moral law.³⁰⁸ But some people simply wanted to cancel the election and put a Republican in the White House. Surely that motivation was worse than a religious one. Basically, what difference does the origin of the opposition to President Clinton make?

Greeley uses the word "dangerous," and that is clearly the feeling of the secular consensus.³⁰⁹ It is one thing to be ruled by those with whom one disagrees. It is apparently far worse to be ruled by religiously motivated people with whom one disagrees.

The problem is not constitutional, of course. Obviously, private speech by religiously motivated people cannot seriously be thought to violate the Constitution. Such speech, aside from partisan endorsement of candidates by tax exempt institutions, is protected by the Constitution.³¹⁰

If a secular citizen is ruled by religious opponents, the citizen may feel that there is little chance of persuading them of the citizen's point of view. The citizen and the religious opponents may not even share a common language to discuss a political issue.

But this distinction between religious and nonreligious motivations is meaningless. Many people have strong opinions about political issues. Having a strong opinion, even an implacable one, is not related to religious reasoning. Try persuading a member of the ACLU that free speech is overrated or the CEO of a coal company that we should have carbon taxes to fight global warming. Religiously motivated opinions are no harder and no easier to change than any other.³¹¹ Anyway, how could strength of conviction disqualify religious voters from democratic participation?

Of course the idea that God prefers one politician to another or even one party platform to another is theologically suspect. But presumably the secular consensus is not genuinely concerned about that, except as such a view might be a convenient political weapon.

Some of the secular criticism of political activity by religious voters is simply hypocritical. Secularists did not bemoan the opposition by Catholic Bishops to the abolition of welfare.³¹²

³⁰⁸ *Id.* at 106–07.

³⁰⁹ *Id.* at 106.

³¹⁰ *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.) ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (emphases in original); *see also supra* note 279 and accompanying text (discussing *Santa Fe* and the private speech of students).

³¹¹ This is the reason that Rawls does not distinguish religious comprehensive views from nonreligious comprehensive views. *See supra* note 199.

³¹² The fight between the Bishops against the abolition of welfare in Wisconsin was a particularly dramatic example. *See* Jeff Mayers, *Catholics Urged to Reach Out to Poor*, WIS. ST. J., Sept. 11, 1997, at 1B.

We can see here in miniature the fundamental problem of secular democracy. Secular democracy requires that religious believers not participate in politics as believers. This is not because the believers will not be persuasive to other voters. Secular democracy is exclusionary in principle. For this reason alone it would not really be possible for a political system to be both democratic and secular, at least not in a culture as religious as ours. In addition, secular democracy cannot address the deepest issues of the meaning of political life. Finally, secular democracy cannot achieve stable constitutional doctrine. We do not have secular democracy, nor could we.

What happened in the election of 2004 was, then, to be expected. The influence of religiously motivated voters in the United States came of age with the 2004 election. These voters today dominate American politics. Certainly this situation is subject to change with the next election. But any change is unlikely to put the secular consensus back into the cultural dominance it once seemed to have achieved.

This is what I mean by the existence in America of religious democracy — a practical fallout from a conceptual void. We now turn from the outdated and largely impotent secular consensus, to the vibrant specter of religious democracy itself. The phenomenon of religious democracy in America is new. We now ask what it means and what its implications are.

III. IS RELIGIOUS DEMOCRACY POSSIBLE?

It would be a mistake to imagine that only secular democracy has conceptual problems. Religious democracy has its own set of difficulties. There really is a question whether religious democracy is possible. Amy Chua, for example, in her book *World on Fire*,³¹³ argues that democracy in a free-market globalizing context unleashes powerful ethnic and other hatreds, including resentment against the United States and Israel, which are expressed in religious terms. Fareed Zakaria sounds similar themes about democracy in any country with internal religious differences: “Compromise seems impossible; one can bargain on material issues such as housing, hospitals, and handouts, but how does one split the difference on a national religion?”³¹⁴ Zakaria attributes this religious threat to democracy to the Abrahamic tradition in particular: “Religion, at least the religion of the Abrahamic traditions (Judaism, Christianity, and Islam), stresses moral absolutes. But politics is all about compromise. The result has been a ruthless, winner-take-all attitude toward political life.”³¹⁵ Writing about Islam, Lee Travis writes: “The core issue is whether a religious

³¹³ AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 7 (2003).

³¹⁴ FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 114 (2003).

³¹⁵ *Id.* at 142.

democracy is possible.”³¹⁶ He asks, “Are rules governing personal and social behavior based on divine revelation and interpreted by the state compatible with the grass-roots participatory ideal of a Western democratic state?”³¹⁷ Jack Nelson-Pallmeyer puts the basic question in the provocative title of his book, *Is Religion Killing Us?*³¹⁸

Within the United States, religious divisions are not typically ethnic in origin. Instead, the issues tend to involve a kind of religious orientation — called the religious right or some such title — versus a more liberal religious outlook and/or a secular attitude. Nevertheless, in America as well, religious democracy is felt to have the potential for intense political division. Martha Minow writes, “[I]f religions offer rich resources for envisioning a better world and motivating people to strive for it, they also generate divisions, hatreds, and barriers to communication and a sense of commonality.”³¹⁹ Justice Breyer states in his dissent in *Zelman* that an important aspect of the separation of church and state required by the Establishment Clause is to “protect[] the Nation’s social fabric from religious conflict.”³²⁰

Certainly religion does stir up such feelings. In May 2005, I received the following e-mail from a national grass roots political group:

The Bush government seeks to impose a narrow, intolerant, and political form of Christian fundamentalism as government policy. No longer on the margins of power, this extremist movement aims to strip women of their reproductive rights, to stoke hatred of gays and lesbians, and to drive a wedge between spiritual experience and scientific truth. We will not surrender to extremists our right to think.³²¹

Before concluding that religious democracy is inherently unstable or otherwise unworkable, it must be specified what sort of religious democracy is meant. There are many different possibilities for the evolution of American religious democracy. In this section, I will outline some of these possibilities. I leave the question of the sustainability of religious democracy open. Whether religious democracy is possible

³¹⁶ Lee A. Travis, *Corporate Governance and the Global Social Void*, 35 VAND. J. TRANSNAT’L L. 487, 498 (2002).

³¹⁷ *Id.*

³¹⁸ JACK NELSON-PALLMEYER, *IS RELIGION KILLING US?: VIOLENCE IN THE BIBLE AND THE QURAN* (2003).

³¹⁹ Martha Minow, *Governing Religion, in ONE ELECTORATE UNDER GOD?: A DIALOGUE ON RELIGION AND AMERICAN POLITICS*, *supra* note 74, at 144, 148.

³²⁰ *Zelman v. Simmons-Harris*, 536 U.S. 639, 717 (2002) (Breyer, J., dissenting).

³²¹ Email from Not In Our Name, nion@cloud9.net, to Bruce Ledewitz, Professor of Law, Duquesne University School of Law, ledewitz@duq.edu (May 24, 2005) (on file with author) (quoting New Not in Our Name Statement of Conscience (Jan. 18, 2005), *available at* <http://www.notinourname.net/soc-jan05.htm>).

will depend on the kind of religion we have. Many citizens in America vote based, in part at least, on religious considerations. Some government policies are changing because of those votes. By itself, this phenomenon need be nothing more than democracy in action. It need not spell the end of democracy.

A. The Different Faces of Religious Democracy in America Today

The nature of religious democracy can be analyzed in terms of four kinds of interactions between religion and political life. Religious democracy can be a symbolic expression, a policy prescription, a cultural critique, or a theological commitment. Of course, religious democracy can be all or a mix of these things as well. I distinguish these categories only to clarify matters.

1. Religious Democracy and Symbolic Expression

In part, the change that religious democracy has brought to America is to alter the tone of the public square. The point that Richard John Neuhaus was making in 1984³²² was that the *language* of belief was absent from the public square.³²³ That certainly has now changed. Even if the believers still wish to say that their perspective is discriminated against, their protests sound hollow given their electoral successes.

It is in the context of language in the public square that one hears the objection to religion as a conversation stopper.³²⁴ It is suggested that allowing religious language in political debate threatens democracy because political debate becomes impossible. These are matters of subjective belief, of taste.

But our current political experience demonstrates that this is simply not the case. In our most contentious political/legal issue — abortion — there are clearly strong religious views, probably on both sides, but certainly expressed as such in the pro-life position. But rarely does anyone argue in the public square that abortion should be outlawed only because God says so. Pro-life religious voters and leaders argue as well that abortion kills a human being. The belief in a soul may make it easier to believe that a fetus is fully human, but many Americans believe that the fetus should be protected as human without a specific commitment to the concept of a soul.

³²² See generally NEUHAUS, *supra* note 63.

³²³ See generally *id.*

³²⁴ See, e.g., Richard Rorty, *Religion as a Conversation Stopper*, in PHILOSOPHY AND SOCIAL HOPE 171 (1999) ("The main reason that religion needs to be privatized is that, in political discussion with those outside the relevant religious community, it is a conversation-stopper."); see also ELIZABETH MENSCH & ALAN FREEMAN, *THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE?* (1993) (offering an analysis of this issue and a response).

Gay marriage seems to me a better example of a source of contentious religious debate. Many people oppose gay marriage basically because the Bible condemns homosexuality.³²⁵ Nevertheless, much more political opposition to gay marriage could be called simply social conservatism. Many people just do not like the idea of homosexuality. That attitude is as divisive, undebatable, and uncompromising as religious opposition is said to be, yet, obviously, nothing can be done about such “reasons” for voting against gay marriage.

Religious democracy does not change the nature of political debate. It is true that political debates now invoke the name of God without hesitation and that national leaders do the same on ceremonial occasions, perhaps more often than ever before. All this makes the believer more comfortable in the public square and the non-believer presumably less so. But there is nothing here that threatens democracy. Whatever political leaders may mean by references to God, they do not mean that the non-believer is outside the political community in any practical sense. Such language does not and is not meant to substitute for ordinary politics. Indeed, the language of God may be invoked to gain ordinary political support.³²⁶

Of more concern are symbolic proposals to declare in some way that America is a religious nation. Edward Foley referred to efforts in the 1950s and 1960s to amend the Preamble of the Constitution to include the words “devoutly recognizing the authority and law of Jesus Christ the Savior and King of Nations” after “We the People of the United States.”³²⁷ Was not the insertion of “under God” in the Pledge of Allegiance in 1953 precisely this kind of aggressive religious identity claim?

Since the election, the religious coalition that helped re-elect President Bush has neither pressed to have Jesus Christ recognized as a national symbol nor to have America declared a Christian nation. Part of the reason for that is that Jews are an important part — or potential part — of that coalition. For another, times have changed,³²⁸ and even in religious democracy, religious pluralism is a favored American commitment. The serious push has been for public recognition of the less divisive term, “God,” rather than any more sectarian term.

³²⁵ For the relevant texts, see *infra* note 540.

³²⁶ Noah Feldman, *A Church-State Solution*, N.Y. TIMES, July 3, 2005, § 6 (Magazine), at 28, 32 (arguing that “[f]aith is not a conversation stopper.”).

³²⁷ Foley, *supra* note 88, at 1195; see also Gaines M. Foster, *A Christian Nation: Signs of a Covenant*, in BONDS OF AFFECTION: AMERICANS DEFINE THEIR PATRIOTISM 120, 120–38 (John Bodnar ed., 1996).

³²⁸ See Stephen B. Presser, *Some Thoughts on our Present Discontents and Duties: The Cardinal, Oliver Wendell Holmes, Jr., the Unborn, the Senate, and Us*, 1 AVE MARIA L. REV. 113, 120 (2003).

It was not unusual even a hundred years ago for Justices of the United States Supreme Court, to declare that ours was a ‘Christian Nation’ but just a scant few years ago a Governor of Mississippi reiterated that mantra and he was roundly excoriated and condemned by the nation’s press.

Whether the word “God” is sectarian is, of course, contested. The Ninth Circuit opinion in *Elk Grove* was correct as a matter of logic that the term “God” is not a generic term that can be plugged into any religion.³²⁹ Indeed, Justice O’Connor referred to a Buddhist amicus brief making just that point about Buddhism not embracing any form of monotheism, though she still viewed the Pledge of Allegiance as not endorsing religion.³³⁰

The question of public and symbolic religious expression is going to become a more pressing constitutional issue under a religious democracy. I stated above that a view of the Establishment Clause as permitting government encouragement of religion is likely to ultimately carry the Court as a part of the development of religious democracy. But this victory is not without a price. Once it is accepted that government may truly encourage, indeed practice, religion, two issues arise — the question of the non-believer and that of the minority believer.

I will take up the issue of the non-believer below in Part IV. In my view, for most Americans, the concept of God is not ultimately an insurmountable issue. The religious/political problem in American political life is based on a lack of theological sophistication and a hostility to religious hierarchy. Simply put, many secularists are actually believers who do not want clergy to tell them what to do. Such voters may come to see that they are not really threatened by public acknowledgment of God.

Much more difficult is the question of the minority believer in religious democracy. Justice Scalia finally began to address this issue in his dissent in *McCreary*. If the Ten Commandments are permissible because “the overwhelming majority of religious believers” must be “able to give God thanks and supplication *as a people*,”³³¹ what about the seven million non-monotheist believers and what about publicly acknowledging Jesus Christ? In other words, when government is permitted to go beyond “a simple reference to a generic ‘God,’”³³² where will we go?

³²⁹ See *Newdow v. U.S. Cong.*, 328 F.3d 466, 487 (9th Cir. 2003), *overruled on other grounds* by *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004).

A profession that we are a nation “under God” is identical, for Establishment Clause purposes, to a profession that we are a nation “under Jesus,” a nation “under Vishnu,” a nation “under Zeus,” or a nation “under no god,” because none of these professions can be neutral with respect to religion.

Id.

³³⁰ *Elk Grove*, 124 S. Ct. at 2326 (O’Connor, J., concurring).

³³¹ *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2756 (2005) (Scalia, J., dissenting) (emphasis in original).

³³² *Elk Grove*, 124 S. Ct. at 2326 (O’Connor, J., concurring).

Justice Scalia's response is that "[o]ur national tradition has resolved that conflict."³³³ By tradition, the non-monotheist believer is out of luck. Genuine monotheism is permitted. But, also by tradition, the majority is not permitted to publicly pray to Jesus Christ.³³⁴

Of course this is no response at all. If the non-monotheist is out of luck today, there is no reason why the non-Christian should not be out of luck tomorrow. That is the problem with using tradition as the sole basis of judicial interpretation of the Constitution.

I wish that Justice Scalia had contested Justice Stevens's implication that our religions are fundamentally divided on the use of the word God.³³⁵ Granted that the Ten Commandments are a Judeo-Christian expression, their unique place in American tradition can be resolved by referring to their place in our legal history, as Chief Justice Rehnquist did in his plurality opinion in *Van Orden*.³³⁶ But we are now moving into a new era of Establishment Clause considerations. The issue for the future of religious democracy is public expression of thanks and supplication. Here, Justice Scalia is much too cavalier. It is not true that the "other" religions are outside Establishment Clause protection. Rather, all of our religions share a core comportment toward reality that can be the basis of political community and, according to Huston Smith, can be expressed through the language of God:

Making due allowance not only for differences in terminology but for differences in nuances, in East Asia we find Confucianism's *shang ti*, the supreme ancestor, and beyond him *Tien*, or Heaven. In Taoism, there is the *tao* that can be spoken, and the Tao that transcends speech.

In South Asia, Hinduism presents us with *sanguna brahman* — God with attributes or qualities, among which *sat*, *chit*, and *amanda* (infinite being, awareness, and bliss) are primary — and *Nirguna Brahman*, the *neti, neti* (not this, not this) of the Brahman who is beyond all qualities. Buddhism presents a special case because of its ambiguous stance toward God, but though the personal God is absent in early Buddhism, it could

³³³ *McCreary*, 125 S. Ct. at 2756 (Scalia, J., dissenting).

³³⁴ I assume this is the point of Justice Scalia's invocation of George Washington's Letter to the Hebrew Congregation of Newport, Rhode Island, and Scalia's pointed comment that the examples he cites from our tradition "invoke[] God, but not Jesus Christ," all in response to Justice Stevens's charge that "followers of Judaism and Islam" are excluded from Justice Scalia's Establishment Clause protections. *Id.* at 2755 (Scalia, J., dissenting) (quoting *Van Orden v. Perry*, 125 S. Ct. 2854, 2886 (2005) (Stevens, J., dissenting)).

³³⁵ See *Van Orden*, 125 S. Ct. at 2881 & n.18 (Stevens, J., dissenting).

³³⁶ *Id.* at 2863 (majority opinion) ("But Moses was a lawgiver as well as a religious leader.").

not be excluded indefinitely and came pouring in through the *Mahayana*. . . . The transpersonal God is, of course, solidly enconced in Buddhism's *sunyata* — emptiness — and *Nirvana*.³³⁷

I do not mean to suggest that our religions are all one and that it really does not matter whether I say the Sh'ma or worship Jesus Christ. Nor am I claiming that all or most believers would agree with Huston Smith. Simplistic comparative religious claims can be an insult to all serious believers.

But we are not dealing with religion by itself. We are dealing here with political community and its capacity for transcendent expression. The Court should not so readily assume that any believer is excluded by religious expression at that level. All religion that I know of expresses gratitude and practices prayer. It is at least not clear that any serious believer is harmed or excluded when general expressions of thanks and supplication are offered publicly out of other religious traditions. This is why I think America will be able to find public, transcendent expressions that do not divide religious believers.

One additional potential political problem with religious democracy is that a fellow religionist may receive votes because of the religious link — as a sort of identity politics — rather than because of the policies that the candidate will carry out. Some critics believe that President Bush received some votes from religious voters despite his policies, simply because he has identified himself as a religious Christian. I stated above that I thought this criticism quite mistaken.³³⁸ To religious voters for whom abortion and gay marriage posed a serious concern, President Bush presented a clear political alternative to Senator John Kerry. This is not anti-democratic; it is democracy.

Insofar as religious symbolism is concerned, religious democracy is not anti-democratic, or at least not insurmountably so. But, of course, symbolism is not the major point of religious democracy. Religious democracy seeks to impose changes in public policy.

2. Religious Democracy and Public Policy

We are asking here not about religious orientation toward particular public policies but about religion and public policy itself. Is there something undemocratic about seeking public policy changes for religious reasons?

In the realm of public policy, there are two kinds of issues concerning which religious voters want change. The first issue is the receipt of public resources by religious organizations, specifically vouchers for education. The second is a series

³³⁷ HUSTON SMITH, WHY RELIGION MATTERS: THE FATE OF THE HUMAN SPIRIT IN AN AGE OF DISBELIEF 222–23 (2001).

³³⁸ See *supra* text accompanying note 42.

of social controversies, especially abortion and gay rights and the related view by religious voters that the powers of judges to make policy should be curbed.

In the first instance — receipt of public money — there does seem something improper about religious voters supporting candidates who pledge, as President Bush did in the 2000 campaign, to funnel public money to religious institutions in the form of “faith-based initiatives.”³³⁹ Voting to line one’s own pocket must surely undermine democracy.

But this just goes to show that democracy itself can be unseemly because voters vote this way all the time. In recent years, the Court has undermined the spoils system.³⁴⁰ Prior to these cases, a major reason to support a candidate or a party was the hope that the voter, or the voter’s group, would receive government jobs. Some voters still vote based on their own economic interests. Self-interest is not undemocratic. Nor do these matters always involve mere self-interest. No doubt many of these voters believe both that these policies are in their own best interest and also that they are in the common interest.

But of course the major policy changes that religious voters are seeking are bans on abortion and gay marriage. Do these proposed public policy initiatives threaten to undermine democracy?

There is a degree of disingenuousness in accusing religious democracy of anti-democratic tendencies over these issues. Both abortion and gay marriage arose as tendentious public policy matters as a result not primarily of democratic legislative action but of judicial action. Abortion was more or less removed from regular electoral politics because of *Roe v. Wade*.³⁴¹ Gay marriage first achieved political visibility in the Hawaii Supreme Court³⁴² and then in the courts of Vermont³⁴³ and

³³⁹ See Richard Dujardin, *No Longer a Risk Presidential Candidates Bush, Gore Speak Openly of Religion in this Election*, GRAND FORKS HERALD, Oct. 28, 2000, at 6. In hindsight, it may turn out that the religious/political breakthrough occurred in the 2000 election campaign. For example, both candidates supported faith-based initiatives, and both often invoked religion. “If it seems that you’ve been hearing a lot more about God and politics from the presidential candidates this year, you may be right.” *Id.*

³⁴⁰ See *Elrod v. Burns*, 427 U.S. 347 (1976) (holding it unconstitutional to dismiss a non-policymaking employee on ground of nonmembership in political party); *Branti v. Finkel*, 445 U.S. 507 (1980) (applying *Elrod* to the dismissal of assistant public defender); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990) (extending *Elrod* and *Branti* to hiring decisions).

³⁴¹ 410 U.S. 113 (1973).

³⁴² *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding Hawaii’s same-sex marriage ban subject to strict scrutiny under the state constitution). In response, the Hawaii state legislature agreed to put a proposed marriage amendment to Hawaii’s constitution onto the ballot, declaring that the legislature had the power to reserve marriage to heterosexual couples. See David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Fate*, 22 HAWAII L. REV. 19, 20 (2000) (discussing Haw. Legis. H.B. 117 (1997)). The amendment passed with a 69 percent vote. See *id.*

³⁴³ *Baker v. State*, 744 A.2d 864 (Vt. 1999) (holding that state constitution guarantees same-sex partners the rights and benefits of married couples).

Massachusetts.³⁴⁴ It may be true that it is difficult to argue religious premises in a democratic policy dispute and that this difficulty represents a problem inherent in religious democracy, but it is even harder to argue judicial decisions in a democratic policy dispute. In the gay marriage context, it is not religious democracy that is anti-democratic, but judicial policy-making.

Even the tendency of opponents of gay marriage to seek state constitutional amendments banning such marriages,³⁴⁵ which is an unfortunate and anti-democratic course of action, cannot be understood except as a reaction to potential, feared court decisions, which would take the issue out of the hands of voters. Such state constitutional amendments are undemocratic, but they are fending off even more undemocratic judicial action. No movement to pass such amendments made political headway before these judicial decisions.³⁴⁶

Aside from the question of the proper role of judges, is there a democratic problem with religious voters seeking to impose their will by banning abortion and by banning gay marriage? Of course, by putting the matter this way, I am assuming that there are no countervailing constitutional rights at stake, which, in the case of abortion, is obviously not currently the law. Naturally, no American government can legitimately violate constitutional rights. But, whether abortion and gay marriage involve constitutional rights is itself a contested question. In any event, it is not a fair criticism of religious democracy that the policy changes it seeks threaten constitutional rights. That is a circular objection.

Assuming that the policy changes sought by religious democracy do not violate constitutional rights, is religious motivation and argument in the policy realm a threat to democracy? Justice Stevens has argued, for example, that the desire to protect fetal life is simply a religious belief — a theological position.³⁴⁷ Such a belief, in

³⁴⁴ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that the ban on same-sex marriage violates state constitution).

³⁴⁵ See *supra* note 25 and accompanying text.

³⁴⁶ I am not criticizing proponents of gay marriage for seeking in the courts the relief to which they feel entitled, although it was a poor strategy. I am responding to the assertion that religious reaction is undemocratic.

³⁴⁷ See *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 778 (1986) (Stevens, J., concurring).

Justice WHITE is also surely wrong in suggesting that the governmental interest in protecting fetal life is equally compelling during the entire period from the moment of conception until the moment of birth. Again, I recognize that a powerful theological argument can be made for that position, but I believe our jurisdiction is limited to the evaluation of secular state interests.

Id. (citation omitted). See also *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 566 (1989) (Stevens, J., concurring in part and dissenting in part) ("I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution.").

his view, is entitled to no judicial support.³⁴⁸ Perhaps it should follow that such a view, therefore, is not appropriately expressed in our democracy. One could say the same things about opposition to gay marriage.

Let us assume for argument's sake that the pro-life and anti-gay movements are purely religious. Is it fundamentally undemocratic for citizens to demand government action based on the citizens' understanding of revelation? This is the question Lee Travis asks about the enforcement of Shari'a in Islamic countries.³⁴⁹

But the anti-democratic problem in Travis's instance of religious domination lies either in the assumed denial of human rights to some citizens — women for instance — or in the fact that religious courts will interpret religious requirements in a way that removes law-making from the democratic process. If a government, for example, decides to cut off the hands of thieves as punishment for theft because that is what Islamic jurisprudence requires,³⁵⁰ one could object either because the punishment is a violation of universal norms protecting human dignity or because the decision was not being made democratically. But if we conclude that no human right is violated by this punishment and that the majority in the particular country favors this punishment, what precisely is the democratic objection when the majority sentiment is grounded in religion?

To put this matter another way, some might say that American support for the death penalty is based on religion because the Bible teaches an eye for an eye.³⁵¹ Imposing the death penalty might then be criticized as a religious and therefore undemocratic action.

But, what if the population turns against the death penalty because the Bible also says, "You shall not kill"?³⁵² What if the death penalty is then abolished? Would that repeal also be undemocratic?

Many decisions in public life are based on substantive moral judgments. There are many issues, from prostitution to drug use, for which the harm principle of John Stuart Mill³⁵³ might not be thought to justify government prohibition. Therefore, perhaps these prohibitions are not "liberal." Yet such prohibitions are common in American democracy.

³⁴⁸ See *Thornburgh*, 476 U.S. at 778.

³⁴⁹ See *supra* note 316 and accompanying text.

³⁵⁰ I am not suggesting that this is actually the case in Islamic jurisprudence. See Cindy Ellen Hill, *A Vermont Lawyer in Pakistan*, 23-AUG VT. B.J. & L. DIG. 37 (1997).

³⁵¹ *Exodus* 21:24.

³⁵² *Exodus* 20:13.

³⁵³ See GERTRUDE HIMMELFARB, ON LIBERTY AND FEDERALISM: THE CASE OF JOHN STUART MILL 68 (1974); see also Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1487 (2005) (reviewing STEPHEN A. SMITH, *CONTRACT THEORY* (2004)) ("Famously formulated by John Stuart Mill, the harm principle states that in a liberal society, the machinery of the state can be legitimately used to prevent harm to others but should not be used to enforce moral obligations whose violation do not result in harm.").

The imposition of majoritarian morality by recourse to government coercion is a serious problem in political theory, but it is not a problem uniquely associated with religious arguments. The believer might say that prostitution violates God's law while the non-believer might say that prostitution is immoral. Both positions raise comparable issues in terms of democracy and public argument. Neither position is inherently undemocratic, or both are.³⁵⁴

As a practical matter, the compatibility of democracy and religious policy making has been demonstrated by America's recent political experience. As one example, the *Lawrence*³⁵⁵ decision striking down criminal sanctions for voluntary homosexual sexual conduct was certainly opposed by many religious voters. Nevertheless, that case did not become a rallying point in the 2004 campaign.³⁵⁶ Nor has there been any substantial political support since the election for the reimposition of criminal sanctions against homosexual conduct. This is so despite the fact that such conduct violates the precepts of traditional religion in America.

What the *Lawrence* episode suggests is that religious democracy does not abolish the give-and-take of political life. Nor does it seek, at least in America, to impose all the tenets of religious belief and practice on unwilling citizens through the use of government sanctions.

Not only have religious voters sought changes in policy that non-religious Americans might also favor, they have done so without relying solely on religious rhetoric. In most situations in which religious democracy in America has sought to change government policy, secular justifications have not only been offered but have been sincerely held, in addition to genuine religious feelings. This is obviously so in the case of abortion and probably so even in the case of gay marriage.

Nor have religious voters been unwilling to debate issues of morality in the public square. I admit that it is frustrating to debate gay marriage with people who point to the Bible as justification for prohibiting it. But I find it much more frustrating to debate the Iraqi invasion with people who simply point to the events of 9/11 — events in which Iraq did not participate — as justification for the invasion of Iraq. In practice, religion has not been an instance of undemocratic policy-making in America.

This short excursion at least raises a question concerning any supposed anti-democratic tendencies in religious voters seeking to change government policy. The

³⁵⁴ Cf. Smith, *supra* note 101, at 1284 (complaining, it seems, that not only religion, but any “comprehensive conception of truth and the human good as a whole” is excluded from public reason by theorists like John Rawls and Stephen Macedo (quoting Stephen Macedo, *In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases?*, in NATURAL LAW AND PUBLIC REASON 11, 18 (Robert R. George & Christopher Wolfe eds., 2000))).

³⁵⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁵⁶ The only political significance of *Lawrence* was as a means of drumming up opposition to gay marriage. See Esther Kaplan, *Onward Christian Soldiers*, NATION, July 5, 2004, at 33.

next question is whether the deeper goals of religious democracy might undermine democratic life.

3. Religious Democracy and Culture

Religious democracy is not just a matter of who wins elections or what policies are followed. Some religious voting is a protest against larger trends in the culture — trends that are difficult for people to find ways to oppose. These religious protest votes may ultimately prove ineffectual because the cultural trends at issue are unstoppable. The question for this article is not effectiveness but whether these religious protest votes tend to undermine democracy.

The sort of cultural trends I am referring to go beyond the so-called culture wars. For one thing, trends in culture are broader than policy issues. For example, the legality of gay marriage is a policy issue. But the social acceptance of gay relationships is a cultural trend. For another, many cultural trends have no specific policy issue referent. For example, many people find makeover shows on television to be destructive of human flourishing. Such shows teach us that we are not acceptable as we are and that our value as people is directly related to unrealistic physical norms.³⁵⁷ These shows are said to harm young women in particular.³⁵⁸ But there is no policy proposal to deal with these shows that is being offered and debated today. Finally, cultural trends may have many and overlapping policy consequences without being reducible to a single issue. The materialism of American culture, for example, has unfortunate economic and environmental consequences, but there is no one issue in political life that seeks to address this.

Undoubtedly, some of the votes supporting President Bush in the 2004 election represented a feeling by voters that unhealthy cultural trends are harming America.³⁵⁹

³⁵⁷ See, e.g., Darren Devlyn & Cheryl Critchley, *Plasty Scene*, HERALD SUN (Melbourne), June 30, 2004, available at 2004 WLNR 8945739 (“[Australian] Health Minister [Bronwyn] Pike has labelled [sic] makeover shows grotesque, saying they play on people’s low self-esteem by prompting them to mutilate themselves for public entertainment.”).

³⁵⁸ Cf. *id.*

³⁵⁹ This was a consistent Bush campaign theme:

Bush “is extending the political debate over values,” citing evidence that “strong families and communities are developing responsibility and character in the nation’s children.” In his weekly radio address, Bush touted a [sic] the Federal Interagency Forum on Child and Family Statistics report that showed “drug use and violent crime among teenagers have decreased dramatically, while children raised in households with married parents are less likely to live in poverty.” Using language “reminiscent of his recent campaign speeches,” Bush said “the culture of America is changing from one that said, ‘if it feels good, do it; and if you’ve got a problem, blame somebody else[.]’”

Bush: Econ Message Off Base — Or Is It?, HOTLINE, July 19, 2004, available at LEXIS

These voters might not have thought that a re-elected President Bush could actually do anything about such cultural trends. Nevertheless, they might have felt that it was worth voting for President Bush simply as a protest. Does such voting, to the extent it was happening, threaten democracy?

Thomas Nagel suggested that it is a violation of Rawlsian political justice for a political community, based on commitment to a particular “contested idea of the ends of life,” to attempt to move its members “in that direction by coercion, education, the exclusion of other options, and control of the cultural environment.”³⁶⁰ The pattern of religious voting as cultural protest could be viewed as a violation of this sense of liberal politics. Many religious voters would no doubt like to control the cultural environment in order to change the feel and tone of the country.

But Nagel called the principle Rawls is rejecting “perfectionism.”³⁶¹ That does not seem to be an accurate description of the generalized feeling that American culture is becoming coarse and that society is therefore diminished in various ways that are difficult to specify. The feeling by some voters that without basic civility social life is impossible cannot be an improper basis for political action. The deterioration of American social life can occur from a kind of looseness in morality — more foul language in public, more petty crime, more available pornography, and so forth. But these are not really alternative conceptions of the good life. And to the extent that they are, courts have always had to protect such deviancy from majoritarian prohibition. Religious democracy may object to all these trends in a very particular way, but many non-religious voters also object to these trends, and for comparable reasons. There is no religious threat to democracy here.

4. Religion and Comprehensive Worldviews

Rawls objected to the participation in democracy by holders of religious, comprehensive doctrines to the extent that acceptance by religious communities of equal rights in democracy is a “mere *modus vivendi*.”³⁶² Rawls argued that to participate in democratic life legitimately, religious groups must accept equal rights for non-believers in principle and not simply as a strategy to employ until the religious group has enough political power to dominate the political system, at which time it would hope to impose its conception of the good upon the unwilling minority.³⁶³ Religious democracy can, of course, be accused of just this sort of political opportunism.

News Library, The Hotline File.

³⁶⁰ Thomas Nagel, *Rawls and Liberalism*, in *THE CAMBRIDGE COMPANION TO RAWLS* 62, 73 (Samuel Freeman ed., 2003).

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.*

On the other hand, the Abrahamic religions do have a strand of theoretical toleration of what is considered wrongful conduct. Islam states that there is to be no compulsion in religious matters.³⁶⁴ In similar fashion, Jesus rejected Satan's offer of secular power.³⁶⁵ Therefore, religious democracy may not be, or at least may not always be, practicing opportunism and subterfuge. Religious democracy may accept in principle majority rule and minority rights as the proper foundation of democratic life.

But, aside from the toleration practiced by religion, it is questionable whether liberal political life itself avoids imposition of just this kind of comprehensive view or dogma. The most contested political issues in our society are inevitably based on fundamental morality. Abortion certainly is irresolvably a moral issue. There is no neutral way to decide whether a fetus is a member of the political community or not.³⁶⁶

In the case of gay marriage, one can say "Live and Let Live" only if it is already established that the acceptance of gay marriage will not harm society. But that is a question rather than an answer.

We can conclude here only that religious democracy in its various guises need not necessarily pose a threat to democratic life. But we have not looked at the possible theologies of religious democracy in America. The question whether religious democracy is possible depends on the answer to the question — how is America conceptualized in religious democracy?

³⁶⁴ See M. Ozonnia Ojielo, *Human Rights and Sharia'h Justice in Nigeria*, 9 GOLDEN GATE U. L. REV. ANN. SURV. INT'L & COMP. L. 135, 135 (2003).

In effect, even Mohammed himself recognized and granted freedom of religion to all the citizens of Medina. This practice of the prophet was supported by the Holy Qur'an, which states thus 'Lakun Dinikun, Wali Y Adinii', meaning, for you, your religion, and for me, my religion. By implication, Prophet Mohammed accepted that there is no compulsion in religion.

Id. (citation omitted).

³⁶⁵ See *Matthew* 4:8–10.

Again, the devil took him to a very high mountain, and showed him all the kingdoms of the world and the glory of them; and he said to him, "All these I will give to you, if you will fall down and worship me." Then Jesus said to him, "Begone, Satan"

Id.

³⁶⁶ Responding to Rawls's insistence that opposition to abortion is, in principle, reliance on an "unreasonable" comprehensive doctrine (in Rawls's special sense), Michael McConnell responded, "Why respect for unborn life rests on a comprehensive doctrine while respect for the equality of women does not is something of a mystery." Michael W. McConnell, *Religion and the Search for a Principled Middle Ground on Abortion*, 92 MICH. L. REV. 1893, 1893 (1994).

B. America in Religious Democracy

Religious voters face the question in every election, “Who are these other voters and what can be expected from them?” As shorthand, I will call any believers “the community of faith,” and specifically Christian believers “the Church.” Everyone else I will call “the world.” The relationship of religion and democracy then turns on how America is regarded by the community of faith. Is America to be treated as the community of faith or as the world or as some combination of both?

Two ways of looking at this question are avoided here. First, my concern cannot be the theological harm that may beset the Church from the mixing of church and state — the danger of “Constantinianism.”³⁶⁷ This cannot be my concern for two reasons. First, only believers can address a theological harm. So, we, who are not members of the community of faith — not members of the Church — cannot know whether this latest form of Constantinianism is to be avoided or not. Certainly I do not wish to preach to the Church about its mission.³⁶⁸

Second, the concern that “secular” and political uses of religious symbols will be harmful to the Church sounds insincere when spoken by someone outside the community. So, for example, when Justice Brennan points to the “insult[]” that commercial use of a crèche in a Christmas display causes to believers,³⁶⁹ the believer may legitimately ask whether Justice Brennan can possibly be the right person to protect the theological integrity of the Church.³⁷⁰ I wish to avoid the appearance of duplicity.

The second basis of analysis that is avoided here is an unrealistic requirement that voters ignore their religion completely when voting. Thomas Nagel asked whether the insistence by John Rawls on certain limits in liberal political discourse is not psychologically impossible for the believer.³⁷¹ Without resolving whether that is the case, it is certainly psychologically impossible for the believer to vote as if he or she were not a believer. This is especially true in the case of the Abrahamic religions, in which all societies are subject to God’s judgment. The Old Testament is very clear, for example, that the sin of Ninevah promised destruction for that pagan city.³⁷² The believer cannot be indifferent to the conduct of his or her society.

³⁶⁷ See Rex J. Ahdar, *A Christian State?*, 13 J.L. & RELIGION 453, 464 (1998–99).

³⁶⁸ This is why the same concern about Constantinianism voiced by Stanley Hauerwas is a very different matter. See Stanley Hauerwas, *A Christian Critique of Christian America*, in RELIGION, MORALITY AND THE LAW: NOMOS XXX 110, 121 (J. Roland Pennock & John W. Chapman eds., 1988).

³⁶⁹ *Lynch v. Donnelly*, 465 U.S. 668, 711–12 & n.19 (1984) (Brennan, J., dissenting).

³⁷⁰ Obviously, I am referring here to Justice Brennan’s public and perceived role, not his own religious life.

³⁷¹ See Nagel, *supra* note 360, at 77 (“To base political values on something less than our most comprehensive transcendental values can seem both morally wrong and psychologically incoherent.”).

³⁷² See *Jonah* 1:2 (describing the fate of a people whom the Hebrews despised); see also

Not only are all citizens members of the human family, but everyone will suffer from God's wrath. This is precisely the perspective of Abraham Lincoln in his Second Inaugural Address, in which God was portrayed as working out the divine purpose through the American Civil War.³⁷³ In Lincoln's understanding, there is no political actor who is not a part of the divine plan. The notion of a purely secular political life is alien to Lincoln in this address. That does not mean that clerics should have political power. But it does mean that God's will must always be taken into account, since it is dispositive. There is, therefore, for Lincoln, no fundamental, non-religious political decision.³⁷⁴

These two approaches — that religion cannot enter political life for theological reasons and that voters should ignore religion in all cases — are the extremes. There is room between them for clarification of the attitude of religious democracy toward America.

1. America as the Community of Faith — as the Church — as Israel

One model for religious democracy is to treat political life as if America were the Church and therefore subject to biblical and other religious injunctions. In this way of thinking, America would be a Christian nation or one nation uniquely under God.

Treating America as the Church is different from asserting that all nations are under God because all people are subject to God's will. That is a different kind of religious political thinking, one that does not treat America as if it were the Church.

When religious voters try to banish wrongdoing from America, they may be acting as if there were no difference between what believers in the community of faith are obligated to do and what citizens in America must do. They may be treating America as identical to the community of faith. In this perspective, America is in a special relationship with God.

In principle, in this special relationship, America might be especially blessed or especially cursed. But in practice, America has been regarded as especially good by most of the religious voters who make up the new Republican Party coalition. America has been regarded as the shining city on a hill.³⁷⁵

Jean C. McGowan, *Jonah*, in 1 THE JEROME BIBLICAL COMMENTARY 633, 633–37 (Raymond E. Brown et al. eds., 1968).

³⁷³ Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES: FROM GEORGE WASHINGTON 1789 TO GEORGE BUSH 1989, at 142, 143 (1989) ("The Almighty has his own purposes.").

³⁷⁴ This was also the point about secular democracy raised in Part II of this article.

³⁷⁵ This is perhaps a theologically suspect formulation. See Richard D. Parker, *Homeland: An Essay on Patriotism*, 25 HARV. J.L. & PUB. POL'Y 407, 418 n.30 (2002) ("Ronald Reagan persisted in calling John Winthrop's 'city on a hill' a 'shining city on a hill.'").

When America is viewed as in a special relationship with God, sin in America cannot simply be tolerated as something one would expect from pagan non-believers. If America is the Church, sin must be prohibited by government just as sin is prohibited within the community of faith — within the Church. For instance, gay marriage cannot just be something that gays do in America that has nothing really to do with the Church. In this way of thinking, there is no conceptual space for the sin of non-believers.

It generally follows in this perspective that America has an obligation to the world, much as the Church has the obligation in the New Testament to convert the world³⁷⁶ and much as Israel was to be a blessing to the nations.³⁷⁷ President Bush's desire to bring freedom and democracy to the world fits very well into this way of thinking.³⁷⁸

It does not necessarily follow that America has the same obligation as does the Church to actually spread Christianity. But some religious voters plainly do think that America should spread Christianity, and they act accordingly. This attitude complicates the American effort in Iraq.³⁷⁹ American opposition to the presence of Islam in any new Iraqi constitution also fueled the suspicion in the Islamic world that, rather than simply fighting terrorism, America was engaged in a new competition between Christianity and Islam.³⁸⁰ President Bush's references to our presence in Iraq, and the war against terrorism generally, as a "crusade" contributes to this perception.³⁸¹

The perspective that America has a special, religious obligation to the world — that this is America's destiny — can lead to imperial projects. Such a view implies,

³⁷⁶ See *Matthew* 28:19 (describing the resurrected Christ as saying to the disciples, "Go therefore and make disciples of all nations . . .").

³⁷⁷ See, e.g., *Genesis* 12:3 (noting that through Abraham, "all the families of the earth will be blessed").

³⁷⁸ See generally LARRY SCHWEIKART & MICHAEL ALLEN, *A PATRIOT'S HISTORY OF THE UNITED STATES: FROM COLUMBUS'S GREAT DISCOVERY TO THE WAR ON TERROR* (2004) (defending the view that the United States has a global mission to spread American values around the world).

³⁷⁹ The June 30, 2003 issue of *Time Magazine* posed this question on its cover: "Should Christians Convert Muslims?" The story emphasized the tensions that conversion was causing in Iraq. See David Van Biema, *Missionaries Under Cover*, *TIME*, June 30, 2003, at 36.

³⁸⁰ See *infra* notes 480–99 and accompanying text.

³⁸¹ See Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction without a Difference?*, 38 U.C. DAVIS L. REV. 609, 670 n.308 (2005) ("The prevalent American perception is encapsulated in President Bush's characterization of the 'war on terror' as a 'Crusade,' a historical analogy with horrifying connotations to the Arab world.") (citing Press Release, The White House Office of the Press Secretary, Remarks by the President upon Arrival (Sept. 16, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010916-2.html>).

as Amitai Etzioni writes, “that the United States has been ordained by a power greater than that of any person or a combination thereof, to undertake a mission. The notion that the United States has been sent by God to do whatever it chooses to do is dangerous.”³⁸²

At one extreme of this understanding of America’s role in the world is the conflation of the Gospel with the political/economic/legal system that is championed by the United States as the ultimate and last word in human governance.³⁸³ This conflation implies that judicial review, market economics, and representative democracy are the way that God intends for people to live for all time and that we are at the end of history.³⁸⁴ The “end of history,” or eschatology, is a Judeo-Christian concept now put into the service of an expansionist American foreign policy.³⁸⁵

At its extreme domestic end, the view of America as the Church tends to abolish any distinction between religion and politics and fuses government and the Church. In law, this tendency identifies government officials with biblical roles, as Michael Perry does when he identifies judges with the prophets of the Old Testament.³⁸⁶ Secular law in such understanding ought always to embody natural right and revealed truth.

³⁸² Posting of the Communitarian Network, comnet@gwu.edu, to commlaw@hermes.gwu.edu (Oct. 29, 2004) (on file with author) (providing excerpts adapted from AMITAI ETZIONI, FROM EMPIRE TO COMMUNITY: A NEW APPROACH TO INTERNATIONAL RELATIONS (2004)).

³⁸³ See Rumu Sarkar, *Critical Essay: Theoretical Foundations in Development Law: A Reconciliation of Opposites?*, 33 DENV. J. INT’L L. & POL’Y 367, 368 (2005).

Modernization theory is based on the assumption that development is the inevitable, evolutionary result of a gradual progression led by the nation-state that results in the creation (and ascendancy) of Western-styled economic, political, and cultural institutions. These institutions rest on three pillars: a free market capitalist system, liberal democratic institutions, and the Rule of Law.

Id. (footnote omitted).

³⁸⁴ The phrase “end of history” was popularized by Francis Fukuyama. See FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

³⁸⁵ See G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 502 (2002) (“Millennialist doctrines portrayed the course of history as taking place across a distinctive time continuum, one in which eventually God’s truth would be revealed, sin would disappear, the fall of man would be redeemed, and the ‘end of history’ would be achieved in a millennial state of grace.”).

³⁸⁶ See MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 98–99 (1982) (“[J]udicial review represents the institutionalization of prophecy. The function of noninterpretivist review in human rights cases is prophetic: it is to call the American people — actually the government, the representatives of the people — to provisional judgment.”). Robert Cover has also been said to view the American judiciary in this light. See generally Ronald R. Garet, *Judges as Prophets: A Coverian Interpretation*, 72 S. CAL. L. REV. 385 (1999).

Richard John Neuhaus, who is critical of this tendency, tried to draw a distinction between a “theonomous culture” and a “theocracy.”³⁸⁷ A theonomous culture is one that “acknowledges accountability to transcendent truth . . . one in which religious and cultural aspirations toward the transcendent are given public expression.”³⁸⁸ Neuhaus believes the United States should be theonomous.³⁸⁹ A theocracy, on the other hand, is “a false theonomy” “in which an institution, namely religion, claims to embody and authoritatively articulate absolute truth.”³⁹⁰ According to Neuhaus, “Theocracy is . . . an act of historical closure, and therefore a form of idolatry.”³⁹¹

As I stated above, the theological objections to the mixing of church and state are beyond my scope. But, of course, Neuhaus was articulating democratic objections to theocracy at the same time as theological ones. Obviously there is no room for democracy in theocracy.

The tendency to identify America with the community of faith has been, for obvious reasons, traditionally a tendency of Christians only. Non-Christians did not see America as representing their community of faith.

Surprisingly, this relationship between non-Christian believers and America has recently been changing. As religious democracy has become more established in the United States, there has been a tendency to view all religions and all believers as united in a struggle against secularism. This surprising change is why the term “Judeo-Christian” now so readily comes to the lips of politicians and religious leaders.³⁹² If the tradition is Judeo-Christian, then Jews can view America as part of the community of faith:

This expansion of the community of faith manifested itself doctrinally, in constitutional law, in the *Allegheny* crèche case³⁹³ where a menorah was included in the “holiday” displays at issue in that case. Justice Blackmun’s lead opinion contained a rather full discussion of the menorah and of the Jewish holiday of Chanukah³⁹⁴ and noted the participation of Chabad, an orthodox Jewish group, in the erection of the menorah at issue.³⁹⁵ Since the *Allegheny* case, there has been more support in the

³⁸⁷ NEUHAUS, *supra* note 63, at 188.

³⁸⁸ *Id.* at 173, 188.

³⁸⁹ *Id.* at 188.

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² See, e.g., Op-Ed, *A reasonable verdict on Ten Commandments*, NEWS TRIB. (Tacoma, Wash.), July 5, 2005, at B6 (describing the plaques from the *McCreary* case as being put up by County officials to “promote Judeo-Christian religious beliefs”); Op-Ed, *The Coming “Holy” War*, PHILA. DAILY NEWS, July 5, 2005, at 17 (stating that “[p]olitically savvy crusaders insert ‘Judeo’” in the phrase “Judeo-Christian”).

³⁹³ *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

³⁹⁴ *Id.* at 582–87.

³⁹⁵ *Id.* at 587 & n.35.

Jewish community for religious communal expression. Some American Jews now identify with religious democracy in the United States despite its overwhelmingly Christian associations.³⁹⁶

This change does not seem to have affected American Muslims yet because of the special circumstances of American involvement in the Middle East and the war on terror in general. But eventually, there is likely to be in the United States a larger forging of links among believers of all kinds. Religious democracy will then begin to see America as representing religious faith in general rather than as representing basically the Church.

The tendency of religious voters to see America as the Church is associated with the conservative spectrum of politics today. But the identification of America with the community of faith is not necessarily only a conservative tendency. The mainline Protestant churches and the Conference of American Bishops pushing liberal domestic economic policies sometimes seem to be acting from the identical identification of America with the Church.³⁹⁷

Another example of a left-wing conflation of gospel and politics is Jim Wallis's book, *God's Politics*,³⁹⁸ which is, on the surface, precisely a progressive call to America to be faithful to the Gospel's understanding of social life. A final judgment on Wallis's view is difficult to make, however, because the book can also be understood as an appeal to the evangelical community itself to take a more nuanced approach when it is in the world influencing government policy. Wallis could then be taking the situation as it already exists rather than as normative. The Church is already in the world with some control, and Wallis might be reacting to that.

Finally, the identification of America with the community of faith is not only a function of specifically or traditionally religious orientations. The *Humanist Manifesto* of 1933³⁹⁹ clearly saw itself as addressing America as a whole and converting it to

³⁹⁶ See Stephen Bloch, *Cumulative Voting and the Religious Right: In the Best Interests of Democracy?*, 24 J. CONTEMP. L. 1, 21 n.77 (1998) (quoting a University of Virginia survey as explaining, "'We do want to acknowledge an entity called the Religious Right, which is larger than the Christian Right. Besides Christians, the Religious Right would certainly include both politically conservative traditional Catholics and Orthodox Jews.'").

³⁹⁷ See, e.g., Nat'l Conf. of Catholic Bishops, *Economic Justice for All — Pastoral Letter on Catholic Social Teaching and the U.S. Economy* (1986), reprinted in CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 572, 607 (David J. O'Brien & Thomas A. Shannon eds., 1997) ("The way society responds to the needs of the poor through its public policies is the litmus test of its justice or injustice."); see also Gustav Niebuhr, *Christians Groups Urge a Vast, Coordinated Attack on Poverty*, N.Y. TIMES, Feb. 17, 2000, at A18; Call to Renewal: Covenant to Overcome Poverty, available at http://www.calltorenewal.com/about_us/covenant.html (last visited Sept. 10, 2005) (describing "the Covenant to Overcome Poverty" issued by the National Council of Churches and other religious leaders).

³⁹⁸ See WALLIS, *supra* note 138.

³⁹⁹ *Humanist Manifesto I*, available at <http://www.americanhumanist.org/about/manifesto1.html> (last visited Sept. 30, 2005). See STEVEN C. ROCKEFELLER, JOHN DEWEY: RELIGIOUS

a new religious or quasi-religious understanding of reality.⁴⁰⁰ John Dewey did not see any more reason for a separation of politics from first principles than does any member of the religious right today.⁴⁰¹ All the same kinds of messianism and intolerance can arise from the identification of America with a secularized "religion."⁴⁰²

This has been a short survey of one possible way of looking at the place of America in the thinking of religious democracy. The threat to democracy from this perspective is straightforward. Acting from the point of view that America is the community of faith, the Church may attempt to take society over, as if everyone were already a member, imposing obligations and responsibilities on everyone that are only appropriate for those who really are members of the Church. Religious democracy may lead the Church to attempt this kind of takeover.

But there is another possible kind of religious democracy, one in which the community of faith is a minority and does not represent the entire community. Under this view, America is understood as the world — potentially an alienating and alienated presence.

2. America as the World

The main difference between America as the world and America as the Church is the acknowledgment that, at least for the time being, America and the community of faith are separate. The community of faith is a minority in the larger society.⁴⁰³ The standards of conduct for believers are separate and different from those for members of the society as a whole. There is no attempt to treat non-believers as identical with believers. Once this perspective is accepted, the community of faith

FAITH AND DEMOCRATIC HUMANISM 449–51 (1991) (providing an account of John Dewey's involvement in the *Manifesto*).

⁴⁰⁰ The original author of the *Manifesto*, Roy Wood Sellars, argued in *Religion Coming of Age* (1928) that "religious humanism" would be the next step in humanity's religious evolution. ROCKEFELLER, *supra* note 399, at 450.

⁴⁰¹ This is how Steven Rockefeller interpreted Dewey's integration of the religious and the political: "Dewey found that as his moral faith in unifying social ideals matured, his personal adjustment in relation to his world deepened and his life gained in religious quality." *Id.* at 475.

⁴⁰² Fukuyama's "end of history," for example is as irresistible as God's will ever was. *See* FUKUYAMA, *supra* note 384.

⁴⁰³ Dr. Kaled Abou El Fadl provided an impressive statement of how this understanding robs even majority rule of the pretense of divine authority. *See* Khaled Abou El Fadl, *Islam and the Challenge of Democratic Commitment*, 27 FORDHAM INT'L L.J. 4, 71 (2003).

[D]emocracy is an appropriate system for Islam because it denies the State the pretense of divinity. Moral educators have a serious role to play because they must be vigilant in urging society to approximate God, but not even the will of the majority can come to embody the full majesty of God.

Id.

must decide what its relationship should be with the rest of society, that is with the world.

Non-Christian religions usually adopt this perspective automatically. After all, no Muslim or Jew can believe that America is literally a part of the Islamic or Jewish world. America is obviously the world to the non-Christian. As suggested above,⁴⁰⁴ this may be changing, but for the moment Jews, Muslims, Hindus, Buddhists, and others see themselves as minorities and must decide what their relationship is with the rest of America, as must those Christians who do not see America as the Church.

There are four basic orientations which the community of faith that sees itself as separate can take with regard to America. The community can serve as influence, witness, converter, or non-participant. The community can take all or some of these orientations at different times. Religious democracy is compatible with some of these orientations, but not with all of them.

Probably the most common attitude for the separate community of faith to take with regard to America is to attempt to influence America in what the community views as a positive direction. M.A. Muqtedar Khan wrote, for example, that "the mission of Islam and Muslims in the West can be to become the moral conscience of free societies."⁴⁰⁵ Many religious voters probably are of this view. They may not think of America as the community of faith itself, but they are willing to join with other voters — religious or not — to improve life in the United States.

Religious voting of this kind can contribute to and eventually merge into a kind of religious democracy. Whether that occurs, and it seems to have done so in the United States, depends mostly on the percentage of religious voters in the electorate. When a lot of particular communities of faith all vote in a certain direction, electoral politics will be affected. The current change in American political life, which I have called religious democracy, is somewhere between this kind of change and the tendency of believers, described above, to merge America with the community of faith.

The difference between this sort of coordinated religious voting and voting as a religious bloc that views America as the community of faith itself is that when different religious groups vote in the same direction, their political power is diffused. They never lose the sense that, although they may be in a coalition, they are still a minority. So, Khan was quick to add that "religious minorities in America are becoming extremely nervous about the relations between the Christian Right and the Republican establishment."⁴⁰⁶ Thus, constitutional separation of church and state

⁴⁰⁴ See *supra* text accompanying note 396.

⁴⁰⁵ M.A. Muqtedar Khan, *The Myth of Secularism, in ONE ELECTORATE UNDER GOD?: A DIALOGUE ON RELIGION & AMERICAN POLITICS*, *supra* note 74, at 134, 138.

⁴⁰⁶ *Id.* at 136.

may be a high priority for these religious communities even when religious voting is, in general, effective at changing the direction of government policy.⁴⁰⁷

The other models of interrelationship between the community of faith and the larger society — the world — presuppose a less optimistic outlook. These are not consistent with the religious democracy that America has become.

In the second model, that of witness, the community of faith observes and proclaims the breakdown of the larger society. This may be what some religious groups did in the United States in the 1960s and 1970s before despair and outrage led to a more organized and participatory political response.⁴⁰⁸ In this model, the community of faith sees the breakdown of the life of the larger society and attests to that breakdown as the inevitable consequence of the refusal of the larger society to embrace its truth.

In the third model, that of conversion, the faith community is not involved with the concerns of the larger society. The community instead concentrates on the task of conversion.⁴⁰⁹ Saint Paul takes something of this view in his letters in the New Testament. Paul is not terribly interested in how the Roman Empire is doing. He does not attempt to influence it, as in the first model. Nor does he take much notice of its cruelty and violence, as in the second model. He goes about his task of bringing the good news to everyone.⁴¹⁰

There is a temptation to regard the conversion model of interaction as non-political or personal, but that frame of reference is false with regard to Paul in particular and Christianity in general. Christ is not an apolitical event for Paul. Christ simply does not fit into any available political category in the Roman world. The same may be true for some Christians today. On the other hand, there probably are communities of faith in which conversion does replace political life, by meditation or mysticism or in some other way. In any event, this third model is not consistent with religious democracy.

Finally, there is the model of the community of faith in withdrawal from the larger society. This stance of non-participation is further removed from the affairs of society than is even the model of conversion. The community of faith that is not participating may be very passive and self-contained.

⁴⁰⁷ Given current political conditions and the war against terrorism, Muslim communities may feel more of a threat today from majority sentiment than do other minority religious groups.

⁴⁰⁸ Alternatively, that might have been a conversion. *See supra* text accompanying note 392.

⁴⁰⁹ This was the view reported in a sermon by Jerry Falwell in 1965, criticizing ministers who were actively involved in the Civil Rights movement: "Preachers are not called to be politicians, but to be soul winners." NEUHAUS, *supra* note 63, at 10.

⁴¹⁰ This is why Paul writes in the First Letter to the Corinthians that he has been sent "to preach the gospel and not with eloquent wisdom," for the crucifixion is not wisdom to the gentile world of the Roman Empire, but rather is "folly to Gentiles." 1 *Corinthians* 1:17, 23.

The stance of non-participation can itself take two different forms. In the pure form, there might be no participation in the larger society's political life. For example, the community of faith might never vote. In a more mixed form, the community might participate in politics to the extent its own interests are involved. In America, that might mean ensuring that limits — constitutional or otherwise — on majority power are kept strongly in place. That could lead to, for example, strong support for the separation of church and state and for the free exercise of religion.

There are probably no examples of a complete distinction between the view of America as the church and the view of America as the world. America's current political situation is a mixture of these two perspectives.

3. America as Both Church and World

There is an odd disconnect in American political life in which certain matters are thought to pertain to America as the Church and others are said to concern solely the community of faith itself. The distinctions can appear to be arbitrary.

In the case of some liberal religious voters, for example, large-scale economic arrangements can be viewed as directly governed, in principle, by the standards of the Torah and the Gospel. Thus, poverty, business regulation, and the role of the market are matters of public concern. They are to be addressed through collective action and are a proper subject of political activity. They are subject to religious democracy.⁴¹¹ To that extent, America may be thought of as the Church.

Yet, in matters pertaining to sexual behavior — birth control, abortion, and gay marriage — the liberal religious voter may be inclined to echo the words of Governor Mario Cuomo: “[M]y own religion . . . required me to accept the restraints it imposed in my own life, but it did not require that I seek to impose all of them on all New Yorkers.”⁴¹² At a certain point, the community of faith is conceptualized as separate from the larger society.

The converse situation more or less occurs in the case of many conservative religious voters. According to them, matters such as abortion, gay marriage, stem cell research, and the right to die should be governed by the standards of the Torah and the Gospel. These matters are to be constrained by public law and are the proper subject of political action. Here religious democracy is properly at work. In this realm, America is the community of faith.

⁴¹¹ See Patrick M. Garry, *Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 34 n.254 (2005) (“Political movements owing to religious inspirations include the Social Gospel movement, nearly all the peace movements, the demand for freer immigration of refugees, and the abolition and civil rights movements.”).

⁴¹² Mario Cuomo, *In the American Catholic Tradition of Realism*, in ONE ELECTORATE UNDER GOD? A DIALOGUE ON RELIGION & AMERICAN POLITICS, *supra* note 74, at 14.

Yet, when it comes to the operation of the market — the economic life of the larger society — collective action is to be resisted and matters left to private arrangement. Government action in the economic realm is a threat to personal autonomy. The Church is certainly concerned with poverty, for example, but asserts that the way to approach poverty is by activity within the community of faith — a food bank, a clothing drive, and so forth. Here, America is not the Church but is separate from the community of faith.⁴¹³ In this understanding, America is the world.

Not surprisingly, these distinctions — America as Church versus America as world — break down at the hands of authentic theology. The theologian Karl Barth, in a remarkable talk to Swiss trade unionists in 1911,⁴¹⁴ was referring to just such false distinctions when he explained “the inherent connection between Jesus and socialism” and cautioned his audience that “the purpose of my lecture . . . has nothing to do with your attitude toward the church.”⁴¹⁵ I cannot summarize Barth here. But Barth makes it clear that even though the concerns of the trade unionist — that is, of the socialist — are “in line with the concerns of Jesus,”⁴¹⁶ the methods of the trade union movement for social justice will be unable to further them: “[A]mong us the greatest part is program, whereas for Jesus program and performance were one. Therefore, Jesus says to you quite simply that you should carry out your program, that you should *enact* what you *want* . . . ; then you will be true socialists.”⁴¹⁷

If I may attempt a translation into the terms used, religious democracy, as I have been describing it, could never be authentically religious no matter what issues it pursues in the public square, for the Torah and the Gospel are different from a political program to be enacted by the government as a result of a process of voting. While that might sound like the urging of political passivity, Barth understood his counsel as the deepest political radicalism. In any event, it is neither easy to say who is the Church nor who is the world.

⁴¹³ See, e.g., Maura Ryan, *On Powell's Theology*, 72 NOTRE DAME L. REV. 41, 58 (1996): I think that we, as Christians, have an obligation at least to try to be the hands with which Christ feeds and heals people today, and, therefore, our first response should always be what can we as the Body of Christ do to solve this problem. If we find that there is nothing that we can do, then let's go talk to Caesar, and say, "Caesar, you have a problem, and justice or compassion or even God wants it solved." Maybe God wants us sometimes to go talk to Caesar, perhaps to keep us humble, perhaps to evangelize Caesar. But I think we have an obligation first to ask how we mobilize the Body of Christ to deal with these problems.

⁴¹⁴ Karl Barth, *Jesus Christ and the Movement for Social Justice* (1911), in KARL BARTH AND RADICAL POLITICS 19 (George Hunsinger ed. & trans., 1976).

⁴¹⁵ *Id.* at 22.

⁴¹⁶ *Id.* at 36. But see *id.* at 36–37 (“But I hope you have also heard the rebuke implied in this distinction I have made between Jesus and yourselves!”).

⁴¹⁷ *Id.* at 37 (emphasis in original).

C. The Policies of Religious Democracy

Religious democracy could prove unsustainable if there are important policy issues that religious democracy is unable to address. Religious democracy might be unable to discuss such issues because of its sectarian divisions. Alternatively, religious democracy might be unable to do so because it cannot consider all political matters in a reasonable and fair way.

In order to consider these possible objections, I will divide some of the important issues facing America, especially those with which religious democracy might be thought especially vulnerable and incapable, into four groups: religion and modernity, religion and individual liberty, religion and electoral competition, and religion and international cooperation. As with this entire article, I cannot do justice to these themes, but at least I can outline the questions that religious democracy raises.

I am dealing here with religious democracy in concept. There are many different kinds of religion and, therefore, many different kinds of religious democracy. Many religious voters have attitudes that non-religious voters may find narrow-minded and intolerant. If religious democracy is possible in principle, the attitudes of believers simply will become the subject of electoral competition. Those attitudes, however, are not a legitimate objection to religious democracy itself.

1. Religion and Modernity: Science, Technology, Capitalism, and the Environment

Ever since Galileo's forced recantation, there has been a legitimate concern that religious authorities are opposed to scientific investigation.⁴¹⁸ The efforts that are going on right now in the name of religion to undermine the teaching of evolution

⁴¹⁸ The astronomer, physicist, and mathematician Galileo Galilei (1564–1642) was condemned by the Church's Inquisition in Rome as "vehemently suspected of heresy." Peter Machamer, *Introduction to THE CAMBRIDGE COMPANION TO GALILEO* 23 (Peter Machamer ed., 1998). See also Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 211 (2003).

[B]ecause Galileo's work was threatening to the Catholic Church and its teachings, and because of the Church's encompassing power, Galileo was under intense pressure — indeed, was ultimately convicted by the inquisitors — to "restate" his views on the structure of the universe. Galileo's recantation was the result, not of scientific observation, but of religious persecution and the very real threat of a horrible death.

Id. (internal citations omitted).

in American public schools further that concern,⁴¹⁹ as does the resistance by believers to the discovery of the age of Earth in geology.⁴²⁰

If it were the case that religion is inherently obscurantist, there might be reason to oppose religious democracy. Most of us would at least have to pause if told that scientific discovery must be subject to Church authority. But this is a pseudo-issue.

The suggestion that there is an inherent tension between religion and science, as opposed to criticisms by some believers of some aspects of science, is simply false. The modern, western scientific tradition was created by churchmen. There was not always Church censorship of even drastically revolutionary thought.⁴²¹ Nor do all communities of faith object to most scientific investigation. The Catholic Church, for example, has come to terms with modern astronomy, biology, and geology.⁴²² Karl Barth himself, quite an orthodox Christian voice, teaches that Genesis should not be thought of as promoting a particular cosmology.⁴²³

⁴¹⁹ See generally Kent Greenawalt, *Establishing Religious Ideas: Evolution, Creationism, and Intelligent Design*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321 (2003) (offering a very carefully stated rejection of most versions of intelligent design as non-scientific theories); see also Diana M. Rosenberg, *Monkey Business and Unnatural Selection: Opening the Schoolhouse Door to Religion by Discrediting the Tenets of Darwinism*, 9 J.L. & POL'Y 611 (2001) (providing a more stringent criticism).

⁴²⁰ Greenawalt, *supra* note 419, at 327 ("A popular modern view, set out in a 1961 book called *The Genesis Flood*, attributes geological evidence to Noah's flood and claims that physical processes have not been uniform over time.").

⁴²¹ See Joseph M. Alioto, *Antitrust on the Rebound*, 39 SANTA CLARA L. REV. 809, 810–11 (1999).

In 1543, a Polish monk, Nicolaus Copernicus, in his book entitled *On the Revolution of the Celestial Bodies*, stunned western civilization with his scientific and mathematical proof that the earth and the other planets revolve around the sun. The ancient Ptolemaic theory was suddenly wrong. There was a new perspective.

Id.

⁴²² See Douglas E. Stewart, Jr., Note, *Going Back in Time: How the Kansas Board of Education's Removal of Evolution from the State Curriculum Violates the First Amendment's Establishment Clause*, 20 Rev. Litig. 549, 559 n.55 (2001) ("In 1996, Pope John Paul II issued a statement calling evolution 'more than a hypothesis,' which strengthened the Roman Catholic Church's acceptance of the 137-year-old theory.").

⁴²³ 3 KARL BARTH, *CHURCH DOGMATICS*, pt. 2, at 6–7 (G. W. Bromiley & T. F. Torrance eds., H. Knight et. al. trans., 2004).

It is no doubt true that human faith has always expressed itself in a particular conception, and human witness in a particular presentation, of the Word of god, and in so doing they have attached themselves to certain cosmologies The fact that this has continually happened does not mean, however, that the Word of God itself . . . contains a specific cosmology

Id.

There may be an essential resistance in Judeo-Christian thinking to certain kinds of technological applications of science, but that is not opposition to scientific discovery itself. The stem cell debate, for example, does not concern investigation of the natural world but of the method by which that investigation might go forward.⁴²⁴ It is true that religion as a whole relativizes scientific discovery and subjects it to other norms, ethical and otherwise. But just as all civilized people condemned Nazi “scientific” experimentation with human subjects,⁴²⁵ we cannot say a priori that holding science to other norms is opposition to science itself.

The fear that technological civilization is destroying our essential humanity is a complex matter. But this fear is not confined to religious believers. One of the most popular statements of this theme is Bill McKibben’s book *Enough*.⁴²⁶ McKibben’s book is not religious but secular, or perhaps I should say that the book transcends the religious/secular divide. Similarly, when Pope John Paul II condemned the “culture of death” in the West, he was not raising a purely religious concern.⁴²⁷

This is the case as well with the Catholic Church’s critical stance toward capitalism.⁴²⁸ The condemnation of materialism in western culture has been a consistent

⁴²⁴ See Arthur C. D’Andrea, Note, *Federalizing Bioethics*, 83 TEX. L. REV. 1663, 1671 (2005) (“The core disagreement of the stem-cell debate is the moral status of a human embryo.”).

⁴²⁵ See April A. Oliver, Note, *Human Experimentation at the Brink of Life*, 9 GEO. MASON L. REV. 1177, 1184–85 (2001).

The work of Nazi doctors in World War II was among the twentieth century’s worst atrocities. Ultimately, these doctors were tried at Nuremberg for the criminal nature of the research they conducted on concentration camp prisoners. The highly publicized trial of the Nazi medical men, known as *United States v. Brandt*, focused on the experiments of twenty-three German physicians and scientists, including Hitler’s personal doctor

. . . [S]ixteen of the Nazi defendants, including Hitler’s doctor, were found guilty of crimes against humanity. Of these sixteen, seven were executed for their crimes.

Id. (internal citations omitted).

⁴²⁶ BILL MCKIBBEN, *ENOUGH: STAYING HUMAN IN AN ENGINEERED AGE* 209–13 (2003).

⁴²⁷ See POPE JOHN PAUL II, *ENCYCLICAL LETTER EVANGELIUM VITAE* para. 12 (1995).

⁴²⁸ See Antonio F. Perez, *International Antitrust at the Crossroads: The End of Antitrust History or the Clash of Competition Policy Civilizations?*, 33 LAW & POL’Y INT’L BUS. 527, 552 & n.73 (2002).

Perhaps the strongest formulation of the Roman Catholic Church’s position — rejecting not capitalism but rather rejecting treating capitalism as an all-encompassing ideology — is found in the Papal encyclical on the concept of development for the post-colonial era. Pope Paul VI, after noting the rise of industrial society, observed that “it is unfortunate that on these new conditions of society a system has been constructed which considers profit as the key motive for economic progress, compe-

theme in Church teaching in recent years.⁴²⁹ There are many secular Americans deeply worried about the penetration of a certain kind of economic thinking into the moral foundations of this country.⁴³⁰ Such people welcome the Catholic Church's resistance to the market even if they disagree with the Church on most other matters.

There is an irony here. While the Catholic Church may be associated with opposition to technology and the market, it is easy to show that religious voters in America are not really opposed to either. Churchgoers in America are among the vast consuming public. Materialism should be a consistent religious concern, particularly among Jews and Christians, but clearly it is not.⁴³¹

The Judeo-Christian opposition to materialism also ought to be a basis upon which to address the modern human threat to the environment. Again, the record of Judaism and Christianity on this issue is mixed. As discussed above, there is a certain tendency in biblical religion to regard nature as mere backdrop to man.⁴³²

Yet, religion is also one of the potential foundations of the acceptance of limits to human growth without which no environmental improvement is ultimately likely. It was the Jewish Sage Maimonides who taught that the beings of this world are not for the sake of man.⁴³³ The Protestant theologian Karl Barth wrote of nature "in its otherness, of equal dignity" with man, of the non-human creatures "with their own dignity and right, and enveloped in the secret of their own relation to their Creator."⁴³⁴

competition as the supreme law of economics, and private ownership of the means of production as an absolute right that has no limits and carries no corresponding social obligation."

Id. (quoting Pope Paul VI, *Populorum Progressio: On the Development of Peoples* ¶ 26 (1967), reprinted in CATHOLIC SOCIAL THOUGHT 240, 246 (David J. O'Brien & Thomas A. Shannon eds., 1992)).

⁴²⁹ *Id.* ("In short, it was not capitalism that the Papacy rejected, but rather the perversion of capitalism into a 'stifling materialism.'").

⁴³⁰ This even has been a source of concern with regard to ethics in the legal profession. See Samuel J. Levine, *Faith in Legal Professionalism: Believers and Heretics*, 61 MD. L. REV. 217, 219 (2002) ("Many scholars argue that the movement towards law-as-business instead of law-as-profession has introduced the values of the market-driven economy into the practice of law, thus replacing its 'moral traditions.'").

⁴³¹ The "What Would Jesus Drive" campaign is a notable exception but still an exception. See John C. Dernbach, *Sustainable Versus Unsustainable Propositions*, 53 CASE W. RES. L. REV. 449, 464 n.81 (2002).

⁴³² See *supra* notes 165–71 and accompanying text.

⁴³³ E-Mail from Hadar Susskind, Washington Representative, Coalition on the Environment and Jewish Life, to Bruce Ledewitz, Professor of Law, Duquesne University (Mar. 17, 2005, 18:58:26 PST) (on file with author) (translating MOSES MAIMONIDES, GUIDE FOR THE PERPLEXED) ("It should not be believed that all the beings exist for the sake of humanity. On the contrary, all the other beings too have been intended for their own sakes, and not for the sake of something else.").

⁴³⁴ 3 CHURCH DOGMATICS, *supra* note 423, pt. 2, at 4.

These statements are not isolated or idiosyncratic. The media noted the support that Pope Benedict XVI received from animal rights groups because of his stand on the rights of animals.⁴³⁵

There is no inherent opposition in religious democracy to the health of the environment. I acknowledge that the opposition of the Catholic Church to artificial birth control⁴³⁶ is certainly a potential practical impediment to environmental improvement, but this is not a conceptual issue. The Church is not pressing for unlimited human growth. That stance, as the Club of Rome knew well,⁴³⁷ is exclusively a secular one.

2. Religion and Individual Liberty: Liberalism and the Rights of Women

Can religious democracy respect the rights of individuals, especially the rights of women? This question should be divided into three viewpoints — the internal administration of the Church, the establishment and free exercise of religion, and the practice of other rights in society.

The Church is not internally a liberal democracy. As the recent forced resignation of Reverend Thomas Reese from the magazine *America* shows,⁴³⁸ the Catholic Church enforces a form of orthodoxy in its internal speech. Additionally, women cannot become Catholic priests. Every community of faith practices limits that the wider society does not.

But such internal restrictions are not generally sought to be applied by the communities of faith to the larger society. This is an instance of the issue of Church and world. Religious democracy need not treat America as if it is subject to the requirements of the internal discipline practiced by communities of faith. Perhaps there is a tendency by communities of faith to forget the legitimate distinction between the community of faith and the larger society, but that is usually an error from the perspective of the community of faith's own beliefs. This is the threat of theocracy.⁴³⁹ That tendency in religious democracy may represent a potential threat to

⁴³⁵ See *Neighbors Describe Pope as Humble Cat Lover*, AMERICA, May 9, 2005, at 4 (“Two animal welfare groups, the Humane Society of the United States and People for the Ethical Treatment of Animals, known as PETA, gave Pope Benedict XVI high marks for his previous comments about the care of animals.”).

⁴³⁶ See JOHN PAUL II, ENCYCLICAL LETTER *VERITATIS SPLENDOR* para. 80 (1993) (describing the use of contraceptives as “intrinsically evil”).

⁴³⁷ See DONELLA H. MEADOWS ET AL., *THE LIMITS TO GROWTH*, A REPORT FOR THE CLUB OF ROME'S PROJECT ON THE PREDICAMENT OF MANKIND 154 (1972). The report presciently sets forth many of the elements of the environmental crisis humankind now faces, and identifies economics and technology as the sources of the threat, rather than religion. *Id.*

⁴³⁸ See Michael Paulson, *Catholic Journals Feel the Chill*, TORONTO STAR, May 14, 2005, at M7.

⁴³⁹ Cf. NEUHAUS, *supra* note 63, at 138.

democratic life, but it is not a mistake that religious democracy must inevitably commit.

The situation is quite different with regard to the rights of religion itself. There, religious democracy must plainly insist on religion's uniqueness. Religious democracy, in principle, is inconsistent with a strictly secularist interpretation of the Establishment Clause of the federal Constitution. Religious democracy in any form sends a message that society favors the practice of religion. Non-believers, if they are realistic, must see themselves in a minority position. Indeed, after the Presidential election of 2004, non-believers in America must already suspect that it will be difficult for the Democratic Party to win a national election without at least defusing the religious issue and softening the image of the Party as hostile to faith. This is already a form of political coercion. It is not undemocratic, but it does alter the relationship of church and state.

Here is a bedrock dispute. If liberal democracy must be secular, as Rawls maintained in a *Theory of Justice*,⁴⁴⁰ then religious democracy cannot survive. Over time, it must become, first, not liberal, and later, not democratic. I do not believe that Rawls was right, but only history will judge.

The reach of the free exercise of religion should expand under religious democracy. The restrictions that the *Smith* case⁴⁴¹ placed on the Free Exercise Clause cannot be ascribed to the wishes of any American community of faith. Indeed, the opposition of religious communities to *Smith* has been practically unanimous.⁴⁴² Even politically powerful religious groups have condemned *Smith*.⁴⁴³ They have done so even though *Smith* is much more of a threat to religious minorities than to more mainstream groups.⁴⁴⁴ It is to be hoped that one accomplishment of religious democracy and one litmus test President Bush will legitimately and openly apply to any nominee to the Supreme Court will be a commitment to overturn *Smith*.

In terms of other rights, religious democracy is always likely to oppose a certain nihilistic and degraded tone in society, as well as the denigration of cherished religious symbols. Thus religious democracy poses some risk, at least in theory, of exercising censorship and reimposing sanctions against blasphemy. More practically, religious democracy in the United States has consistently opposed particular exercises of human autonomy, either because they are said to harm others, as in the case

⁴⁴⁰ See *supra* note 78 and accompanying text.

⁴⁴¹ *Employment Div. v. Smith*, 494 U.S. 872 (1990).

⁴⁴² See Neal Devins, *How Not to Challenge the Court*, 39 WM. & MARY L. REV. 645, 650–54 (1998) (describing the enactment process of the Religious Freedom Restoration Act and the hostility voiced by an “unprecedented coalition” of religious groups to *Smith*).

⁴⁴³ See *id.* at 653 (congressional testimony of Robert Dugan, Jr., representing the National Association of Evangelicals).

⁴⁴⁴ See *id.* at 651.

of abortion, or because they are said to threaten what it means to be human, as in the case of the right to die.⁴⁴⁵

Distinctions among rights can be made. In general, communities of faith in the United States seem to have accepted the radical freedom of speech that America practices.⁴⁴⁶ Admittedly, believers have objected to public support for works of art that are felt to be insulting to communities of faith.⁴⁴⁷ Those objections are likely to increase under religious democracy. But the test of liberal political life is not the presence of public subsidies for dissenters, but the absence of jail time.

Religious democracy may be viewed in American political terms as hostile to the concept of fundamental human rights to be enforced by the courts. That appearance, however, may be misleading. It may be a result of unsophisticated jurisprudence by American religious thinkers. This anti-judicial tendency results from oppo-

⁴⁴⁵ There has been consistent opposition by religious groups to certain forms of end-of-life medical decision-making. See Kim C. Arestad, Note, *Vacco v. Quill and the Debate Over Physician-Assisted Suicide: Is the Right to Die Protected by the Fourteenth Amendment?*, 15 N.Y.L. SCH. J. HUM. RTS. 511, 545 (1999).

⁴⁴⁶ Of course these freedoms can favor religious believers themselves. See Avery Cardinal Dulles, S.J., *Catholic Social Teaching and American Legal Practice*, 30 FORDHAM URB. L.J. 277, 284 (2002).

Some Americans seem to feel that religion is so divisive a topic that it ought not to show itself on the public square. People have a right to be religious, they assert, so long as they keep their piety to themselves and do not urge their beliefs on others. The Catholic Church, on the contrary, insists that people have an inalienable right to bear witness to what they hold to be true as a matter of religious conviction. In the name of free speech, people ought not to be muzzled in the classroom or elsewhere. In this connection, the Church has often declared the right of private religiously oriented schools to exist and to be supported by some form of tax relief, so that parents of modest means have a true choice about the kind of education being given to their children. The Church also teaches that religiously oriented schools should be allowed to hire teachers and administrators who support the values of the school, although here certain delicate questions arise about the right of employees to enjoy privacy concerning their personal beliefs and conduct.

Id. (footnote omitted).

⁴⁴⁷ See, e.g., Amitai Etzioni, *Law in Civil Society, Good Society, and the Prescriptive State*, 75 CHI.-KENT L. REV. 355, 368 (2000).

Champions of the civil society strenuously objected when federal agencies such as the National Endowment for the Arts and the National Endowment for the Humanities sought not to fund projects that offended some core social values, such as photos that showed Christ on a cross dipped in urine. A good society would take it for granted that it will provide public funds only to projects that enhance, or at least do not undermine, that which it considers virtuous.

Id. (footnote omitted).

sition to particular judicial decisions, most notably *Roe v. Wade*.⁴⁴⁸ This impression of opposition to judicial review of fundamental rights overlooks the historical reality that substantive due process protected the rights of Catholic parents to educate their children in the Church, away from the assimilationist pressures of the public schools.⁴⁴⁹ The ascent of religious democracy probably does entail restrictions on certain forms of autonomous decision-making, but definitely not an across-the-board reduction of freedom in America.

In terms of the rights of groups, the two groups that may feel threatened by the success of religious democracy in 2004 are homosexuals and women. In terms of gay rights, opposition to gay marriage helped fuel Republican victories in 2004.⁴⁵⁰ In terms of the rights of women, President Bush will do all he can to overturn *Roe v. Wade*.⁴⁵¹

No doubt the prospects of gay marriage received a setback in the 2004 election. No doubt, as well, the momentum toward the acceptance of gay rights within the

⁴⁴⁸ See John H. Robinson, *The Compromise of '38 and the Federal Courts Today*, 73 NOTRE DAME L. REV. 891, 898–902 (1998) (offering a nuanced discussion of this tendency).

⁴⁴⁹ See Paula Abrams, *The Little Red Schoolhouse: Pierce, State Monopoly of Education and the Politics of Intolerance*, 20 CONST. COMMENT. 61, 63 (2003) (“*Pierce* [v. *Society of Sisters*, 268 U.S. 510 (1925)] struck down an Oregon law requiring all children to attend public schools. The Oregon ballot initiative was largely the product of anti-Catholic and anti-immigrant sentiments.”).

⁴⁵⁰ See John G. Culhane & Stacey L. Sobel, *The Gay Marriage Backlash and its Spillover Effects: Lessons From a (Slightly) “Blue State”*, 40 TULSA L. REV. 443, 444 (2005).

⁴⁵¹ There is not much question about this. See Dawn E. Johnsen, *Should Ideology Matter in Selecting Federal Judges?: Ground Rules for the Debate*, 26 CARDOZO L. REV. 463, 470 (2005).

[S]hortly after President George W. Bush’s re-election, a radio journalist asked David Frum, special assistant to President Bush, whether Bush would select Justices according to an anti-abortion litmus test. Frum predictably answered no to “litmus test” — a term of negative connotations that virtually no one will endorse — but nonetheless went on to acknowledge that he expects close scrutiny of “judicial philosophy” and legal views, including views regarding *Roe v. Wade*:

I think he [Bush] will find there are a lot of Justices who personally favor abortion who happen to think that *Roe v. Wade* was a bad case. And I think what he will be looking at is judicial philosophy. That is, I think, a somewhat different thing from a litmus test. You want to know how a judge thinks, you want to know how he approaches the law. . . . They will look through the vast corpus of cases that if the person is on a lower court they’ve presided over, they’ll look at their writings, they’ll look at the way they’ve litigated things, and say, is this a person whose philosophy is broadly congruent with ours.

Id. (quoting *Fresh Air with Terry Gross* (NPR radio broadcast Nov. 3, 2004)).

Church has been stopped with the current threatened split within the American Episcopal Church over the issue of the ordination of a gay Bishop.⁴⁵²

But, as in the case of rights generally, a distinction can be made between rights in society and rights in the Church. In principle, communities of faith should not oppose the rights of homosexuals in society. They should not oppose ordinances prohibiting discrimination against gays, for example.⁴⁵³ Indeed, communities of faith should not necessarily oppose secular gay marriage even if scripture condemns homosexuality. After all, practitioners of gay marriage are, presumably, not members of these communities of faith. Religious opposition to liberal divorce laws certainly has diminished.⁴⁵⁴ The distinction between members and non-members has been ignored by the communities of faith, but in principle, religious democracy need not pursue discriminatory policies. I hope this will eventually prove to be the case with regard to gay marriage in particular, but I admit I am not confident.

Unlike gay rights, it seems that the situation for women will improve overall in religious democracy compared to the current status of women in American society. Whether this turns out to be the case will depend on whether the right to an abortion, which is plainly at risk from religious democracy, is a *sine qua non* of women's rights. That is obviously not for me to say, but there are many women in America who do not view abortion in that way.⁴⁵⁵

Religion has a mixed record in terms of the rights of women. In the Arab world, women are clearly not equal citizens, and this status is supported by religious authorities.⁴⁵⁶ In the Netherlands, Ayaan Hirsi Ali wages a struggle to liberate Muslim

⁴⁵² See Steve Levin, *Plan Realigns Anglican Church*, PITTSBURGH POST-GAZETTE, June 16, 2005, at A1.

⁴⁵³ The Catholic Church does not uniformly oppose anti-discrimination provisions that protect homosexuality. See generally Robert Nugent, *The U.S. Catholic Bishops and Gay Civil Rights: Four Case Studies*, 38 CATH. LAW. 1 (1998).

⁴⁵⁴ Diminished, but not disappeared. See Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1798 n.155 (2005) (discussing religious support of covenant of marriage in Louisiana as more politically feasible than desired goal of tightening state divorce law generally).

⁴⁵⁵ See Milton C. Regan, Jr., *Getting Our Stories Straight: Narrative Autonomy and Feminist Commitments*, 72 IND. L.J. 449, 455–57 (1997) (discussing feminist differences on this issue).

⁴⁵⁶ See John F. Murphy, *The Impact of Terrorism on Globalization and Vice-Versa*, 36 INT'L LAW. 77, 79 (2002) (discussing the view of Thomas Friedman).

Many Arab-Muslim states today share the same rigid political structure. Think of it as two islands: one island is occupied by the secular autocratic regimes and the business class around them. On the other island are the mullahs, imams and religious authorities who dominate Islamic practice and education, which is still based largely on traditional Koranic interpretations that are not embracing of modernity, pluralism or the equality of women. The governing bargain is that the regimes get to stay

women from a religious tutelage that even liberal society has been unable to penetrate.⁴⁵⁷ Religion enforces many such restrictions on women. As Donna Sullivan writes, "Many gender-specific human rights violations are grounded in cultural and religious practices."⁴⁵⁸

On the other hand, religion can also serve as a protest against secular oppression. In Turkey, for example, women are donning headscarves despite a ban on the practice, in protest against the government.⁴⁵⁹

In America, the condition of the rights of women under the demands of the economic market is appalling. American economic life is, in practice if not in law, pure sexism, in which the desire of women to have children,⁴⁶⁰ let alone the desire of men and women to care for their children, is relentlessly punished in economic terms.⁴⁶¹ It is a fiction that equal rights for women are possible when the market's insatiable appetite for unlimited work is not curbed by public policy.⁴⁶² It is a fiction that equal rights for women are possible when, in practice, men divorce their wives, and, based on the unequal economic evaluation of the contributions of the two parties, women and children lose wealth and income thereby and men gain.⁴⁶³ Furthermore, these are

in power forever and the mullahs get a monopoly on religious practice and education forever.

Id. (quoting Thomas L. Friedman, *Breaking the Circle*, N.Y. TIMES, Nov. 16, 2001, at A25).

⁴⁵⁷ See Christopher Caldwell, *Daughter of the Enlightenment*, N.Y. TIMES, Apr. 3, 2005, § 6 (Magazine), at 26.

⁴⁵⁸ Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT'L L. & POL. 795, 795 (1992).

⁴⁵⁹ See Clarke Thomas, Editorial, *Where a Head Scarf is No Mere Cloth in the Famously Secular Turkey, Women's Headwear Has Become a Telling Flashpoint*, PITTSBURGH POST-GAZETTE, June 15, 2005, at B7.

⁴⁶⁰ See Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 27 (2004) (discussing the economic pressure on women having children and the failure of law to address it).

⁴⁶¹ Marion Crain, "Where Have all the Cowboys Gone?" *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1909-10 (1999) (exploring impact of market pressure on the divorce rate).

⁴⁶² See generally HARRIET B. PRESSER, *WORKING IN A 24/7 ECONOMY: CHALLENGES FOR AMERICAN FAMILIES* (2003). Kenneth Standard, President of the New York State Bar Association, addressed these issues for lawyers in particular in 2004 and placed the source of the pressure on the larger economic system:

Much of the malaise I have seen stems from trends in society that are affecting workplaces in general — the difficult economic climate, the competitive commercial environment, corporate restructurings resulting in a smaller number of people shouldering the same amount or even more of the work, the advancements in technology that enable us to be connected to laptops, cellphones, E-mail, etc. 24/7, and the heightened expectations and demands of clients/customers.

Kenneth G. Standard, *Balancing Act*, 76 N.Y. ST. B.J. 5, 5 (2004).

⁴⁶³ The statistics are quite consistent concerning this wealth effect. See Jill Elaine Hasday,

only the economic aspects of the rights of women in America. The constant advertising barrage of the sexual image of women, for example, is so unhealthy that the self-esteem of younger women is said constantly to be at risk.⁴⁶⁴ Religious democracy can serve as a way to address and challenge these inequities.

The concern that religious democracy will undermine individual rights is based, in part, on the consistent religious criticism of the individualism of American society.⁴⁶⁵ That critique is indeed an important part of the religious message in America. But this religious critique is not destructive of human rights. Indeed, the critique supports the criticism by the political left against the dominance in America of the market and the diminution in this society of any notion of social solidarity.⁴⁶⁶ Hyper-individualism has not proved to be a foundation of liberal democracy, but a threat to it. The emphasis of religious democracy on community may represent a change in American political life, but not one for the worse.

3. Religious Democracy and Electoral Competition: Constitution and Democracy

In June 2005, there were widespread allegations that the election in Iran was rigged.⁴⁶⁷ These charges raise the question whether religious leaders can ever really accept democracy and limits on government when the government is controlled by religious authorities.

Insofar as religious democracy looks to a norm outside democracy for legitimacy, which of course every religion does, it can be argued that religion cannot participate fully in democratic life. Many have suggested that Islam cannot recognize democracy as fundamentally legitimate.⁴⁶⁸ Rabbi Eliezer in the *Talmud* famously states,

The Canon of Family Law, 57 STAN. L. REV. 825, 869–70 n.171 (2004).

⁴⁶⁴ Cf. Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367, 420 n.212 (1999) (discussing the effect of advertising on consumer's self-satisfaction); see also Cheryl B. Preston, *Consuming Sexism: Pornography Suppression in the Larger Context of Commercial Images*, 31 GA. L. REV. 771 (1997) (comparing the effects of commercial advertising and pornography).

⁴⁶⁵ See, e.g., William Joseph Wagner, *Universal Human Rights, the United Nations, and the Telos of Human Dignity*, 3 AVE MARIA L. REV. 197, 215 & n.58 (2005) (arguing that individualist, rights-based theory undermines social solidarity).

⁴⁶⁶ See Joachim J. Savelsberg, *Cultures of Control in Contemporary Societies*, 27 LAW & SOC. INQUIRY 685, 689 (2002) (describing the "crisis decades" of declining social solidarity).

⁴⁶⁷ See Michael Slackman, *Iran Moderate Says Hard-Liners Rigged Election*, N.Y. TIMES, June 19, 2005, § 1, at A1.

⁴⁶⁸ See, e.g., Francis Fukuyama, *The West Has Won*, GUARDIAN UNLIMITED, Oct. 11, 2001, available at <http://www.guardian.co.uk/waronterror/story/0,1361,567333,00.html> (arguing that "there does seem to be something about Islam, or at least the fundamentalist versions of Islam that have been dominant in recent years": that renders Islam particularly resistant to modernity," by which Fukuyama means democracy and capitalism); Christian Pippan & Emile Noel Fellow, Book Review, 15 EUR. J. INT'L L. 213, 215 (2004) (reviewing L. Ali

“Be not concerned about your voting” when the rabbis vote, in good majoritarian fashion, on a matter that should be controlled by tradition and reason.⁴⁶⁹ It is said in the United States that there is a serious Christian movement working against the Constitution on the ground that, in principle, the Bible, rather than any secular governing framework, must control the system of government.⁴⁷⁰ Along these lines, Professor Dow, for example, has objected to religious democracy as inconsistent with the democratic norm that the people must be able to enact any law they want.⁴⁷¹ The people cannot be bound to certain preexisting religious codes or even the will of God. Religion can never accept that concept.

These concerns seem grossly exaggerated and excessively theoretical in terms of the American political context. Religious democracy here has proceeded entirely by majoritarian methods. Indeed, it is the opponents of religious democracy who have resorted to the courts, in part because of the democratic success of politicians who appeal to the religious leanings of voters.

The tendency of the Democratic Party to denigrate religion — or to be perceived as doing so⁴⁷² — has been the anti-democratic problem in America. Conversely, religious groups have been content to play the electoral game.

The surprising ability of religious groups to work together to further the re-election effort for President Bush in 2004 is the best evidence that religious democracy is not inherently unstable. The main members of the religious portion of the Republican Party coalition — Catholics and Protestants — have certainly opposed each other politically in the past.⁴⁷³ All of that was subsumed in the 2004 electoral effort. Even funding for Catholic schools, traditionally a source of opposition from

Khan, *A THEORY OF UNIVERSAL DEMOCRACY: BEYOND THE END OF HISTORY* (2003), and arguing that existing models of political Islam have “failed to accept meaningful political competition.”). *But see* El Fadl, *supra* note 403.

⁴⁶⁹ 4 BABYLONIAN TALMUD, *Hagigah* 3b, at 11 (I. Epstein trans. & ed., Soncino Press 1938).

⁴⁷⁰ *See generally* Kimberly J. Cook, *Abortion, Capital Punishment, and the Politics of “God’s” Will*, 9 WM. & MARY BILL RTS. J. 105 (2000).

⁴⁷¹ Dow, *supra* note 75, at 885 (noting that in a democracy, “[t]here is nothing that the people are not free to do.”).

⁴⁷² *See infra* text accompanying notes 520–24.

⁴⁷³ Monroe Freedman suggested, for example, that the adoption of anti-solicitation rules by the American Bar Association in the early Twentieth Century reflected Protestant bias against newly immigrated Jews and Catholics. MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS’ ETHICS* 240–41 (1990).

Protestants,⁴⁷⁴ has been supported by the new religious coalition.⁴⁷⁵ An effort was even made during the campaign to reach out to Jews by toning down specifically Christian rhetoric. All of this suggests that religious democracy is neither inherently divisive nor undemocratic.

The impeachment and attempted removal of President Clinton is an exception to the general willingness of religious groups to use purely electoral methods to gain and maintain power.⁴⁷⁶ The tendency to demonize political opponents, which was exemplified in regard to Clinton,⁴⁷⁷ is, admittedly, an undemocratic tendency potentially present in religious democracy. When I believe that my political party especially serves God, I may end up believing as well that my opponents especially do not serve God.

This tendency to demonize opponents is another potential threat to democracy that religious democracy may or may not be able to resist. We do not know whether religious democracy can curb such tendencies. If it cannot, religious democracy will not last.

4. Religious Democracy and Peace Among the Nations

Religious democracy has never been able to quiet international competition between countries with different religions. Not only do religious differences exacerbate international relations, they can spill over into domestic religious unrest. An example of this tension is the relationship between India and Pakistan. The movement called political Hinduism embodies opposition to Pakistan internationally and hostility to Indian Muslims domestically.⁴⁷⁸

⁴⁷⁴ See C.M.A. McCauliff, *Distant Mirror or Preview of our Future: Does Locke v. Davey Prevent American Use of Creative English Financing for Religious Schools?*, 29 VT. L. REV. 365, 367 n.4 (2005) (discussing the history of interreligious disputes over funding). In 1988, the 200th General Assembly of the Presbyterian Church adopted a policy statement opposing vouchers. See Dean M. Kelley, *Religious Access to Public Programs and Government Funding*, 8 BYU J. PUB. L. 417, 434 n.78 (1994).

⁴⁷⁵ See *Americans Divided over Role of Religion in Politics, New Poll Says*, 57 CHURCH & ST. 17, 17 (2004) ("The American people oppose school vouchers, 45 percent to 39 percent. Support was highest among evangelical Protestants and Roman Catholics and lowest among the unaffiliated, atheists and agnostics.").

⁴⁷⁶ See Greeley, *supra* note 307.

⁴⁷⁷ See Presser, *supra* note 328, at 122 ("In what recently amounted to a national referendum on morality in politics, the impeachment proceedings against former President Clinton, we saw to what an extent a good portion of the nation (one side in the cultural war) believed that personal morality had nothing to do with politics.").

⁴⁷⁸ See Mohammed Ayoob, *Political Islam: Image and Reality*, 21 WORLD POL'Y J. 1 (2004); see also Mushirul Hasan, *Now Redeem the Promise*, INDIAN EXPRESS, July 26, 2000, available at <http://www.indianexpress.com/columnists/mush/20000726.html> (providing a critical view of the claims of political Hinduism, or Hindutza).

There is deep international Muslim suspicion of American foreign policy intentions. A poll was taken in the fall of 2003 testing public opinion in Indonesia about the United States and in a story reporting the results, Raymond Bonner of *The New York Times* wrote: "The majority of Indonesians, who are moderate Muslims, view the campaign against terrorism as a war on Islam, and the war in Iraq has fueled those views."⁴⁷⁹ If Muslims feel that way in Indonesia, then many, if not most, Muslims likely feel that way around the world.

In America, the exception to the religious harmony present in the 2004 Republican Party coalition was the American Muslim community.⁴⁸⁰ The reason that Muslims were, by and large, not part of this coalition was not attributable to theological disputes between Christians and Muslims per se. Instead, the problem presumably was American Muslim opposition to American foreign policy under President Bush, specifically the feeling that the war against terrorism is really directed against Islam.⁴⁸¹

Most Americans, of course, would vehemently deny that the war against terrorism is a war against Islam. On the political right, the war is said to be for morality, as William Bennett writes in his book, *Why We Fight: Moral Clarity and the War on Terrorism*.⁴⁸² On the left, the fight is said to be for democracy, as argued in George Packer's collection of essays, *The Fight Is for Democracy*.⁴⁸³ Recently, the sides have begun to merge. Some on the right now say that the war is for democracy, most notably that the war in Iraq is creating the potential for democracy in the Middle East.⁴⁸⁴ Some on the left say the war is for morality, to liberate women from the

⁴⁷⁹ Raymond Bonner, *Islamic Cleric Gets Mixed Verdict in Indonesian Trial for Terrorism*, N.Y. TIMES, Sept. 3, 2003, at A1.

⁴⁸⁰ The CNN exit poll did not list a category for Islam in the "vote by religion" question, but listed only Protestant, Catholic, Jewish, and for every other voter who identified with a religion, "Other." 74 percent of this "Other" religious group, which represented 7 percent of the voters, supported Senator Kerry. This is not clearly a Muslim vote, but it is likely that Muslim voters make up a substantial portion of this group. See Election 2004, *supra* note 19; see also Peter Skerry & Devin Fernandes, *Interpreting the Muslim Vote*, BOSTON GLOBE, Nov. 26, 2004, at A27.

⁴⁸¹ Skerry and Fernandes suggest that the Muslim community is more divided on these matters than might be assumed. Skerry & Fernandes, *supra* note 480.

⁴⁸² WILLIAM J. BENNETT, *WHY WE FIGHT: MORAL CLARITY AND THE WAR ON TERRORISM* (2003).

⁴⁸³ GEORGE PACKER, *THE FIGHT IS FOR DEMOCRACY: WINNING THE WAR OF IDEAS IN AMERICA AND THE WORLD* (2003).

⁴⁸⁴ Thus, Charles Krauthammer in April 2005 referred to the "Arab spring" of movement toward democracy in the Middle East touched off by changes in Iraq. Charles Krauthammer, *The Arab Spring Continues in Lebanon*, Townhall.com, Apr. 1, 2005, at <http://www.townhall.com/opinions/columns/charleskrauthammer/2005/04/01/14980.html>.

patriarchy of traditional societies.⁴⁸⁵ But there are code words that suggest that Islam may be the target.⁴⁸⁶

Americans believe that we are sincere when our government denies that we oppose Islam. We say to ourselves that America permits free exercise of Islam, like every other religion. For example, we do not ban headscarves in public schools like the French do.⁴⁸⁷ So, this widespread feeling that we oppose Islam must be mistaken — a horrible and serious misunderstanding. But the impression of our hostility to Islam has some basis. For one thing, the Bush Administration, from the beginning of the war in Iraq, sought to exclude Islam from any new Iraqi constitution. The original Bush Administration plan, outlined by L. Paul Bremer in the *Washington Post*, had been that a new Iraqi constitution would be drafted by an appointed body, leading to a process of eventual elections and transfer of sovereignty.⁴⁸⁸ This plan was scrapped because of Iraqi, mostly Shiite, objections. In March 2004, an interim Iraqi constitution was adopted that was to expire once a government is elected under a permanent constitution.⁴⁸⁹

Comments by Bush Administration officials in the fall of 2003 about the role of Islam under an Iraqi constitution revealed the American hostility to Islam. *Time Magazine* reported on the Bush Administration's acceptance of the idea that a permanent Iraqi constitution had to be drafted by elected representatives.⁴⁹⁰ In the article, Michael Elliott said the change meant that Washington would not "achieve its larger goals. For the idealists in the Administration, one purpose of the adventure in Iraq was to create in the Middle East a democratic, pluralistic state with protections for the rights of minorities and women."⁴⁹¹ The article suggested that the Administration's hope had been to limit the role of Islam in Iraq but that now the Administration was ready to give in to Iraqi political realities. Two unnamed officials were quoted in the article as follows, "Islam's going to be in [the constitution], no matter what We don't have to make Iraq look like the U.S. If we get [a stable country] that's more Islamic than we would like, that's O.K."⁴⁹²

⁴⁸⁵ Recently, support on the left for the war in terms of women's rights has waned, not because the goal is not worth pursuing, but because Bush's announced goal of liberating women in the Middle East does not seem to be succeeding. See Maureen Dowd, *Reformer Without Results*, N.Y. TIMES, Aug. 13, 2005, at A11.

⁴⁸⁶ See, e.g., Fukuyama, *supra* note 468.

⁴⁸⁷ See Maximilien Turner, Comment, *The Price of a Scarf: the Economics of Strict Secularism*, 26 U. PA. J. INT'L ECON. L. 321 (2005) (discussing the 2004 French law banning conspicuous religious apparel from public schools).

⁴⁸⁸ L. Paul Bremer III, *Iraq's Path to Sovereignty*, WASH. POST, Sept. 8, 2003, at A21.

⁴⁸⁹ See Carolyn Eisenberg, *Iraq's Future*, NEWSDAY, Mar. 31, 2004; at A49.

⁴⁹⁰ Michael Elliott, *If at First You Don't Succeed* . . . , TIME, Nov. 24, 2003, at 36.

⁴⁹¹ *Id.*

⁴⁹² *Id.*

Another indication of American hostility to Islam is the issue of conversion. In the June 30, 2003 issue, *Time Magazine* ran this question on its cover: "Should Christians Convert Muslims?"⁴⁹³ The story described efforts of some Christian groups in Iraq to convert Muslims to Christianity.⁴⁹⁴ The story also gave the background of Christian missions around the world, including Afghanistan, in which the same issue of conversion has come up.⁴⁹⁵ Mainstream Christian aid groups do not engage in conversion, but newer groups do.⁴⁹⁶

This willingness to try to convert Muslims to Christianity reveals the attitude by Christians that there is no salvation outside the Church. This may be a sincere and understandable attitude for Christians to take, but for practitioners of other religions, it certainly would suggest hostility to those religions, including Islam.

This impression was reinforced when General William Boykin, our deputy under secretary of defense for intelligence, was quoted concerning a fire fight against a Muslim warlord he had fought in Somalia: "I knew . . . that my God was bigger than his. I knew that my God was a real god, and his was an idol."⁴⁹⁷ In May 2004, there were reports linking Boykin to the abuses at Abu Ghraib, which reinforced the point about hostility to Islam.⁴⁹⁸ The editor of the Middle East Report, Chris Toensing, said at the time of Boykin's possible involvement, "This will be taken as proof that what happened at Abu Ghraib (prison) is evidence of a broader culture of dehumanising Arabs and Muslims, based on the American understanding of the innate superiority of Christendom."⁴⁹⁹

Is this disharmony and international competition an inherent aspect of religious democracy? Must religious democracy in America mean "Christianity on the march?"⁵⁰⁰ Will religious democracy promote international tension and even war?

These are serious questions. Unlike religious democracy at home, we do not have a model of peaceful international cooperation in the face of religious differences. On this issue, since the Christian/Muslim tension is already so high, we can only hope that religious peace is possible.

⁴⁹³ TIME, June 30, 2003, at Cover.

⁴⁹⁴ David Van Biema, *Missionaries Under Cover*, TIME, June 30, 2003, at 36.

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

⁴⁹⁷ See Bob Herbert, *The Latest Overreach from the Pentagon*, INT'L HERALD TRIB., Dec. 28, 2004, at 9 (quoting General Boykin).

⁴⁹⁸ See Susan Taylor Martin, *Religious Remarks Hound General*, ST. PETERSBURG TIMES, May 17, 2004, at 1A.

⁴⁹⁹ 'Holy War' general linked to Iraq Prison Scandal, ABC News Online, May 12, 2004, at <http://www.abc.net.au/news/newsitems/s1106865.htm>.

⁵⁰⁰ Robert Kuttner, *What Would Jefferson Do? An Essay on Faith, Reason, Terror, and Democracy*, AM. PROSPECT, Nov. 2004, at 31, 36.

IV. THE RELIGIOUS VOID IN AMERICAN POLITICAL LIFE

This article has looked at secular democracy and religious democracy. It appears that secular democracy is in decline and is perhaps conceptually weak, while religious democracy is in ascendancy and perhaps can contribute to a healthier political life in America.

Yet despite such optimism, religious democracy is opposed and even loathed by millions of Americans.⁵⁰¹ In addition to that, religious democracy has served to cement the Republican Party in power, even though the policies pursued by that party have not been what one might expect of a Christian-oriented political organization.⁵⁰² What accounts for the hostility to religious democracy? What accounts for the politically conservative orientation of religious democracy? There is indeed a political problem in America. But the problem is not religious democracy itself. The problem is that many voters are cut off from the possibility of participation in religion in the political realm. That reality has had very negative political consequences. It has led to smugness in believers, who imagine their political coalition is righteous, and unbecoming disdain of religion by non-believers, who imagine only fools could believe all that stuff.⁵⁰³ I wish to suggest in this section how this political situation might be changed.

What follows is a proposal for American political life. But my proposal is not new to American law. As early as 1961, in *Torcasco v. Watkins*,⁵⁰⁴ the Supreme Court described "religions in this country which do not teach what would generally be considered a belief in the existence of God."⁵⁰⁵ Later, in *United States v. Seeger*,⁵⁰⁶ the Court granted conscientious objector status based on a belief that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."⁵⁰⁷ If voters looked at religion in similar terms today, we would not be able to speak of "religious voters" and "secular voters." We would conclude instead that most Americans are quite religious and that neither party enjoys a monopoly, or even a competitive advantage, over the issue of religion.⁵⁰⁸

⁵⁰¹ See Hedges, *supra* note 6, at 55 (providing a flavor of the intense opposition of liberals to the religious right).

⁵⁰² Obviously, this is a matter of judgment. Just for starters though, Jesus praised the peacemakers. See *Matthew* 5:9. Conversely, President Bush has felt obliged to wage continuous war since 9/11.

⁵⁰³ See generally RICHARD DAWKINS, *THE BLIND WATCHMAKER* (1986) (suggesting that many believers may be scientifically illiterate).

⁵⁰⁴ 367 U.S. 488 (1961).

⁵⁰⁵ *Id.* at 495 n.11.

⁵⁰⁶ 380 U.S. 163 (1965).

⁵⁰⁷ *Id.* at 166.

⁵⁰⁸ There are voices today that argue similarly for a "spiritual left" or a "politics of meaning." See Michael Lerner, *After the Fall: Why America Needs a Spiritual Left*, *TIKKUN*,

A. *The Imbalance in American Religious Democracy*

Religion in America today is, in political terms, largely the possession of the Republican Party.⁵⁰⁹ With the exception of ethnic groups that traditionally vote Democratic — like Jews and African Americans — voters who identify as practicing religion are likely to vote Republican.

This reality has two political consequences. First, given the simple numbers, a pro-God political party in America is going to have continued political success over a perceived anti-God political party. That by itself is not a problem for democracy. It is not a flaw of religious democracy that it favors one political party anymore than voting rights for women is questionable because women tend to vote for the Democratic Party in larger numbers than do men.⁵¹⁰

The second consequence of Republican Party support by religious voters is that no broad, politically progressive coalition can be maintained in America today. Such a coalition cannot be sustained by self-identified secular voters. Not only are there not enough of them, but the concerns of poverty and peace are inherently religious themes.⁵¹¹ Secularism has proven to be too thin a political diet to nourish such fundamental concerns. This is disastrous for progressive political causes.⁵¹²

I am not demeaning the progressive religious political efforts going on in America today. Every religious tradition in America has its progressive political side. A number of Catholics are in fact radically left-wing. Thomas Merton's life and writings⁵¹³ and Cardinal Joseph Bernardin's "seamless garment" understanding

Jan./Feb. 2005, at 34. The differences in what I am proposing here from that idea are, first, the difference between history on the one hand and *Tikkun's* psychology on the other and, second, the related difference between the trans-human and *Tikkun's* humanism. *Tikkun* must assure the skeptical Left that the magazine is not proposing that "people on the Left should all become religious or spiritual," whereas that is just what I would like to see. *Id.*

⁵⁰⁹ See *supra* notes 19–24 and accompanying text.

⁵¹⁰ The CNN exit poll in the 2004 Presidential election showed a significant gender gap between the candidates. Among men, President Bush won, 55 percent to 44 percent for Senator Kerry. But among women, President Bush lost, 48 percent to 51 percent. See CNN.com Election 2004-U.S. President [hereinafter 2004 Presidential Election Results], at <http://www.cnn.com/ELECTION/2004/pages/results/president> (last visited Sept. 10, 2005).

⁵¹¹ Historically progressive American political causes were always supported by religious voters. See E.J. Dionne, Jr., *Faith Full — When the Religious Right was Left*, NEW REPUBLIC, Feb. 28, 2005, at 12 ("How strange it is that American liberalism, nourished by faith and inspired by the scriptures from the days of abolitionism, is now defined — by its enemies but occasionally by its friends — as implacably hostile to religion.").

⁵¹² So that there is no mistake, this is no theoretical, nor universal, concern. I am referring to political causes such as environmental protection, national health insurance, progressive taxation, public support for the poor and working poor, all of which I support.

⁵¹³ See David L. Gregory, *Dorothy Day's Lessons for the Transformation of Work*, 14 HOFSTRA LAB. L.J. 57, 62 n.14 (1996) (listing Merton's major works).

of “life issues”⁵¹⁴ have greatly enriched political dialogue in this country. Nor are Catholics alone in their radicalism. Jim Wallis exemplifies progressive politics in the evangelical community. The National Council of Churches has always championed the rights of workers and other progressive causes.⁵¹⁵ Rabbi Michael Lerner, editor of *Tikkun Magazine*, courageously promotes a program of peace and reconciliation in America and the Middle East.⁵¹⁶ Examples of what could be called “left wing” religion abound in America.⁵¹⁷

All these efforts, however, have yielded only very modest political results.⁵¹⁸ One reason for this is institutional. In American politics, a cause generally needs a political party to support and promote it. Usually this means one of the two major parties. Progressive religion has not received a hearing in recent years in the Democratic Party.⁵¹⁹ This has meant in practice that it has not gotten much of a hearing in a political sense at all. So the political problem would seem to be the resistance of the Democratic Party to religion.

⁵¹⁴ See Michael R. Merz, *Conscience of a Catholic Judge*, 29 U. DAYTON L. REV. 305, 306 (2004) (describing Cardinal Bernardin’s approach to life issues in the 1980s).

⁵¹⁵ See Eric Schlosser, *Migrant Farm Workers’ Rights Are Withering on the Vine*, CAP. TIMES, Mar. 9, 2004, at 9A (describing the National Council of Church’s support for a labor boycott); see also John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 314 (2001) (describing mainline churches as “liberal”).

⁵¹⁶ See generally TIKKUN . . . TO HEAL, REPAIR AND TRANSFORM THE WORLD: AN ANTHOLOGY (Michael Lerner ed., 1992).

⁵¹⁷ One such Christian umbrella organization is the Christian Alliance for Progress, whose web page contains many examples of the efforts of progressive Christians in the public square. Christian Alliance for Progress Home Page, <http://www.christianalliance.org>.

⁵¹⁸ See Leonard Pitts, Jr., *Where’s the Christian Left?*, PITTSBURGH POST-GAZETTE, Nov. 11, 2004, at A17.

⁵¹⁹ The problem of expressing the Christian left politically, which Leonard Pitts addressed, *id.*, was illustrated a few days later, when a sympathetic reader wrote the following response to his article:

My guess is that “the Christian left” resides in the Democratic Party. Unfortunately, the Democratic Party aggressively supports abortion and stem-cell research requiring the destruction of human embryos. These, of course, are antithetical to Christianity, and therefore many Christians have abandoned the Democratic Party. While these Christians might like to go “left” on economic justice issues, they are compelled to go “right” on the life issues. Economic justice means nothing if you haven’t made it out of the womb.

Cary Valvo, Letter to the Editor, *Dems and Life Issues*, PITTSBURGH POST-GAZETTE, Nov. 19, 2004, at A18.

It is commonly said that the Democratic Party is anti-religious.⁵²⁰ Is that really true? In the June 12, 2005 edition of the *Pittsburgh Post-Gazette*, Reverend N. Graham Standish wrote an article arguing that no political party can claim to embody God's will.⁵²¹ In the course of the article, Reverend Standish revealed that he left the Republican Party in 1992 because the political attack style of the Republicans conflicted with his notion of the teachings of the Gospel.⁵²² He then added in a devastating though offhand observation, "For a time, I considered joining the Democratic Party, but they seemed to have little interest in people of faith"⁵²³

Dr. Standish clearly has no anti-Democratic Party axe to grind. If someone like Dr. Standish received this impression, it can only be that this is the reception people of faith tend to receive from the Democratic Party. So, when Howard Dean criticized the Republican Party for being "pretty much a white, Christian party,"⁵²⁴ it did not occur to him, nor to many other Democrats, that he was treating the category "Christian" as if it were an insult.

Of course, Democrats now know that this impression of religious hostility is a formula for political disaster. The Party has received a great deal of counsel to open itself up to religion and to speak the language of values.⁵²⁵

The Democratic Party, however, has been unable to comply with this advice. Part of the reason for this inability is a clash of political issues. Women's rights

⁵²⁰ The comment by Howard Dean in June 2005 certainly suggested that possibility. See *supra* notes 305–06 and accompanying text. The perception of the Democratic Party as anti-religious, however, goes much deeper than an isolated comment. See Howard Fineman & Tamara Lipper, *Dean's Mouth Gives the Democrats Plenty to Talk About*, NEWSWEEK, June 20, 2005, at 36.

But Dean's real problem may not be his mouth but his mind-set. He and his aides seemed genuinely mystified at the idea that his characterization of the GOP was a political mistake. But by labeling the other party a bastion of Christianity, he implied that his own was something else — something determinedly secular — at a time when Dean's stated aim is to win the hearts of middle-class white Southerners, many of whom are evangelicals. In a slide-show presentation at the DNC conference last weekend, polltaker Cornell Belcher focused on why those voters aren't responding to the Democrats' economic message. One reason, he said, is that too many of them see the Democrats as "anti-religion." And why was that? No one asked Dean, who wasn't taking questions from the press.

Id.

⁵²¹ Rev. Dr. N. Graham Standish, *A Country Divided by Christ*, PITTSBURGH POST-GAZETTE, June 12, 2005, at J1.

⁵²² *Id.*

⁵²³ *Id.*

⁵²⁴ Murray, *supra* note 305.

⁵²⁵ See, e.g., Ellen Goodman, *Democrats: Expand Language of Morality*, PITTSBURGH POST-GAZETTE, Nov. 10, 2004, at A17.

groups and gay rights groups are important members of the Democratic Party coalition. Insofar as religious progressives might challenge these positions, it is hard for the Party to open up to these voters.⁵²⁶ That is the nature and limit of coalition building. The Republican Party has its own, similar fissures.⁵²⁷

But issue conflict is not the major reason that the Democratic Party fails to welcome people of faith with open arms. Many religious progressives, after all, support the right of women to choose and support gay rights as well. The main problem is something else. The hostility to religion among secularists in the Democratic Party is a real and deep phenomenon.

Secularists in America are working hard to divorce politics and government from their traditional religious foundations. It is no accident, for example, that Alan Dershowitz's new book is entitled *Rights From Wrongs: A Secular Theory of the Origin of Rights*.⁵²⁸ That book is part of an overall attempt by progressives to develop fully secular politics. The attempt to do the same with regard to constitutional law is represented by the book *The Godless Constitution*.⁵²⁹

There are also attempts to develop a fully secular inner and moral life. The publisher calls Sam Harris's new book, *The End of Faith*,⁵³⁰ a "truly modern foundation for ethics and spirituality that is both secular and humanistic."⁵³¹ All of this can be attributed to the continuing work of the heirs to the secular consensus I discussed above.⁵³²

⁵²⁶ This is what the letter writer was explaining in response to Leonard Pitts. See Valvo, *supra* note 519. This is also why, despite the embarrassment to the Party, a pro-life Pennsylvania Democratic Governor was not permitted to address the 1992 Democratic Party National Convention. See Editorial, *A Way to Common Ground on Abortion*, INDIANAPOLIS STAR, June 26, 2005, at E4 (describing that event).

⁵²⁷ Republican Party divisions came to the forefront almost immediately after Justice O'Connor announced her planned retirement. See Jeffrey Rosen, *So What's the "Right" Pick?*, N.Y. TIMES, July 3, 2005, § 4 (Week in Review), at 1 (dividing the conservative spectrum from which a judicial nominee might come into the following categories: "Originalist Conservatives," "Libertarian/Constitution in Exile Conservatives," "Traditionalist Conservatives," "Pragmatic Conservatives," and "Deferential Conservatives").

⁵²⁸ DERSHOWITZ, *supra* note 88. The book also has been listed by the title *Rights From Wrongs: the Origin of Human Rights in the Experiences of Injustice*. The clash can be observed on the Barnes & Noble website. See <http://www.barnesandnoble.com> (search "Search Books" for "Rights from Wrongs"; then follow "Rights from Wrongs: The Origins of Human Rights in the Experiences of Injustice" hyperlink) (last visited Sept. 10, 2005).

⁵²⁹ See KRAMNICK & MOORE, *supra* note 94.

⁵³⁰ SAM HARRIS, *THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON* (2004).

⁵³¹ The publisher's comment can be found listed with the book at the Barnes & Noble website. See *supra* note 528 (providing the website).

⁵³² The effort to derive foundations for political life without religion may, of course, not succeed. See *supra* Part III; see also Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground?*, 54 EMORY L.J. 97 (2005).

But why is this work continuing in the face of political failure, indeed political catastrophe? At the risk of oversimplifying, I think that much of the determined hostility against religion among secular voters lies in the fact that religious training for many Americans ends at about the grammar school level.⁵³³ Thus, secularists think of God as fundamentalists portray God. They think of the Bible as a rule book. They regard religion as oppression. They reject supernaturalism and miracles and think that this is a rejection of religion.

Most secularists do not know that there are many other ways to understand the religion of the Bible. They have never heard of Dietrich Bonhoeffer's condemnation of a "positivism of revelation," or of his call for "religionless Christianity."⁵³⁴ They do not know that Rabbi Mordecai Kaplan rejected supernaturalism and the chosenness of Israel.⁵³⁵ Ill-trained in and ignorant of religious matters, people call themselves secular as a well-intentioned, but quite unnecessary, act of self-defense.

The political harm from religious democracy in America is that only a little more than half of the population participates in it.⁵³⁶ This is just enough to ensure political power for the Republican Party but not enough to develop authentic religious democracy. An authentic religious democracy would challenge prevailing religious assumptions in the public square. America will not have that kind of religious democracy until those who mistakenly regard themselves as secular are able to take a new look at religion.

The current religious/political stalemate, which is truly stale, pits those who pray in public against those who seek to live without prayer. Neither option can contribute to a healthy political sphere. America faces today a situation not unlike that facing John Dewey and others in 1933.⁵³⁷ Their response was an attempt to help modern men and women who were cut off or felt cut off from traditional religious forms to experience authentic religious life. That response led to the *Humanist Manifesto*.⁵³⁸

⁵³³ See SMITH, *supra* note 337, at 273 ("Your standard criticisms of religion sound so much like satires of third-grade Sunday school teachings that they make me want to ask when you last read a theological treatise and what its title was.").

⁵³⁴ DIETRICH BONHOEFFER, *LETTERS AND PAPERS FROM PRISON* 153 (Eberhard Bethge ed., 3d ed. 1967).

⁵³⁵ See Ze'ev W. Falk, *Jewish Religious Law in the Modern (and Postmodern) World*, 11 J. L. & RELIGION 465, 471 (1994-95).

⁵³⁶ The reference here is to the close political divide between the two party coalitions. The result in the 2004 presidential election was 51 percent for President Bush (62,040,606) versus 48 percent for Senator Kerry (59,028,109). See 2004 Presidential Election Results, *supra* note 510. The religious nature of this divide is presented by figures and notes 19-24 and accompanying text.

⁵³⁷ See ROCKEFELLER, *supra* note 399, at 451 ("Believing that the pressing social, psychological, and moral issues facing America were tangled up with religious issues, Dewey became further involved in religious discussions in 1933.").

⁵³⁸ *Id.*

In hindsight, we can see that their effort failed. But the need has not vanished. We must be willing to begin again where the drafters of the *Humanist Manifesto* left off.

In principle a religious renewal would not require resuscitation of the Biblical tradition. People could look elsewhere for religious foundations. They could look to Wicca or indigenous traditions or Buddhism.

In practice, however, a rebirth of religious orientation in America can only be based on the Bible. The Bible and the Bible's story of God are the foundation of the American tradition. Rediscovery of religion here has to begin there.

Is this suggestion an unholy use of religion for mere political gain? A rebirth of religion in America is surely a more serious matter than a hoped-for partisan change in voting patterns. That criticism is part of the misunderstanding of the religion of the Bible. The Bible primarily concerns exactly the sort of thing Americans vote about. The Bible is politics.⁵³⁹ A political rebirth of biblical religion is just what the Bible has in mind.

B. Secularists Who Are Believers

My goal is a simple one. I am aiming to convince secular voters that they are in fact religious in orientation. Therefore, they have neither need nor justification for hostility against religious voters and against the Bible generally in political life. Indeed, the Bible is the best available teaching for political life. Who are these secular voters whom I claim are religious?

Some would say that, as far as the Bible is concerned, the question of who is a believer is easy to answer. To be a Jew is to believe in God and to follow the commandments of the Torah. To be a Christian is to believe in Jesus Christ as the Son of God and to obey God's will as revealed in the Old and New Testaments. For example, because both the Old Testament and the New Testament condemn homosexuality,⁵⁴⁰ a believer cannot accept gay marriage.

It is not just fundamentalists who think this way. Even liberal biblical religion tends to regard the Bible as a sort of answer-in-the-back-of-the-book. When liberal biblical religion embraces something condemned in the Bible, such as gay rights, there often is an air of guilt and defensiveness around the effort.⁵⁴¹

⁵³⁹ To jump ahead of my argument somewhat, for the biblical world "to be non-political is to be irrelevant." N.T. WRIGHT, *JESUS AND THE VICTORY OF GOD* 98 (1996).

⁵⁴⁰ The relevant Old Testament texts are: *Genesis* 19:1–29, *Leviticus* 18:22, and *Leviticus* 20:13. The relevant New Testament passages are all from the letters of St. Paul: *Romans* 1:18–32, *1 Corinthians* 6:9, and *1 Timothy* 1:10.

⁵⁴¹ This is the feeling I get reading Michael Perry on the subject of the Bible and homosexuality. See generally Michael J. Perry, *Christians, the Bible, and Same-Sex Unions: an Argument for Political Self-Restraint*, 36 WAKE FOREST L. REV. 449 (2001).

It is this way of looking at the Bible — as an objective dogma — that Bonhoeffer criticized as “positivism of revelation.”⁵⁴² In another letter,⁵⁴³ Bonhoeffer amplified what he meant by that term:

[It] says in effect, “like it or lump it”: virgin birth, Trinity, or anything else; each is an equally significant and necessary part of the whole, which must simply be swallowed as a whole or not at all. That isn’t biblical. There are degrees of knowledge and degrees of significance; that means that a secret discipline must be restored whereby the *mysteries* of the Christian faith are protected against profanation.⁵⁴⁴

Bonhoeffer was describing the problem with a believer condemning something simply because the Bible condemns it — for example, homosexuality. Let us say you know a homosexual couple. They are loving and kind to each other. They are living out their sexuality the only way they can. They do not seem to you to be choosing something but to have been imprinted with something. So you find the Biblical condemnation of them to be harsh and unjust, indeed incomprehensible. “That does not matter,” says a certain kind of Jew and Christian. The Bible condemns it. “Like it or lump it.”⁵⁴⁵ It is all one. You cannot be a Christian or a Jew without buying the whole package as is. Nor is there to be any interpretation by the believer when the matter is clearly decided by the Bible — sort of like the parol evidence rule.⁵⁴⁶

Secularists are put off by religion of this kind. But that is an overbroad reaction to what is only one kind of biblical religion. Obviously a person can be a Jew or a Christian and support gay rights and gay marriage. There are many such believers. Biblical believers are not stuck with what Bonhoeffer called, critically, “a law of faith.”⁵⁴⁷ Dietrich Bonhoeffer was just this kind of Christian.

Naturally, there must be some limit to this approach to the interpretation of the Bible. Surely one could not be a Jew without believing in God or a Christian without believing in Christ. In the same letter, Bonhoeffer called “Christ’s incarnation” a

⁵⁴² In a letter to Eberhard Bethge dated April 30, 1944, Bonhoeffer attributed this way of interpreting and understanding the Bible to Karl Barth. BONHOEFFER, *supra* note 534, at 278–82. Bonhoeffer’s partial criticism of Barth — he also praised him — is way outside my scope here, but I feel I have to add that I do not see this in Karl Barth.

⁵⁴³ *Id.* at 285.

⁵⁴⁴ *Id.* at 286 (emphasis in original).

⁵⁴⁵ *Id.*

⁵⁴⁶ See Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 561 (1998).

⁵⁴⁷ BONHOEFFER, *supra* note 534, at 286.

“gift for us.”⁵⁴⁸ He, of course, was not questioning the essential teaching of the Gospel. That recognition leads to another question — can one be a Biblical believer without being a Jew or a Christian?

To consider this question, let me take myself as an example of what could be called the biblically-oriented secularist. This secularist does not believe in God, meaning he does not believe that there is a separate being, a person, not a part of the observable universe, who has plans and speaks and wills.⁵⁴⁹ This places this secularist outside the Bible, which seems to begin with just the opposite understanding.⁵⁵⁰

We will return later to the question of God, for obviously there are many ways to think about God. Whether one is a believer in God is not always clear.

What about the other beliefs of this secular voter? He believes that scientific explanations of reality are in general accurate and full accounts. But scientific accounts leave out all depth and meaning. This voter does not believe in any continuation of his existence after death, either in Heaven or resurrection, but he is part of the eternal stream of life all the same. He does not believe that the world will ever be radically different from the way it is now. But he feels that it can and will become a much better place. He believes that the creation of the universe was, if not an accident, still not part of what could be called a “plan.” Yet, what happens in it is of incomparable importance.

Perhaps a person with these beliefs should not be called a Jew or a Christian. That must be decided by others — by Jews and Christians. But could such a person still be a believer in the biblical understanding of faith?

N.T. Wright, in his magisterial, continuing work describing the early Church and the origins of Christianity,⁵⁵¹ makes the point that the Old Testament does not plainly include doctrines like life after death, resurrection, and end-of-world-salvation, although there are hints and clues about such things.⁵⁵² The Old Testament and

⁵⁴⁸ *Id.*

⁵⁴⁹ Of course, many theologians have taught that God is not a being. *See, e.g.,* Arthur J. Jacobson & Steven B. Smith, *Introduction: Spinoza's Law*, 25 CARDOZO L. REV. 497, 499 (2003) (discussing the views of Baruch Spinoza).

⁵⁵⁰ *See Genesis* 1:3 (“And God said, ‘Let there be light’; and there was light.”).

⁵⁵¹ N.T. WRIGHT, *CHRISTIAN ORIGINS AND THE QUESTION OF GOD*, 3 Vols. (1992–2003).

⁵⁵² Life after death is discussed in Wright’s third volume, *The Resurrection of the Son of God*. 3 WRIGHT, *supra* note 551, at 90 (“The minimal sort of ‘life’ that the shades had in Sheol, or in the grave, approximated more to sleep than to anything else known by the living.”). Resurrection is also discussed in this volume. *See id.* at 85 (“[W]ithin the [Jewish] Bible itself, the hope of resurrection makes rare appearances, so rare that some have considered them marginal.”). End of the world salvation is discussed in Wright’s second volume, *Jesus and the Victory of God*. *See* 2 WRIGHT, *supra* note 551.

It is time . . . to reject the old idea that Jesus expected the end of the space-time universe. . . . Jesus’ warnings about imminent judgment were intended to be taken as denoting (what we would call) socio-political events, *seen as the climactic moment in Israel’s history*, and,

particularly the Pentateuch, is concerned with the working out of God's purpose in history — the Hebrews becoming a people, their enslavement, their liberation, the inheritance of the land, and the creation of a holy way of life in that land.⁵⁵³ There is no eschatological end of history in this understanding.⁵⁵⁴ The rejection of some other kind of existence for humankind — the insistence that this life is really all there is for us — does not exclude one from biblical commitment. So, with the obvious exception of non-belief in God, nothing in the above list of beliefs disqualifies this secular voter from considering himself a believer and trying to act accordingly.

Let me now add more strokes to this portrait of the secular voter. This person also believes that the good has real weight in history — indeed is sovereign in history — and that the world has a tilt in the direction of the good. He believes that this weight is not attributable to the will of human beings. He believes that there is a difference between right and wrong, between beautiful and ugly, between true and false, and that these differences are not matters of human judgment but are real and reliable. He believes that there is significance to the attempt by people to live by love and compassion and that in some way, the whole universe upholds the righteous who live this path. He believes that the holy has power over everything demeaning, narrow and small. He believes that societies that protect the poor and the vulnerable flourish and that those that do not fail. He believes that slaves are destined to be free. In short, he believes in the blessing and the curse — and he chooses life for himself and his people.⁵⁵⁵

in consequence, as constituting a summons to *national* repentance. In this light, Jesus appears as a successor to Jeremiah and his like

Id. at 96–97 (emphasis in original).

⁵⁵³ See WALTER BRUEGGEMAN, AN INTRODUCTION TO THE OLD TESTAMENT: THE CANON AND CHRISTIAN IMAGINATION 43–100 (2003).

⁵⁵⁴ Yet, putting it that way is misleading as well. As Walter Brueggemann wrote of the Old Testament:

The hope of Israel is in three dimensions. First, there continued to be alive in Israel hope for a politically serious, Davidic (messianic) recovery Second, Israel's vigorous hope moved beyond political realism in a transcendent direction, issuing in apocalyptic-visionary expectation of world scope. . . . Third, in a less differentiated way, Israel continued to hope that, in Yahweh's own time and way, the world would be brought right by Yahweh. This latter sort of hope is not messianic (=Davidic), but neither is it apocalyptic.

BRUEGGEMANN, *supra* note 192, at 446.

⁵⁵⁵ Cf. *Deuteronomy* 30:19. I use the word "tilt" because I am trying to capture the quality of inexorability but also of indeterminacy. The Hebrews were slaves in Egypt 400 years before liberation. *Genesis* 15:13. The same was true in America. It follows that an individual human life may or may not experience God's justice. This is the problem of Job. The Hebrews were well aware of these questions, which inevitably arise when we think of God as too much like us.

With that last reference I seem to have smuggled religion back in after all. But there is no smuggling here. These are the very understandings and commitments that the Hebrews introduced to the world. This is the Bible. Brueggemann described the Old Testament understanding of reality as “a moral shape to the public process . . . a hidden cunning in the historical process that is capable of surprise.”⁵⁵⁶

This litany of belief suggests three conclusions. First, it is not easy to be a non-believer. There cannot be very many. Most Americans do not accept a purely material interpretation of history. Nor do most Americans believe that the world is chaos, not governed at all.

Second, although it is also no mean feat to be a believer, it seems to me that most Americans are. Most Americans believe, for example, that injustice is knowable and wrong and that there are social and political consequences that attach to its practice. Most Americans believe that America is to follow the path of justice and peace and that if we do not, we will suffer as a nation. In other words, most Americans, even those who call themselves secular, believe that society is judged by — that just means “subject to” — transcendent norms. Such people are not secular. They are believers within the biblical tradition.

Third, these beliefs are not matters of “ethics.” By ethics, we usually mean what people *should* do. But, in contrast, I am describing what we, as a nation, *must* do if we are to avoid the curse and receive the blessing. It follows, of course, that we must get the truth of history right. If homosexuality is wrong, and we permit it, even encourage it, our nation will be judged. On the other hand, if we behave unjustly to homosexuals, we also will be judged. The stakes of politics are just as ultimate as the religious right says. It does not follow that they are right in their conclusions. They have not entertained the possibility of sin in their confidence for one moment.

Ethics are universal and modest. Biblical religion is neither of these things. Mark Lilla has argued that liberal Protestantism collapsed after the 1950s, leading to a more “ecstatic, literalist and credulous” Protestantism — a “dumbing down of American religion” that would have horrified the framers of the Constitution.⁵⁵⁷ In typical liberal/secular fashion, his proposed remedy is that “citizens should probably be more vigilant about policing the public square,” not less so,⁵⁵⁸ as I propose in this article.

But Lilla acknowledged that liberal biblical religion collapses for a reason. People “yearn[] for a more dynamic and critical faith, one that would stand in judgment over the modern world. . . . an authentic experience with the divine”⁵⁵⁹

This yearning cannot be cured by a half-measure quarantine of the public square. This hunger for meaning is a deep religious/political happening that must

⁵⁵⁶ See BRUEGGEMAN, *supra* note 192, at 113.

⁵⁵⁷ Mark Lilla, *Church Meets State*, N.Y. TIMES, May 5, 2005, § 7 (Book Review), at 39.

⁵⁵⁸ *Id.*

⁵⁵⁹ *Id.*

be expressed but cannot be expressed through flat, thin, liberal politics. Rawls is not the answer. Surely that is clear by now. This yearning requires religious democracy based on openness to the radical message of the Bible.

We see the nature of biblical belief in the story of Abraham⁵⁶⁰ in the book of Genesis. This story is foundational for Jews and Christians as well as for Muslims as the story is retold in the Quran. The story of Abraham does not contain most of the elements that the secularist cannot believe. Abraham is not promised life after death. He is not promised resurrection. He is not promised salvation at the end of the world. Instead, he is promised that his descendants will be a blessing to all the peoples of the world, in what sounds like the same world, but in a far better condition.⁵⁶¹

The point of the story of Abraham is not that there is a God who speaks in sentences. The point is this: Abraham receives a call.⁵⁶² He does not know where or in what particular he is to be great, but he is told that the way to be great is to be a blessing to the world. The difference between Abraham and us is not that he receives a call and that we do not. We all know we have received a call, if we are honest with ourselves. Nor is the point that Abraham is religious and we are secular. Abraham would no doubt have been regarded as anti-religious by the people of his time.⁵⁶³ The point of the Abraham story is that he responds: "So Abram went, as the Lord had told him . . ."⁵⁶⁴ He did not know where he was going.

Religious language in the public square actually represents the beliefs that I have been describing. Justice O'Connor should not call all this "confidence in the future."⁵⁶⁵ Indeed, we might have confidence that we are being judged and found wanting — that the future will be dark. We may find that global warming, for example, is God's judgment for our selfishness and greed and stupidity.

What is being expressed here — in the above paragraphs — is closer to what Neuhaus called theonomy — accountability to transcendent truth⁵⁶⁶ — than to confidence in the future. Theonomy is accepted by many who call themselves secular but are not. The reason we cannot express these ideas without religious language is that they are religious ideas. That is why Robert Bellah's understanding of American

⁵⁶⁰ Abraham is known as Abram at the beginning of the story. *Genesis* 12:1.

⁵⁶¹ *Genesis* 12:1–3.

⁵⁶² *Genesis* 12:1 ("Go from your country and your kindred and your father's house to the land that I will show you.").

⁵⁶³ Similarly, Christians were regarded as atheists in the first century. See Daveed Gartenstein-Ross, *No Other Gods Before Me: Spheres of Influence in the Relationship Between Christianity and Islam*, 33 *DENV. J. INT'L L. & POL'Y* 223, 264 n.262 (2005).

⁵⁶⁴ *Genesis* 12:4.

⁵⁶⁵ *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring).

⁵⁶⁶ See *supra* notes 387–90 and accompanying text.

civil religion was so genuinely religious.⁵⁶⁷ We really are a religious people. When we say the name, God, we are saying these things.⁵⁶⁸

C. The Political Consequences of Belief

The question in American political life is no longer religion or not religion. We have religion now in the public square. We are a religious democracy. The question is, what kind of religious democracy are we to be? Are we going to consider as religion only what is currently denominated such by members of the Republican Party coalition? That would mean a religious democracy primarily concerned with abortion and gay rights and relatively unconcerned with issues of peace and economic justice. How genuine and radical will the religion in the American public square be?

Religious democracy is too new to give answers to these questions. But I would like to sketch very briefly how radical a challenge authentic religious democracy could become to the status quo in America. Authentic religious democracy yields a vantage point for judgment of the modern world. It is not certain that anything else does.

1. Truth Versus Relativism

Public life in America is now filled with spin. It is easy to imagine that everything is a manipulable matter of opinion. The Bible is an antidote to that kind of thinking. The Bible insists that there is such a thing as truth.⁵⁶⁹

Nihilism, relativism, and skepticism are surprisingly influential in American law. This is why a conservative can write that Chief Justice Rehnquist

does not, in the least, believe in the principles of the Declaration of Independence as either myth or as reality. He does not believe

⁵⁶⁷ See *supra* notes 178–84 and accompanying text.

⁵⁶⁸ Justice Breyer's swing concurrence in *Van Orden* demonstrated that he does not understand the difference between theonomy and ethics. See *Van Orden v. Perry*, 125 S. Ct. 2854, 2868 (2005) (Breyer, J., concurring). Justice Breyer wrote approvingly that "[i]n certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct)." *Id.* at 2869. But the point of the Ten Commandments, and what renders all of their content religious, is the understanding that there are consequences, that is, punishments, for their violation. This is why they are not known as the "Ten Suggestions."

⁵⁶⁹ *Deuteronomy* 32:4 ("He is the Rock, his work is perfect; for all his ways are justice; a God of truth and without iniquity, just and right is he."). The Hebrew phrase "Ayl Emoonah" is not always translated as "a God of Truth." In the Revised Standard Version of the Bible, the phrase is translated "A God of faithfulness." *Deuteronomy* 32:4 (Revised Standard Version). But, of course, God's faithfulness is truth. God keeps faith with his promises in history.

that we can say that despotism is intrinsically evil. Nor does he believe that we can say that free government and the rule of law are intrinsically good.⁵⁷⁰

Justice Scalia shares the same intellectual heritage as does the late Chief Justice Rehnquist. Justice Scalia criticizes substantive due process, not on the ground that it led to the deaths of innocents in abortion, but that it lacks a “guiding principle.”⁵⁷¹ Because there is no guiding principle, any court applying substantive due process, in the end, “will, by God, write it the way the majority wants.”⁵⁷²

Justice Scalia does not sense the irony in this formulation. Why wouldn’t the guiding principle of substantive due process, or any other substantive morality, be “by God,” that is, that which is true is that which is in accordance with God’s will?

Justice Scalia would respond that there is “no chance of agreement”⁵⁷³ concerning God’s will. That is so in the present. But it will not necessarily be so as history plays out. Jefferson said that the slaves were destined to be free.⁵⁷⁴ It turns out he was right. There was a guiding principle. Many people just mistook it. And, even though the South did not agree, that lack of agreement did not change the guiding principle at all. The eradication of slavery was not subject to human will any more than is the reality of global warming. Not everything is spin.

I have been criticizing conservatives here, but I could just as well have accused a liberal like John Hart Ely of the same skeptical world view.⁵⁷⁵ Ely wrote of substantive due process: “[O]ur society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles, at least not a set that could plausibly serve to overturn the decisions of our elected representatives.”⁵⁷⁶

Ely’s viewpoint is not something a defender of *Roe v. Wade*⁵⁷⁷ could possibly agree with. For such a defender, the right of choice should be a matter of truth, not just a matter of opinion. Yet, defenders of *Roe* have not squarely faced this issue. Nor did Justice Blackmun’s original opinion in *Roe*, which attempted to avoid all substantive moral judgments through the interpretive strategies of original intent and textualism.⁵⁷⁸ The fetus was not a person for purposes of due process because fetuses

⁵⁷⁰ HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION 84 (1994).

⁵⁷¹ ANTONIN SCALIA, A MATTER OF INTERPRETATION 45 (1997).

⁵⁷² *Id.* at 47.

⁵⁷³ *Id.* at 45.

⁵⁷⁴ See *supra* notes 211–12 and accompanying text.

⁵⁷⁵ See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

⁵⁷⁶ *Id.* at 54.

⁵⁷⁷ 410 U.S. 113 (1973).

⁵⁷⁸ See generally *id.* at 113–67.

were not so considered at the time the Constitution and the Fourteenth Amendment were adopted.⁵⁷⁹

Justice Blackmun did not want to decide whether the fetus had a right to life. The question for him was not whether the fetus really is a person, but only whether the fetus has been so regarded.⁵⁸⁰ Justice Blackmun did not want to conclude that rights are real. But if there really are such rights, we must decide whether the fetus is a human being with the rights of a human being. If the fetus is a human being, abortion is homicide. What happens to a society that lives by homicide?

The Bible does not take a position on abortion. Jewish law, which is based, of course, on the Old Testament, was not strict about abortion⁵⁸¹ and did not consider it to be homicide.⁵⁸² But the Bible certainly has an understanding of the value of human life. Human life is precious, much more so than our possessions, including our bodies.

Left and right in American politics have switched sides over time concerning the powers of the judiciary.⁵⁸³ Religious democracy is consistent with either a pro- or anti-substantive due process or fundamental rights position. Whether judges can be trusted to protect human rights and whether they should be trusted to do so is a matter of political judgment.⁵⁸⁴ The fundamental question, though, is whether there is such a thing as a human right in the first place. Are there ways of life that are better and worse for people? Are there absolute needs that every human being has a right to have fulfilled? The commitment that there are such needs and rights can no

⁵⁷⁹ *Id.* at 157–58.

⁵⁸⁰ Justice Blackmun even called Texas's view in defending the statute at issue in *Roe* "one theory of life." *Id.* at 162.

⁵⁸¹ See Susan E. Looper-Friedman, "Keep Your Hands Off My Body": Abortion Regulation and the Takings Clause, 29 NEW ENG. L. REV. 253, 268 n.79 (1995) ("[A]ccording to Jewish law there are circumstances when abortion is not only permitted, but may be required to save the life or health of the mother or the well-being of her living children.").

⁵⁸² Rabbi Elliot N. Dorff, *Jewish Theological and Moral Reflections on Genetic Screening: The Case of BRCA1*, 7 HEALTH MATRIX 65, 73 (1997) ("Judaism does not see abortion as murder, as Catholicism does, because biblical and rabbinic sources understand the process of gestation developmentally.").

⁵⁸³ See generally Michael Wells, *Rhetoric and Reality in the Law of Federal Courts: Professor Fallon's Faulty Premise*, 6 CONST. COMMENT. 367 (1989) (arguing in the substantive due process era, business interests favored federal court power and now liberals do).

⁵⁸⁴ Even if there are such rights, judges might not be the proper actors to defend them. See *Cruzan v. Dir., Mo. Dep't. of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

[T]he point at which life becomes 'worthless,' and the point at which the means necessary to preserve it become 'extraordinary' or 'inappropriate,' are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory

Id.

longer be taken for granted or surrendered without thought. It is a matter that must be addressed.

American society has surrendered truth. That is the hidden secret of advertising gurus and political consultants. Religious democracy could help us find our way again.

2. Human Solidarity Versus the Market

At some point in history, biblical religion in America became supportive of capitalism. This makes no sense because Jesus was as far from supporting economic competition as one could be. Not only did Jesus doubt that the rich have a place in the kingdom of God,⁵⁸⁵ but He also strongly suggested in several places that attachment to possessions was antithetical to His way of life.⁵⁸⁶ If Jesus were taken seriously, our economic system, based as it is on increasing material consumption, would grind to a halt. As the gorilla teacher says in *Ishmael*, people assume that Jesus could not have meant what he said.⁵⁸⁷ It is a mystery how one can be a capitalist and a Christian.

The problem with capitalism from the Bible's perspective is not just greed and hyperconsumption. The very logic of winners and losers — the heart of capitalist competition — is the problem. Brueggemann illustrates this point in his interpretation of Psalm 72.⁵⁸⁸ The Psalm says of the king:

For he delivers the needy when he calls,
the poor and him who has no helper.
He has pity on the weak and the needy,

⁵⁸⁵ *Mark* 10:25 ("It is easier for a camel to go through the eye of a needle than for a rich man to enter the kingdom of God.").

⁵⁸⁶ *Matthew* 6:19–21.

Do not lay up for yourselves treasures on earth, where moth and rust consume and where thieves break in and steal, but lay up for yourselves treasures in heaven, where neither moth nor rust consumes and where thieves do not break in and steal. For where your treasure is, there will be your heart also.

Id. See also *Mark* 10:17–22.

In the book of Mark, the rich man, loved by Jesus and invited to follow him, does not because it would have entailed giving away his possessions. In words that should haunt any believer with more possessions than a simple life would justify (which would mean almost all of us) the story ends: "At that saying his countenance fell, and he went away sorrowful; for he had great possessions." *Mark* 10:22.

⁵⁸⁷ QUINN, *supra* note 165, at 232 ("Even the most fundamental of the fundamentalists plug their ears when Jesus starts talking about birds of the air and lilies of the field. They know damn well he's just yarning, just making pretty speeches.") (referring to *Matthew* 6:26).

⁵⁸⁸ BRUEGGEMAN, *supra* note 192, at 423–24.

and saves the lives of the needy.
 From oppression and violence he redeems their life;
 and precious is their blood in his sight.⁵⁸⁹

Brueggemann interprets this as follows: "The public good requires that active social power must be mobilized to enhance the entire community and to resist personal aggrandizement of some at the expense of others."⁵⁹⁰

Capitalism requires as its norm the personal aggrandizement of some at the expense of others. It is true that capitalism promises that, in the end, all will be benefited from the competition, including the losers. Nevertheless, there still are losers, so the aggrandizement is still at the expense of others.⁵⁹¹ This is not an aspect of capitalism. This is its heart.

Even worse than the rivalry in the heart of capitalism is the pace of technological capitalism. Religious conservatives now argue that the Ten Commandments should be permitted to be placed on public buildings — the issue in a general sense in *Van Orden*⁵⁹² and *McCreary*.⁵⁹³ But have these conservatives read the Ten Commandments? Have they seen the conflict with the market that they so praise? One of the Ten Commandments requires that the sabbath day be set aside from work.⁵⁹⁴ In contrast, the creed of technological capitalism is 24/7/365.⁵⁹⁵ Americans are

⁵⁸⁹ *Psalm* 72:12–14.

⁵⁹⁰ BRUEGGEMANN, *supra* note 192, at 424. Brueggemann did not single out these particular verses, but these verses give a flavor of the thrust of the whole Psalm. *Id.* at 423–24.

⁵⁹¹ Actually I am giving capitalism too much credit. Capitalism usually leaves much of the winnings where they fall. See Ezra Rosser, *This Land is My Land, This Land is Your Land: Markets and Institutions for Economic Development on Native American Land*, 47 ARIZ. L. REV. 245, 293 (2005).

The Kaldor-Hicks [*sic*] criterion, also called "potential Pareto improvement," slightly modifies Pareto's original idea by saying that if the change resulted in "winners" and "losers," and the gain to the "winners" was enough to pay the "losers" equal to the loss, then the change is welfare improving. Significantly, this Kalder-Hicks improvement is said to hold even where the "winners" do not actually pay off the "losers," so long as the winners could have done so.

Id. (footnotes omitted).

⁵⁹² *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

⁵⁹³ *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005).

⁵⁹⁴ *Exodus* 20:9–10 ("Six days shall you labor, and do all your work; but the seventh day is a sabbath to the LORD your God; in it you shall not do any work . . .").

⁵⁹⁵ The cheerfulness of this tyranny would be amusing if the matter were not so serious. Consider a typical announcement from the State Bar of Montana:

It's hard to imagine how we'd get along today without our computers, but when they misbehave it's too often a real nightmare. We've all been there. Things happen, and computer problems can cripple productivity and slow billing to a crawl.

Maybe when manufacturers claim 'Plug and Play' what they mean

constantly told that we must work harder, better, faster. Now, as Thomas Friedman warned us in his book, *The World is Flat*,⁵⁹⁶ Americans must work even harder because of the economic challenge represented by China and India.⁵⁹⁷

Capitalism in its technological phase is a treadmill. We have been made slaves, not different essentially from the slaves of Egypt.⁵⁹⁸ One of the core teachings of the Bible is that human beings are not just beasts of burden. Where is the proposed constitutional amendment to reinstitute rest?⁵⁹⁹

Whenever criticisms like this are raised, we are told that all of the burdens of the modern market are inevitable. We are at the end of history. Human choice is beside the point. All the world will be forced to embrace representative government, judicial review, and most importantly, technological capitalism. This is precisely Friedman's point.⁶⁰⁰

is 'Plug and Pray.'

Getting computer help can be frustrating, time-consuming and prohibitively expensive.

The State Bar of Montana has partnered with Dial-a-Tech, an award-winning Computer Help Desk service we hope you'll find to be a valuable business tool and terrific family resource. Dial-a-Tech was originally launched is [sic] the mid-90s as the technical support backbone for CompUSA computer superstores nationwide. Dial-a-Tech is a registered trademark of Telvista Inc.

... How do SBM members get help? Help is available 24/7/365 including holidays via toll-free phone; email; and live chat.

New Benefit Helps State Bar Members Get the Most from Technology, MONT. LAW., Nov. 30, 2004, at 14. I am sure this is a very good benefit. But the implication is, unmistakably, that lawyers in Montana are, and ought to be, working and billing, "24/7/365, including holidays." *Id.*

⁵⁹⁶ THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005).

⁵⁹⁷ *Id.* at 260–65.

⁵⁹⁸ See *supra* note 555.

⁵⁹⁹ There have been such proposals and their biblical resonance has been strongly noted. *Tikkun Magazine*, some years ago, for example, was championing just this cause. See, e.g., Jeremy Rifkin, *Hi-tech Populism in the Information Age*, *TIKKUN*, May/June 1995, at 44. There used to be blue laws in many states prohibiting work on Sundays (the Christian Sabbath). See generally Andrew J. King, *Sunday Law in the Nineteenth Century*, 64 *ALB. L. REV.* 675 (2000). They passed away out of popular indifference, difficulty of enforcement, and judicial invalidation. See, e.g., *Kroger Co. v. O'Hara Twp.*, 392 A.2d 266 (Pa. 1978) (invalidating Sunday Trading Laws under State Constitution). See also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *SUFFOLK U. L. REV.* 881, 897 (1983) (observing that Sunday blue laws were commonly unenforced before they were repealed by legislatures).

⁶⁰⁰ See generally FRIEDMAN, *supra* note 596. It is also Fareed Zakaria's point in reviewing Friedman's book. Fareed Zakaria, *The Wealth of Yet More Nations*, *N.Y. TIMES*, May 1, 2005, § 7 (Book Review), at 10. Zakaria quoted Friedman's doubts about whether the emerging economic power of India can be good for the young people of the United States and adds:

The Bible rejects such determinism and fatalism.⁶⁰¹ As Brueggemann said, the Bible insists that at the heart of history is the capacity for surprise.⁶⁰² Humans are ultimately not permitted to enslave themselves permanently.⁶⁰³

3. Teshuvah Versus Imperialism

I do not want to hear another politician say that the American people are good.⁶⁰⁴ Jesus's words echo in my head: "Why do you call me good? No one is good but God alone."⁶⁰⁵

The American people are not good. Maybe we are no worse than most, but that is all that can be said. We are the people of slavery. We are the people who stole this land. We are the people who expanded into Hawaii, Cuba, and the Philippines. We are the people who intervened in the Americas and elsewhere. We are the people who perfected firestorms as a military tactic. We are the only people who ever used an atomic bomb. These are just some of our crimes. No, we are not good.

Neuhaus wrote that democracy requires a sense of human sin.⁶⁰⁶ So, as we have lost the sense of our own sin, we have lost one of the foundations of democratic life.

When you think you are good, you may end up worse than simply not good. There may be no limit to the evil you can do. You might begin to suspend judgment on your own actions because you know you are good. How could a good people do something really evil?

Strangely, the converse is also true. Without a sense of human sin, critics end up supposing that America is unique — not in this case uniquely good, but uniquely

[Friedman] ends up, wisely, understanding that there's no way to stop the wave. You cannot switch off these forces except at great cost to your own economic well-being. Over the last century, those countries that tried to preserve their systems, jobs, culture or traditions by keeping the rest of the world out all stagnated. Those that opened themselves up to the world prospered.

Id. at 11. Sorry about your culture and traditions. I'm sure they were lovely.

⁶⁰¹ See BRUEGGEMAN, *supra* note 192, at 113.

⁶⁰² *Id.*

⁶⁰³ See *id.* at 113 n.132.

⁶⁰⁴ See, e.g., Independence Day, 2004, Office of the White House Press Secretary (July 2, 2004), available at <http://www.whitehouse.gov/news/releases/2004/07/20040702-8.html> (quoting President Bush as saying, "We are a strong, decent, and good-hearted country."); see also News Conference with Rep. Duncan Hunter, Federal News Service, June 13, 2005, available in LEXIS, News Library, Federal News Service File (commenting on allegations of abuse of prisoners at Guantanamo Bay and stating, "The American people are good people.").

⁶⁰⁵ Mark 10:18.

⁶⁰⁶ NEUHAUS, *supra* note 63, at 53 (citing Reinhold Niebuhr) ("Democratic discourse . . . depends . . . upon our agreement about sin — our own sin, and thus our own fallibility, as well as the sin and fallibility of others. Democratic discourse requires that no party fashion itself as the moral majority in order to imply that others belong to an immoral minority.").

evil. That is just as absurd a starting point as the presumption that the American people are good. America's adversaries certainly are not good either. As Barth put it, neither the revolutionary nor the conservative are justified.⁶⁰⁷ Our political life "cannot be the scene of the conflict between the Kingdom of God and Anti-Christ."⁶⁰⁸

The Bible does not share our illusions about ourselves. The Hebrew nation is not portrayed in the Bible as good. But the Hebrews are portrayed as capable of the practice of teshuvah.⁶⁰⁹

Teshuvah means repentance.⁶¹⁰ It is quite different from the notion of an apology, as if we could apologize for the crime of slavery or for lynchings as we apologize for arriving late to a movie.⁶¹¹ A politics of teshuvah would be open to doubt of our own motives. It would try to look at ourselves as others in the world see us. It would not paralyze us any more than teshuvah now paralyzes the religious person. But teshuvah does render all human action ambiguous in moral terms. That is just what America needs.

⁶⁰⁷ KARL BARTH, *THE EPISTLE TO THE ROMANS* 489 (Edwyn C. Hoskyns trans., Oxford Univ. Press 6th ed. 1977) (1933) [hereinafter BARTH, *THE EPISTLE*].

⁶⁰⁸ *Id.*

⁶⁰⁹ The people are told to repent. *Ezekiel* 14:6 ("Therefore say to the house of Israel, Thus says the Lord GOD: Repent and turn away from your idols; and turn your faces from all your abominations."). Not only the Hebrews can repent, but so also can pagans, and even God.

Then tidings reached the king of Nin'veh, and he arose from his throne, removed his robe, and covered himself with sackcloth, and sat in ashes. And he made proclamation and published through Nin'veh, "By the decree of the king and his nobles: Let neither man nor beast, herd nor flock should taste anything; let them not feed, or drink water, but let man and beast be covered with sackcloth, and let them cry mightily to God; yea, let every one turn from his evil way and from the violence which is in his hands. Who knows, God may yet repent and turn from his fierce anger, so that we perish not?" When God saw what they did, how they turned from their evil way, God repented of the evil which he had said he would do to them; and he did not do it.

Jonah 3:6–10.

⁶¹⁰ See generally Samuel J. Levine, *Teshuva: A Look at Repentance, Forgiveness, and Atonement in Jewish Law and Philosophy and American Legal Thought*, 27 *FORDHAM URB. L.J.* 1677 (2000).

⁶¹¹ The United States Senate offered a formal apology for failing to pass an anti-lynching bill when federal action was needed, but Congress never has passed an apology for slavery, despite the efforts of Dayton Representative Tony Hall in the 1990s. See Opinion, *Lynching Wasn't Work of a Few*, DAYTON DAILY NEWS, June 20, 2005, at A8, available at 2005 WLNR 9868411.

Current religious democracy tends to identify America as the agent of God's will. That should not surprise us since religion and blasphemy are routinely linked. What is needed in America is not the banishment of religion but a deeper appreciation of what religion can mean.

4. Freedom Versus Slavery

Passover is the Jewish holiday that celebrates the liberation of the Hebrew slaves from Egypt highlighted by a ceremonial meal called the Seder. Jews like to say at the Seder table that there are many kinds of slavery.⁶¹² It is a cliché. But, like most clichés, it is true. What the Bible ultimately promises is freedom from all slavery. What Jesus proclaims in his first public utterance is "to set at liberty those who are oppressed."⁶¹³ Freedom is the Bible's major theme.

In an early work, Walter Brueggemann described the new way of life that Moses brought, in contrast to the Egyptian paradigm. This new prophetic consciousness mixed religion and politics: "a religion of God's freedom as alternative to the static imperial religion of order and triumph and a politics of justice and compassion as alternative to the imperial politics of oppression."⁶¹⁴ Freedom as the ground of justice.

The secularist does not know any of this. The secular voter thinks of the Bible as oppressive — that it is filled with rules that must not be broken, some of which are unjust. The Bible is filled with rules, and some of them are unjust. That is why the Bible is not to be regarded as a rulebook.

But the secularist who says this about the Bible is, as Jesus said, pointing to the speck in his brother's eye and overlooking the log in his own.⁶¹⁵ Perhaps some parts of the Bible are oppressive, but who is forced to live in accordance with all of its teachings? On the other hand, what we can be certain about is the oppressive, terribly oppressive in many ways, nature of this modern world that men and women have made. The oppression of the modern world is causing enormous suffering. The Bible is the best starting point for us to understand the oppression to which we are now subject and, perhaps, defeat it. Or, if we cannot defeat it, at least by using the Bible's vantage point, we might challenge it.

The Bible is a source of hope. The Bible sees the world as good.⁶¹⁶ It regards injustice and suffering as illegitimate — almost inconceivable. The Bible trusts the universe. It is open to all things.

⁶¹² See, e.g., Judy Shanks, Shabbat Shalom, Temple Isaiah, Apr. 14, 2005, at <http://www.temple-isaiah.org/clergy/55-5-67.shtml> ("We reenact the Exodus precisely to feel, intensely, the pain of the many kinds of slavery that exist in our world . . .").

⁶¹³ *Luke* 4:18 (quoting Jesus as reading from the Prophet Isaiah in *Isaiah* 61:1–2).

⁶¹⁴ WALTER BRUEGGEMANN, *THE PROPHETIC IMAGINATION* 18 (1978).

⁶¹⁵ *Matthew* 7:5 ("You hypocrite, first take the log out of your own eye, and then you will see clearly to take the speck out of your brother's eye.").

⁶¹⁶ *Genesis* 1:31 ("And God saw everything that he had made, and behold, it was very good.").

This openness of the Bible — this freedom — may sound strange, since some religious conservatives want to banish the teaching of evolution. Certainly, it is not biblical to imagine that God cannot work through evolution, but there is a sense in which evolution, understood as a complete explanation of all life, must be false. And the believer is right to say so, for no such reductionist explanation of reality is possible.⁶¹⁷

As Brueggemann said, the Bible promises that no human project can be absolute.⁶¹⁸ So history cannot be at an end. Current political, legal, and economic organization cannot be the last word. The Bible, not the Constitution or the courts, is our guarantee of freedom.

D. What About God?

I said earlier that I would return to the question of God. The secular voter does not believe in God. This would seem an insurmountable barrier to the embrace of religious democracy that I have been promoting.

Obviously, I am not going to try here to say who or what God is. Karl Barth stated, simply, that “[e]very theological statement is an inadequate expression of its object.”⁶¹⁹ Negative theology⁶²⁰ and process theology⁶²¹ are attempts to talk about God without endorsing the beingness of God. Paul Tillich wrote of “the God above the God of theism.”⁶²² Suffice it to say that the secularist who believes everything else I have outlined above is not outside religious democracy because he asserts that God does not exist. Karl Barth, as usual, anticipated such a Jonah-like attempt to flee from God:

⁶¹⁷ Science seems to be catching up to the idea that the sum is, if not greater, at least not exactly the same as its parts added together. See ROBERT B. LAUGHLIN, *A DIFFERENT UNIVERSE: REINVENTING PHYSICS FROM THE BOTTOM DOWN* (2005) (recognizing emergent properties, which appear only as large agglomerations of matter).

⁶¹⁸ See *supra* text accompanying note 192.

⁶¹⁹ KARL BARTH, *ANSELM: FIDES QUÆRENS INTELLECTUM* [FAITH IN SEARCH OF UNDERSTANDING] 29 (Ian W. Robertson trans., Meridian Books 1962) (1958).

⁶²⁰ “Negative theology — also known as the *Via Negativa* (Latin for “Negative Way”) and Apophatic theology — is a theology that attempts to describe God by negation, to speak of God in terms of what may not be said about God. In brief, the attempt is to gain and express knowledge of God by describing what God is *not* . . . , rather than by describing what God is.” Wikipedia, *Negative Theology*, at http://en.wikipedia.org/wiki/Negative_Theology (Last visited Sept. 11, 2005) (emphasis in original).

⁶²¹ See generally C. ROBERT MESLE AND JOHN B. COBB, JR., *PROCESS THEOLOGY: A BASIC INTRODUCTION* (1994).

⁶²² PAUL TILlich, *SYSTEMATIC THEOLOGY* 12 (1957) (referring to another of his books, *THE COURAGE TO BE* (1952)).

If you understand the connection between the person of Jesus and your socialist convictions, and if you now want to arrange your life so that it corresponds to this connection, then that does not at all mean you have to "believe" or accept this, that, and any other thing. . . . And as an atheist, a materialist, and a Darwinist, one can be a genuine follower and disciple of Jesus.⁶²³

As Jesus said directly, "Not everyone who says to me 'Lord, Lord,' shall enter the kingdom of heaven, but he who does the will of my Father"⁶²⁴ The Bible helps us to see what that will is. It does not attempt to convince us that there is someone doing the willing. Disagreement about that is no excuse for failure to act, nor, more importantly, is it an excuse to scoff.

There is a book in the Old Testament that illustrates biblical belief for someone who does not believe in "God." It is the book of Esther, the only book in the Old Testament that does not contain the word God.⁶²⁵ In the book of Esther, a decree has been issued by the Persian King, at the behest of the high official Haman, ordering the deaths of all the Jews in the kingdom.⁶²⁶ Queen Esther, who is a Jew, though this was not widely known, is requested by her cousin Mordecai to intercede with the King on behalf of the Jews.⁶²⁷ She is afraid to do so because there is a penalty of death for an uninvited approach to the King, unless the King accepts the entry.⁶²⁸ Mordecai sends the following response to Esther: "[I]f you keep silence at such a time as this, relief and deliverance will rise for the Jews from another quarter, but you and your father's house will perish. And who knows whether you have not come to the kingdom for such a time as this?"⁶²⁹ Mordecai does not say, "God made you Queen for this reason." Rather, he asserts, simply, that she *is* Queen for just this moment.⁶³⁰ In other words, Esther's life has this certain shape. This is the moment for the fulfillment of the purpose of her life. This is the fulfillment of her destiny.

All meaning in human life comes from the perception that our lives have a meaningful shape. This is the sense I may have in my vocation, or in my art, or in going to war to end slavery.

Just as Esther's life has this shape, so history has this shape as a whole. This is Brueggemann's understanding of the Bible. There is a moral shape in history.⁶³¹ Who would want to deny that? Who, in denying that, would want to live out of that denial?

⁶²³ BARTH, *supra* note 414, at 22.

⁶²⁴ *Matthew* 7:21.

⁶²⁵ See Dreisbach, *supra* note 161, at 958.

⁶²⁶ See *Esther* 3:8–11.

⁶²⁷ See *Esther* 2:10, 4:8–9.

⁶²⁸ See *Esther* 4:10.

⁶²⁹ *Esther* 4:14.

⁶³⁰ *Id.* 4:13.

⁶³¹ See BRUEGGEMAN, *supra* note 192, at 113.

When the scientist asserts that evolution shows there is no design in the universe,⁶³² he is not speaking of the shape of his own life.⁶³³ He is not speaking of the history of science, and he certainly is not speaking of history itself.⁶³⁴

There is one more point about God in the Bible. The moral process in history is not indifferent to us. We are invited to participate. We are called. We are called by something that is more than other people. Esther is called by Mordecai,⁶³⁵ it is true, but the call goes deeper than that. In answering such a call, we are promised, if not a happy life, at least a life of significance. Karl Barth said this better than anyone else: "as that reality by which men know God, lay hold of Him, and cling to Him, as the Unknown, Hidden God, as the final 'Yes' in the final 'No' of all concrete, observable life."⁶³⁶ Perhaps we cannot say any more about God than that.

CONCLUSION

America is a religious democracy now. The secular consensus has ended. This change does not appear to be temporary. The change has centered in the actions of voters rather than governmental actors. Therefore, even if religious democracy were something the courts wanted to alter, they would be unable to do so.

Religious democracy, however, is not something we should wish to alter. It opens a depth of political life that secular politics cannot reach. For that reason, religious democracy might help America to become a better democracy.

Clearly, there are questions that religious democracy will have to answer. The most significant one is whether religious democracy can practice true pluralism at home and abroad. Can religious democracy protect non-believers and dissenting believers? This is a vital question, but it is not the greatest challenge facing religious democracy.

American political life is crippled today by a false dualism between religious voters and secular voters. This divide has led to a narrow expression of religion in America's public square. The challenge to religious democracy is not ultimately its relationship to our many religious traditions or even its relationship to secularism. The greatest challenge to religious democracy will be to bring about religious renewal in American political life.

⁶³² See DAWKINS, *supra* note 503.

⁶³³ Even though he may say he is. *Id.* at 6 ("Darwin made it possible to be an intellectually fulfilled atheist.").

⁶³⁴ See *id.*

⁶³⁵ *Esther* 4:8–9, 13–14.

⁶³⁶ BARTH, *THE EPISTLE*, *supra* note 607, at 493.