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RELIGIOUS ARGUMENTS IN PUBLIC POLITICAL DEBATE[†]

*Michael J. Perry**

If few Americans were religious believers, the issue of the proper role of religion in politics would probably be marginal to American politics, because religion would be marginal to American politics. But most Americans are religious believers. Indeed, the citizenry of the United States is one of the most religious—perhaps even the most religious—of the citizenries of the world's advanced industrial democracies. According to recent polling data, "[a]n overwhelming 95% of Americans profess belief in God";[1] moreover, "70% of American adults [are] members of a church or synagogue."[2] If there were, among the overwhelming majority of Americans who are religious believers, a consensus about most religious matters—including most

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† © 1996 Michael J. Perry. This Essay is drawn from a larger work, *Religion in Politics: Constitutional and Moral Perspectives*, that will be published by the Oxford University Press in 1997. The Author's stylistic and technical conventions have been preserved in this version.

* Howard J. Trienens Chair in Law at Northwestern University School of Law. For helpful discussion as I was writing the larger work from which this Essay is drawn, I am grateful to many friends and colleagues, especially Robert Audi, Thomas Berg, William Collinge, Daniel Conkle, Charles Curran, Franklin Gamwell, Kent Greenawalt, Stephen Gardbaum, Scott Idleman, Andrew Koppelman, William Kralovec, Daniel Morrissey, Mark Noll, John Rawls, Richard Saphire, David Smolin, Lawrence Solum, Laura Underkuffler, Howard Vogel, Gerry Whyte, and Ashley Woodiwiss. I am also grateful to have had the opportunity to discuss a draft of the larger work in several venues during the 1995 to 1996 academic year: Wheaton College, Illinois; the Northwestern University Center for the Humanities; the Saint Thomas University School of Law; the Cumberland School of Law of Samford University; the University of Colorado School of Law; the University of California at Davis School of Law; the University of San Diego School of Law; and the St. John's University School of Law. Finally, I am grateful to the Northwestern University law students who, in recent years, joined me in thinking about "Religion, Politics, and the Constitution." I am grateful to John Rawls for letting me see an advance copy of the new introduction to the paperback edition of *Political Liberalism*, which will be published in 1996.

1. Richard N. Ostling, *In So Many Gods We Trust*, TIME, Jan. 30, 1995, at 72, 72.

2. Book Note, *Religion and* Roe*: The Politics of Exclusion*, 108 HARV. L. REV. 495, 498 n.21 (1994) (reviewing ELIZABETH MENSCH & ALAN FREEMAN, THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE? (1993)); *cf.* Andrew Greeley, *The Persistence of Religion*, CROSS CURRENTS, Spring 1995, at 24.

religious-moral matters—the issue of the proper role of religion in politics would probably engage far fewer Americans than it does, because Americans who are religious believers would not have to fear being subjected to alien religious tenets. But there is, among Americans who are religious believers, a dissensus about many fundamental religious matters, including many fundamental religious-moral matters. Because the United States is *both* such a religious country *and* such a religiously pluralistic country (now more than ever), the issue of the proper role of religion in politics is anything but marginal to American politics. The proper role of religion in politics is a central, recurring issue in the politics of the United States.

In the larger work from which this Essay is drawn, I address a fundamental question about religion in politics: What role may religious arguments play, if any, either in public debate about what political choices to make or as a basis of political choice?[3] Here I focus solely on the question about the role religious arguments may play in public political debate. The controversy about the proper role of religious arguments in politics comprises two debates: a debate about the *constitutionally* proper role of religious arguments in politics and a related but distinct debate about their *morally* proper role.[4] According to the constitutional law of the United States, government may not "establish" religion. Given this "nonestablishment" norm, what role is it constitutionally proper (permissible) for religious arguments to play, if any, in public debate about what political choices to make?[5]

First, some clarifications.

- The political choices with which I am principally concerned in this Essay are those that ban or otherwise disfavor one or another sort of human conduct based on the

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3. I have pursued aspects of this inquiry before. *See* MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991) [hereinafter PERRY, LOVE AND POWER]. In the years since *Love and Power* was published, and partly in response to critical commentary on *Love and Power*, I have continued to think about the difficult problem of religion in politics. As it happens, my thinking has been a rethinking.

4. As a matter of political morality, secular arguments that one or another sort of human conduct is immoral, as distinct from religious arguments, are not, as such, a problematic basis of political choice. *See* Kent Greenawalt, *Legal Enforcement of Morality*, 85 J. CRIM. L. & CRIMINOLOGY 710 (1995).

5. I have presented and defended, elsewhere, a particular construal of the nonestablishment norm. *See* Michael J. Perry, *Religion, Politics, and the Constitution*, 5 J. CONTEMP. LEGAL ISSUES (forthcoming Summer 1996).

view that it is immoral for human beings (whether all human beings or some human beings) to engage in the conduct. A law banning abortion is a paradigmatic instance of the kind of political choice I have in mind; a law banning homosexual sexual conduct is another.

• The religious arguments with which I am principally concerned are arguments that one or another sort of human conduct, like abortion or homosexual sexual conduct, is immoral.

• By a "religious" argument, I mean an argument that relies on (among the other things it relies on) a religious belief: an argument that presupposes the truth of a religious belief and includes that belief as one of its essential premises. A "religious" belief is, for present purposes, either the belief that God exists—"God" in the sense of a transcendent reality that is the source, the ground, and the end of everything else—or a belief about the nature, the activity, or the will of God.[6] A belief can be "nonreligious," then, in one of two senses. The belief that God does not exist is nonreligious in the sense of "atheistic." A belief that is about something other than God's existence or nonexistence, nature, activity, or will is nonreligious in the sense of "secular." In addition to religious arguments, we can imagine "atheistic" arguments (arguments that rely on the belief that God does not exist) and "secular" arguments: arguments that rely only on secular beliefs. One who is "agnostic" about the existence of God—who neither believes nor disbelieves that God exists—will find only secular arguments persuasive.[7]

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6. Although some Buddhist sects are theistic, Buddhism—unlike Christianity, for example—is predominantly nontheistic, in the sense that Buddhism does not affirm the meaningfulness of "God"-talk. Nonetheless, Buddhism does seem to affirm the existence of a transcendent reality that is the source, the ground, and the end of everything else. For example, see *The Emptying God: A Buddhist-Jewish-Christian Conversation* and in particular David Tracy's reflections on Masao Abe's writings. David Tracy, *Kenosis, Sunyata, and Trinity: A Dialogue with Masao Abe*, *in* THE EMPTYING GOD: A BUDDHIST-JEWISH-CHRISTIAN CONVERSATION 135 (John B. Cobb, Jr. & Christopher Ives eds., 1990).

7. My position, in this section, about the constitutionally permissible role of religion in politics—like my position in the rest of this Essay about the morally proper role of religion in politics—is meant to apply to atheistic arguments as well as to religious ones: arguments that presuppose the truth of and include as one of their essential elements the

I. CONSTITUTIONALITY

Let's begin with this question: Does a legislator or other public official,[8] or even a citizen (i.e., a citizen who is not a legislator or other public official) violate the nonestablishment norm by presenting a religious argument in public political debate? For example, does a legislator violate the nonestablishment norm by presenting, in public debate about whether the law should recognize homosexual marriage, a religious argument that homosexual sexual conduct is immoral? An affirmative answer is wildly implausible. Every citizen, without regard to whether she is a legislator or other public official,[9] is constitutionally free to present in public political debate whatever arguments about morality, including whatever religious arguments, she wants to present.[10] Indeed, the freedom of speech protected by the constitutional law of the United States is so generous that it extends even to arguments, including secular arguments, that may not, as a constitutional matter, serve as a basis of political choice—for example, the argument that persons of nonwhite ancestry are not truly or fully human (which is an unconstitutional basis of political choice under the antidiscrimination part of the Fourteenth Amendment).[11] Thus,

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belief that God does not exist. In a society that, like the United States, is overwhelmingly religious, it would not be acceptable to deprivilege religious arguments relative to atheistic ones. As Kent Greenawalt has cautioned, "one must present reasons for [the proposed principle of restraint] that have appeal to persons of religious and ethical views different from one's own." Kent Greenawalt, *Grounds for Political Judgment: The Status of Personal Experience and the Autonomy and Generality of Principles of Restraint*, 30 SAN DIEGO L. REV. 647, 672 (1993); *cf.* KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 63 (1988) [hereinafter GREENAWALT, PRIVATE CONSCIENCES] ("assum[ing] that a principle of restraint against reliance on religious grounds would also bar reliance on antireligious grounds").

8. By "other public official" I mean, here and elsewhere in this Essay, principally the policy making officials in the executive branch of government. The chief policy-making official in the executive branch of the national government is, of course, the President of the United States; the chief policy-making official in the executive branch of a state government is the governor of the state.

9. *See* Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 604 n.83 (1995); *cf.* McDaniel v. Paty, 435 U.S. 618 (1978).

10. The Supreme Court recently remarked that "in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be *Hamlet* without the prince." Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2446 (1995).

11. MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 143-49 (1994) [hereinafter PERRY, CONSTITUTION IN THE COURTS].

whether or not religious arguments may, as a constitutional matter, serve as a basis of political choice—and, so, even if they may not serve as a basis of political choice—it is clear that citizens and even legislators and other public officials are constitutionally free to present such arguments in public political debate.[12] The nonestablishment norm is not to the contrary.

Moreover, to disfavor religious arguments relative to secular ones would be to violate the core meaning—the antidiscrimination meaning—of the free exercise norm. After all, included among the religious practices protected by the free exercise norm are bearing public witness to one's religious beliefs and trying to influence political decision making on the basis of those beliefs.[13] As the Second Vatican Council of the Catholic Church observed in the document *Dignitatis Humanae*, true freedom of religion includes the freedom of persons and groups "'to show the special value of their doctrine in what concerns the organization of society and the inspiration of the whole of human activity.'"[14] Although the nonestablishment norm, as I have explained, forbids any branch or agency of government to do certain sorts of things, to engage in certain sorts of actions, it does not forbid any person—including any person who happens to be a legislator or other public official—to say whatever she wants to say, religious or not, in public political debate. The serious question, then, is not whether legislators or other public officials, much less citizens, violate the nonestablishment norm by presenting religious arguments in public political debate.[15] The

12. This is not to deny that as a constitutional matter government may require as a condition of continued employment that some of its employees (for example, members of the police force) refrain from saying some things in public that they are constitutionally free to say (for example, "blacks aren't human").

13. *See, e.g.*, PRESBYTERIAN CHURCH (U.S.A.), GOD ALONE IS LORD OF THE CONSCIENCE: POLICY STATEMENT AND RECOMMENDATIONS REGARDING RELIGIOUS LIBERTY 48 (1989): "[I]t is a limitation and denial of faith not to seek its expression in both a personal and a public manner, in such ways as will not only influence but transform the social order. Faith demands engagement in the secular order and involvement in the political realm."

14. David Hollenbach, S.J., *A Communitarian Reconstruction of Human Rights: Contributions from Catholic Tradition*, *in* CATHOLICISM AND LIBERALISM 127, 142 (R. Bruce Douglass & David Hollenbach, S.J. eds., 1994) (quoting *Dignitatis Humanae*, nos. 2 and 4.)

15. Of course, presenting religious arguments in *nonpublic* political debate—political debate around the kitchen table, for example, or at a meeting of the local parish's Peace and Justice Committee—is not constitutionally problematic. A practical problem with the position that presenting religious arguments in public political debate is constitutionally

serious question, rather, is whether government would violate the nonestablishment norm by basing a political choice—for example, a law banning abortion—on a religious argument.[16] In the larger work from which this Essay is drawn, I argue under the nonestablishment norm, government may not make a political choice about the morality of human conduct unless a plausible secular rationale supports the choice.[17]

* * * * *

Constitutional legality does not entail moral propriety: that an act would not violate any constitutional norm does not entail that the act would be, all things considered, morally appropriate.[18] Beyond the constitutional inquiry, therefore, lies the moral inquiry. I have explained that citizens and even legislators and other public officials are constitutionally free to present religious arguments, including religious arguments about the morality of human conduct, in public

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problematic is that it may sometimes be difficult to say when "nonpublic" political debate has crossed the line and become "public." But that practical problem is also an academic one, because, as I have explained, presenting religious arguments in public political debate is not constitutionally problematic. For an argument that the nonestablishment norm forbids legislators to present religious arguments in public political debate, see Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993). I concur in Scott Idleman's rejection of Greene's position, see Scott C. Idleman, *Ideology as Interpretation: A Reply to Professor Greene's Theory of the Religion Clauses*, 1994 U. ILL. L. REV. 337. For Greene's response, see Abner S. Greene, *Is Religion Special?: A Rejoinder to Scott Idleman*, 1994 U. ILL. L. REV. 535.

16. I explain below why even one who opposes government basing political choices on religious arguments need not, and indeed should not, oppose legislators or other public officials, much less citizens, presenting religious arguments about the morality of human conduct in public political debate. *See infra* text accompanying notes 33-35.

17. *See* MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES (forthcoming 1997) [hereinafter PERRY, RELIGION IN POLITICS].

18. Similarly, constitutional illegality does not entail moral impropriety; that an act would violate a constitutional norm does not entail that the act would be, apart from its unconstitutionality, morally inappropriate. Even taking into account its unconstitutionality, an act may not be, all things considered, morally inappropriate. While relevant to an assessment of the morality of an act, that an act is unconstitutional does not by itself entail the immorality of the act. After all, one can imagine a constitution that forbids that which is morally required, or requires that which is morally forbidden. Indeed, if we conclude that an act that would violate a constitutional norm would not be, apart from its unconstitutionality, morally inappropriate—and especially if we conclude that the act would be morally appropriate—we can proceed to inquire whether the constitutional law of the United States should not be revised by the Supreme Court, or even amended pursuant to Article V of the Constitution, to permit the act.

political debate. The question remains, however, whether, all things considered, it is not morally inappropriate for citizens and especially legislators and other public officials to present such arguments in public political debate. I now turn to that question.[19]

II. POLITICAL MORALITY

I have concluded here that citizens and even legislators and other public officials are constitutionally free to present religious arguments, including religious arguments about the morality of human conduct, in public debate about what political choices to make. (To repeat, the political choices with which I am principally concerned in this forthcoming book are political choices about the morality of human conduct: choices to ban or otherwise disfavor one or another sort of human conduct on the basis of the view that it is immoral for human beings, whether all or some, to engage in the conduct.) I now explain why, as a matter not just of constitutionality but of political morality too, citizens and even legislators and other public officials may present, in public political debate, religious arguments about the morality of human conduct. Indeed, I conclude that it is important that such religious arguments, no less than secular arguments about the morality of human conduct, be presented in public political debate. It bears emphasis that the inquiry I pursue in this Essay, about the role of religious arguments in public political debate, is about political morality, not political strategy.

> [T]he distinction between principle and prudence should be emphasized. The fundamental question is not whether, as a

19. According to the construal of the nonestablishment norm I have defended elsewhere, see PERRY, RELIGION IN POLITICS, *supra* note 17, government may rely on a religious argument in making a political choice about the morality of human conduct only if a plausible secular rationale supports the choice. The question remains, however, whether, all things considered, it is not morally inappropriate for legislators and other public officials, and for citizens voting in a referendum election, to rely on a religious argument in making a political choice about the morality of human conduct even if a plausible secular rationale—or even, in their view, a persuasive secular rationale—supports the choice. (Those with the principal policy making authority and responsibility—in particular, legislators—should ask themselves whether they find a secular rationale persuasive.) From the other side, the question remains whether, *apart from the nonestablishment norm*, it is not morally permissible for legislators and others to rely on a religious argument in making a political choice about the morality of human conduct even if, in their view, no persuasive or even plausible secular rationale supports the choice. I address those questions—questions not of constitutionality but of political morality—in the larger work from which this Essay is drawn, see *id.*

> matter of prudent judgment in a religiously pluralist society, those who hold particular religious views ought to cast their arguments in secular terms. Even an outsider can say that the answer to that question is clearly, "Yes, most of the time," for only such a course is likely to be successful overall.[20]

It is inevitable that some legislators, and some citizens participating in a referendum election, will rely on—will put at least some weight on—religious arguments in voting for political choices about the morality of human conduct. Moreover, a religious argument can be quite influential in moving a critical mass of legislators or citizens to want to make a particular political choice and in inclining them to accept, as a rationale for the choice, a secular argument that supports the choice. For example, a biblically based argument that homosexual sexual conduct is immoral has moved some citizens and legislators to want to deny legal recognition to homosexual marriage and has inclined some of them to accept, as a secular rationale for their position, the argument that homosexuality, like alcoholism, is pathological and ought not to be indulged, or the argument that recognizing homosexual marriage would threaten the institution of heterosexual marriage and other "traditional family values." Because of the role that religiously based moral arguments inevitably play in the political process, then, it is important that such arguments, no less than secular moral arguments, be presented in, so that they can be tested in, public political debate. Ideally, such arguments will sometimes be tested, in the to and fro of public political debate, by competing scripture- or tradition-based religious arguments. Luke Timothy Johnson's warning is relevant here:

> If liberal Christians committed to sexual equality and religious tolerance abandon these texts as useless, they also abandon the field of Christian hermeneutics to those whose fearful and—it must be said—sometimes hate-filled apprehension of Christianity will lead them to exploit and emphasize just those elements of the tradition that have proven harmful to humans. If what Phyllis Trible has perceptively termed "texts of terror" within the Bible are not encountered publicly and engaged intellectually by a hermeneutics

20. Mark Tushnet, *The Limits of the Involvement of Religion in the Body Politic*, *in* THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY 191, 213 (James E. Wood, Jr. & Derek Davis eds., 1991).

> that is at once faithful and critical, then they will continue to exercise their potential for harm among those who, without challenge, can claim scriptural authority for their own dark impulses.[21]

Nonetheless, some persons want to keep religiously based moral arguments out of public political debate as much as possible. For example, the American philosopher Richard Rorty has written approvingly of "privatizing religion—keeping it out of . . . 'the public square,' making it seem bad taste to bring religion into discussions of public policy."[22] One reason for wanting to "privatize" religion is that religious debates about controversial political issues can be quite divisive. But American history does not suggest that religious debates about controversial issues—racial discrimination, for example, or war—are invariably more divisive than secular debates about those or other issues.[23] Some issues are so controversial that debate about them is inevitably divisive without regard to whether the debate is partly religious or, instead, only secular.[24]

Another reason for wanting to keep religiously based moral arguments out of public political debate focuses on the inability of some persons to gain a critical distance on their religious beliefs—the kind of critical distance essential to truly deliberative debate. But in the United States and in other liberal democracies, many persons *are* able

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21. Luke Timothy Johnson, *Religious Rights and Christian Texts*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES 65, 72-73 (John Witte, Jr. & Johan D. van der Vyver eds., 1996) (footnote omitted).

22. Richard Rorty, *Religion as Conversation-Stopper*, 3 COMMON KNOWLEDGE 1, 2 (1994).

23. *Cf.* Michael W. McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. REV. 405, 413: "Religious differences in this country have never generated the civil discord experienced in political conflicts over such issues as the Vietnam War, racial segregation, the Red Scare, unionization, or slavery."

24. *Cf.* McDaniel v. Paty, 435 U.S. 618 (1978).

> That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. . . . The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association and political participation generally. . . .
>
> The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association. . . .
>
> . . . [G]overnment may not as a goal promote "safe thinking" with respect to religion . . . . The Establishment Clause, properly understood, . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.

Id. at 640-41 (Brennan, J., concurring) (citations omitted).

to gain a critical distance on their religious beliefs;[25] they are certainly as able to do so as they and others are able to gain a critical distance on other fundamental beliefs.[26] David Tracy speaks for many of us religious believers when he writes:

> For believers to be unable to learn from secular feminists on the patriarchal nature of most religions or to be unwilling to be challenged by Feuerbach, Darwin, Marx, Freud, or Nietzsche is to refuse to take seriously the religion's own suspicions on the existence of those fundamental distortions named sin, ignorance, or illusion. The interpretations of believers will, of course, be grounded in some fundamental trust in, and loyalty to, the Ultimate Reality both disclosed and concealed in one's own religious tradition. But fundamental trust, as any experience of friendship can teach, is not immune to either criticism or suspicion. A religious person will ordinarily fashion some hermeneutics of trust, even one of friendship and love, for the religious classics of her or his tradition. But, as any genuine understanding of friendship shows, friendship often demands both critique and suspicion. A belief in a pure and innocent love is one of the less happy inventions of the romantics. A friendship that never includes critique and even, when appropriate, suspicion is a friendship barely removed from the polite and wary communication of strangers. As Buber showed, in every I-thou encounter, however transient, we encounter some new dimension of reality. But if that encounter is to prove more than transitory, the difficult ways of friendship need a trust powerful enough to risk itself in critique and suspicion. To claim that this may be true of all our other loves but not true of our love for, and trust in, our religious tradition

25. *Cf.* Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J.L. & RELIGION 1 (1993-1994).

26. To his credit, Richard Rorty insists that there is "hypocrisy . . . in saying that believers somehow have no right to base their political views on their religious faith, whereas we atheists have every right to base ours on Enlightenment philosophy. The claim that in doing so we are appealing to reason, whereas the religious are being irrational, is hokum." Rorty, *supra* note 22, at 4.

> makes very little sense either hermeneutically or religiously.[27]

Of course, it is undeniable that some religious believers are unable to gain much if any critical distance on their fundamental religious beliefs. As so much in the twentieth century attests, however, one need not be a religious believer to adhere to one's fundamental beliefs with close-minded or even fanatical tenacity.

Although no one who has lived through recent American history can believe that religious contributions to the public discussion of difficult moral issues are invariably deliberative rather than dogmatic, there is no reason to believe that religious contributions are never deliberative. Religious discourse about the difficult moral issues that engage and divide us citizens of liberal democratic societies is not necessarily more problematic—more monologic, say—than resolutely secular discourse about those issues. Because of the religious illiteracy—and, alas, even prejudice—rampant among many nonreligious intellectuals,[28] we probably need reminding that, at its best, religious discourse in public culture is not less dialogic—it is not less openminded and deliberative—than is, at its best, secular discourse in public culture. (Nor, at its worst, is religious discourse more monologic—more closeminded and dogmatic—than is, at its worst, secular discourse.)[29] David Hollenbach's work has developed this important point:

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27. DAVID TRACY, PLURALITY AND AMBIGUITY: HERMENEUTICS, RELIGION, HOPE 112 (1987) (footnotes omitted).

28. As David Tracy has written, religion is

> the single subject about which many intellectuals can feel free to be ignorant. Often abetted by the churches, they need not study religion, for "everybody" already knows what religion is: It is a private consumer product that some people seem to need. Its former social role was poisonous. Its present privatization is harmless enough to wish it well from a civilized distance. Religion seems to be the sort of thing one likes "if that's the sort of thing one likes."

DAVID TRACY, THE ANALOGICAL IMAGINATION 13 (1981); *see also* KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 6 (1988) ("A good many professors and other intellectuals display a hostility or skeptical indifference to religion that amounts to a thinly disguised contempt for belief in any reality beyond that discoverable by scientific inquiry and ordinary human experience."); *cf. Special Issue—Religion & the Media: Three Forums*, COMMONWEAL, Feb. 24, 1995.

29. *See* KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE, 159 (1988) [hereinafter GREENAWALT, RELIGIOUS CONVICTIONS]: "[I]f the worry is openmindedness and sensitivity to publicly accessible reasons, drawing a sharp distinction between religious convictions and [secular] personal bases [of judgment] would be an extremely crude tool." David Tracy has lamented that

> Much discussion of the public role of religion in recent political thought presupposes that religion is more likely to fan the flames of discord than to contribute to social concord. This is certainly true of some forms of religious belief, but hardly of all. Many religious communities recognize that their traditions are dynamic and that their understandings of God are not identical with the reality of God. Such communities have in the past and can in the future engage in the religious equivalent of intellectual solidarity, often called ecumenical or interreligious dialogue.[30]

> [f]or however often the word is bandied about, dialogue remains a rare phenomenon in anyone's experience. Dialogue demands the intellectual, moral, and, at the limit, religious ability to struggle to hear another and to respond. To respond critically, and even suspiciously when necessary, but to respond only in dialogical relationship to a real, not a projected other.

David Tracy, DIALOGUE WITH THE OTHER 4 (1990). Steven Smith, commenting wryly that "'dialogue' seems to have become the all-purpose elixir of our time," has suggested that "[t]he hard question is not whether people should talk, but rather what they should say and what (among the various ideas communicated) they should believe." Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 434-35 (1990). As Tracy's observation suggests, however, there is yet another "hard" question, which Smith's suggestion tends to obscure: Not whether but *how* people should talk; what qualities of character and mind should they bring, or try to bring, to the task.

30. David Hollenbach, S.J., *Civil Society: Beyond the Public-Private Dichotomy*, RESPONSIVE COMMUNITY Winter 1994-1995 at 15, 22 [hereinafter Hollenbach, *Civil Society*]. One of the religious communities to which Hollenbach refers is the Catholic community. *See* David Hollenbach, S.J., *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 SAN DIEGO L. REV. 877, 891 (1993) [hereinafter Hollenbach, *Contexts of the Political Role*]:

> For example, the Catholic tradition provides some noteworthy evidence that discourse across the boundaries of diverse communities is both possible and potentially fruitful when it is pursued seriously. This tradition, in its better moments, has experienced considerable success in efforts to bridge the divisions that have separated it from other communities with other understandings of the good life. In the first and second centuries, the early Christian community moved from being a small Palestinian sect to active encounter with the Hellenistic and Roman worlds. In the fourth century, Augustine brought biblical faith into dialogue with Stoic and Neoplatonic thought. His efforts profoundly transformed both Christian and Graeco-Roman thought and practice. In the thirteenth century, Thomas Aquinas once again transformed Western Christianity by appropriating ideas from Aristotle that he had learned from Arab Muslims and from Jews. In the process he also transformed Aristotelian ways of thinking in fundamental ways. Not the least important of these transformations was his insistence that the political life of a people is not the highest realization of the good of which they are capable—an insight that lies at the root of constitutional theories of limited government. And though the Church resisted the liberal discovery of modern freedoms through much of the modern period, liberalism has been transforming Catholicism once again through the last half of our own century. The memory of these events in social and intellectual history as well as the experience of the Catholic Church since the Second Vatican Council leads

A central feature of Hollenbach's work is his argument, which I accept, that the proper role of "public" religious discourse in a society as religiously pluralistic as the United States is a role to be played, in the main, much more in public culture—in particular, "in those components of civil society that are the primary bearers of cultural meaning and value—universities, religious communities, the world of the arts, and serious journalism"—than in public debate specifically about political issues.[31] He writes: "[T]he domains of government and policy-formation are not generally the appropriate ones in which to argue controverted theological and philosophical issues."[32] But, as Hollenbach goes on to acknowledge, "it is nevertheless neither possible nor desirable to construct an airtight barrier between politics and culture."[33] There is, then, in addition to the reasons I have already given, this important reason for not opposing the presentation of religiously based moral arguments in public political debate: In a society as overwhelmingly religious as the United States, we do present and discuss—and we should present and discuss—religiously based moral arguments in our public culture.[34] Rather than try to

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> me to hope that communities holding different visions of the good life can get somewhere if they are willing to risk conversation and argument about these visions. Injecting such hope back into the public life of the United States would be a signal achievement. Today, it appears to be not only desirable but necessary.

See also id. at 892-96.

31. *See* Hollenbach, *Civil Society*, *supra* note 30, at 22.

> Conversation and argument about the common good [including religious conversation and argument] will not occur initially in the legislature or in the political sphere (narrowly conceived as the domain in which conflict of interest and power are adjudicated). Rather it will develop freely in those components of civil society that are the primary bearers of cultural meaning and value—universities, religious communities, the world of the arts, and serious journalism. It can occur wherever thoughtful men and women bring their beliefs on the meaning of the good life into intelligent and critical encounter with understandings of this good held by other peoples with other traditions. In short, it occurs wherever education about and serious inquiry into the meaning of the good life takes place.

Id.

32. Hollenbach, *Contexts of the Political Role*, *supra* note 30, at 900; *see also* Kent Greenawalt, *Religious Convictions and Political Choice: Some Further Reflections*, 39 DEPAUL L. REV. 1019, 1034 (1990) (expressing skepticism about "the promise of religious perspectives being transformed in what is primarily political debate").

33. Hollenbach, *Contexts of the Political Role*, *supra* note 30, at 900.

34. *Cf.* Paul G. Stern, *A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse*, 99 YALE L.J. 925, 934 (1990):

> [W]e can freely and intelligently exercise our freedom of choice on fundamental matters having to do with our own individual ideals and conceptions of the good only if we have access to an unconstrained discussion in which the merits of competing moral, religious, aesthetic, and philosophical values are given a fair

do the impossible—maintain a wall of separation ("an airtight barrier") between the religiously based moral discourse that inevitably and properly takes place in public culture ("universities, religious communities, the world of the arts, and serious journalism") on the one side and the discourse that takes place in public political debate ("the domains of government and policy-formation") on the other side—we should simply welcome the presentation of religiously based moral arguments in *all* areas of our public culture, *including* public debate specifically about contested political choices.[35] Indeed, for the reasons I have given, we should not merely welcome but *encourage* the presentation of such arguments in public political debate—so that we can test them there. To be sure, religious discourse in public—whether in public political debate or in other parts of our public culture—is sometimes quite sectarian and, therefore, divisive. But religiously based moral discourse is not necessarily more sectarian than secular moral discourse. It can be much less sectarian. After all, certain basic moral premises common to the Jewish and Christian traditions, in conjunction with the supporting religious premises, still constitute the fundamental moral horizon of most Americans—much more so than do Kantian (or neoKantian) premises, or Millian premises, or Nietzschean premises, and so forth.[36] According to John Coleman, "the tradition of biblical

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opportunity for hearing.

35. No one suggests that presenting religious arguments in *nonpublic* political debate—political debate around the kitchen table, for example, or at a meeting of the local parish's Peace and Justice Committee—is morally problematic. A practical problem with the position that presenting religious arguments in public political debate is morally problematic is that it may sometimes be difficult to say when *nonpublic* political debate has crossed the line and become *public*. Moreover, it is no more possible to maintain "an airtight barrier" between the religiously based moral discourse that takes place in nonpublic political debate and that which takes place in public political debate than it is to maintain an airtight barrier between the religiously based moral discourse that takes place in "universities, religious communities, the world of the arts, and serious journalism" and that which takes place in "the domains of government and policy-formation." Why not, then, just welcome the presentation of religiously based moral arguments in public as well as in relatively nonpublic political debate?

36. The following statement by Jürgen Habermas is noteworthy here:

> I do not believe that we, as Europeans, can seriously understand concepts like morality and ethical life, person and individuality, or freedom and emancipation, without appropriating the substance of the Judeo-Christian understanding of history in terms of salvation. And these concepts are, perhaps, nearer to our hearts than the conceptual resources of Platonic thought, centering on order and revolving around the cathartic intuition of ideas. Others begin from other traditions to find the way to the plenitude of meaning involved in concepts such as these, which structure our self-understanding. But without the transmission

religion is arguably the most powerful and pervasive symbolic resource" for a public ethics in the United States today.[37] "[O]ur tradition of religious ethics seems . . . to enjoy a more obvious public vigor and availability as a resource for renewal in American culture than either the tradition of classic republican theory or the American tradition of public philosophy."[38] Coleman reminds us that "the strongest American voices for a compassionate just community always appealed in public to religious imagery and sentiments, from Winthrop and Sam Adams, Melville and the Lincoln of the second inaugural address, to Walter Rauschenbusch and Reinhold Niebuhr and Frederick Douglass and Martin Luther King."[39] As Coleman explains, "The American religious ethic and rhetoric contain rich, polyvalent symbolic power to command commitments of emotional depth, when compared to 'secular' language, . . . [which] remains exceedingly 'thin' as a symbol system."[40] Coleman emphasizes that "when used as a public discourse, the language of biblical religion is beyond the control of any particular, denominational theology. It represents a common American cultural patrimony. . . . American public theology or religious ethics . . . cannot be purely sectarian. The biblical language belongs to no one church, denomination, or sect."[41] In Coleman's view,

> The genius of public American theology . . . is that it has transcended denominations, been espoused by people as diverse as Abraham Lincoln and Robert Bellah who neither were professional theologians nor belonged to any specific church and, even in the work of specifically trained professional theologians, such as Reinhold Neibuhr, has appealed less to revelational warrant for its authority within public policy discussions than to the ability of biblical insights and symbols to convey a deeper human wisdom. . . . Biblical

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> through socialization and the transformation through philosophy of *any one* of the great world religions, this semantic potential could one day become inaccessible. If the remnant of the intersubjectively shared self-understanding that makes human(e) intercourse with one another possible is not to disintegrate, this potential must be mastered anew by every generation.

JÜRGEN HABERMAS, POSTMETAPHYSICAL THINKING: PHILOSOPHICAL ESSAYS 15 (William M. Hohengarte trans., 1992).

37. JOHN A. COLEMAN, S.J., AN AMERICAN STRATEGIC THEOLOGY 192 (1982).

38. *Id.*

39. *Id.* at 193.

40. *Id.*

41. *Id.* at 194.

> imagery . . . lies at the heart of the American self-understanding. It is neither parochial nor extrinsic.[42]

So, religiously based moral discourse is not always more sectarian than secular moral discourse; it can be less sectarian. But even if religiously based moral discourse were invariably more sectarian than secular moral discourse, this important point would remain: Sectarian discourse, including sectarian religious discourse, can make a worthwhile contribution to public deliberation about difficult moral issues. As Jeremy Waldron has explained:

> Even if people are exposed in argument to ideas over which they are bound to disagree—and how could *any* doctrine of public deliberation preclude *that*?—it does not follow that such exposure is pointless or oppressive. For one thing, it is important for people to be acquainted with the

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42. *Id.* at 194-95. Coleman adds: "I am further strongly convinced that the Enlightenment desire for an unmediated universal fraternity and language (resting as it did on unreflected allegiance to *very particular* communities and language, conditioned by time and culture) was destructive of the lesser, real 'fraternities'—in [Wilson Carey] McWilliams' sense—in American life." *Id.* at 194; *cf.* John A. Coleman, S.J., *A Possible Role for Biblical Religion in Public Life, in Theology and Philosophy in Public: A Symposium on John Courtney Murray's Unfinished Agenda,* 40 THEOLOGICAL STUD. 701, 704 (David Hollenbach, S.J. ed., 1979):

> American Catholic social thought in general and [John Courtney] Murray in particular appealed generously to the American liberal tradition of public philosophy and the classic understanding of republican virtue embedded in the medieval synthesis. Curiously, however, they were very sparing in invoking biblical religion and the prophetic tradition in their efforts to address issues of public policy.

There are two reasons for this Catholic reluctance to evoke biblical imagery in public discourse. Much of the public religious rhetoric for American self-understanding was couched in a particularist Protestant form which excluded a more generously pluralistic understanding of America. Perhaps one reason why American Catholics and Jews have never conceived of the American proposition as a covenant—even a broken one—is because Protestant covenant thought tended in practice to exclude the new immigrants. Hence, for American Catholics as for Jews, more "secular" Enlightenment forms and traditions promised inclusion and legitimacy in ways Protestant evangelical imagery foreclosed. As Murray states, "the Protestant identification with America led to 'Nativism in all its manifold forms, ugly and refined, popular and academic, fanatic and liberal. The neoNativist as well as the paleo-Nativist addresses to the Catholic substantially the same charge: "You are among us but not of us." ' " *Id.* Murray made no religious claims for the founding act of America as such. Catholics, decidedly, were not here in force when the Puritans and their God made a covenant with the land. Nor were they ever conspicuously invited to join the covenant. They preferred, therefore, a less religious, more civil understanding of America. The second reason for a Catholic predilection for the two traditions of republican theory and liberal philosophy is the Catholic recognition of the need for a secular warrant for social claims in a pluralist society. This penchant is rooted in Catholic natural-law thought.

> views that others hold. Even more important, however, is the possibility that my own view may be improved, in its subtlety and depth, by exposure to a religion or a metaphysics that I am initially inclined to reject. . . . I mean to draw attention to an experience we all have had at one time or another, of having argued with someone whose world view was quite at odds with our own, and of having come away thinking, "I'm sure he's wrong, and I can't follow much of it, but, still, it makes you think . . . ." The prospect of losing that sort of effect in public discourse is, frankly, frightening—terrifying, even, if we are to imagine it being replaced by a form of "deliberation" that, in the name of "fairness" or "reasonableness" (or worse still, "balance") consists of bland appeals to harmless nostrums that are accepted without question on all sides. This is to imagine open-ended public debate reduced to the formal trivia of American television networks.
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> . . . [This] might apply to *any* religious or other philosophically contentious intervention. We do not have (and we should not have) so secure a notion of public consensus, or such stringent requirements of fairness in debate, as to exclude any view from having its effect in the marketplace of ideas.[43]

Again, Richard Rorty thinks that it makes sense to "privatiz[e] religion—[to] keep[] it out of . . . 'the public square,' making it seem bad taste to bring religion into discussions of public policy."[44] Rorty should think again. Not only are the reasons for wanting to privatize religion weak, there are strong countervailing reasons, which I have given in this section, for wanting to "public-ize" religion, not privatize it. We should welcome religiously based moral arguments into the public square (where we can then test them), not try to keep them

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43. Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 SAN DIEGO L. REV. 817, 841-42 (1993); *cf.* Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1794 (1994):

> It is always possible that learning more about a moral or religious doctrine will lead us to like it less. But the respect of deliberation and engagement affords a more spacious public reason than liberalism allows. It is also a more suitable ideal for a pluralist society. To the extent that our moral and religious disagreements reflect the ultimate plurality of human goods, a deliberative mode of respect will better enable us to appreciate the distinctive goods our different lives express.

44. *See supra* note 22 and accompanying text.

out. We should make it seem distasteful to sneer when people bring their religious convictions to bear in public discussions of controversial political issues, like homosexuality and abortion. It is not *that* religious convictions are brought to bear in public political debate that should worry us, but *how* they are sometimes brought to bear (e.g., dogmatically). But we should be no less worried about how fundamental secular convictions are sometimes brought to bear in public political debate.[45]

III. GREENAWALT ON RELIGIOUS ARGUMENTS IN PUBLIC POLITICAL DEBATE

Kent Greenawalt is one of the most thoughtful contributors to the debate about the morally proper role of religion in politics. By way of defending the position I have been presenting in this Essay, I want to explain why I disagree with Greenawalt's position that legislators should not present religious arguments in public political debate.[46] (Greenawalt writes: "I concentrate on legislators, assum-

45. As I have explained in the larger work from which this Essay is drawn, I am in substantial agreement with the position that, in Kathleen Sullivan's formulation, "the negative bar against establishment of religion implies the affirmative 'establishment' of a civil order for the resolution of public moral disputes.... [P]ublic moral disputes may be resolved only on grounds articulable in secular terms." Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992). However, Sullivan is wrong to suggest that the fact that government may not make political choices in the absence of a plausible secular rationale constitutes "the banishment of religion from the public square." *Id.* at 222. First, "the public square"—the public culture of a society—includes much more than politics. To banish religion from politics is not to banish it from the rest of public culture. Second, religion has not been banished even from politics (much less from the rest of public culture): As I have explained, it is neither constitutionally nor morally inappropriate for legislators or other public officials, much less citizens, to present religiously based arguments about the morality of human conduct in public political debate. Indeed, because of the role that such religious arguments inevitably play in the political process, it is important that such arguments, no less than secular moral arguments, be presented in—so that they can be tested in—public political debate.

46. Greenawalt defends his position in a recent book, GREENAWALT, PRIVATE CONSCIENCES, *supra* note 7. Greenawalt emphasizes that his position on the morally proper role of religion in politics is designed not for every liberal democratic society but for a particular one: the United States. Greenawalt understands that the precise arrangement between religion and politics that makes the most sense for the United States, given its history and traditions, political culture, and present circumstances, may not make the most sense for another liberal democratic society with a relevantly different history, political culture, etc. Moreover, Greenawalt's principal aim is not to recommend an arrangement that the law should impose, but only principles of *self*-restraint: principles, an arrangement, that citizens and legislators and other public officials should impose on themselves. Put another way, Greenawalt's aim is to recommend an informal (nonlegal)

ing that chief executives [the President of the United States and state governors] should be governed by similar standards."[47]) In the preceding section, I explained why we should encourage the airing of religious arguments, even by legislators, in public political debate. Now I want to explain why Greenawalt's reasons for asking legislators to avoid presenting such arguments in public political debate do not bear the weight he puts on them.

Greenawalt's rationale is twofold. Greenawalt's first and principal reason is that if a legislator presents a religious argument in public political debate, some of those the legislator represents "are likely to feel imposed upon in the sense of being excluded."[48] Greenawalt is concerned about "the inequality and disrespect that members of minorities may feel . . . , the sense they may have that they are being imposed upon as second class citizens."[49] In my view, this reason will not bear the weight Greenawalt puts on it. Unless my representative and I are clones, there will almost certainly be some occasions, perhaps many, on which she and I are in fundamental disagreement. Why should I feel significantly more imposed upon, if imposed upon at all, if our disagreement is rooted in religious differences than if it is rooted in secular differences? In a different but related context, Steven Smith has written something that is relevant here—and I concur in it:

> [T]he very concept of "alienation," or symbolic exclusion, is difficult to grasp. . . . How, if at all, does "alienation" differ from "anger," "annoyance," "frustration," or "disappointment" that every person who finds himself in a political minority is likely to feel? "Alienation" might refer to nothing more than an awareness by an individual that she belongs to a religious minority, accompanied by the realization that at least on some kinds of issues she is unlikely to

arrangement for the United States; it is to recommend that a certain understanding, that certain expectations, be established (or, if already established, maintained) in American political culture. Greenawalt understands that even if the law does not and should not forbid (or require) an activity, there may nonetheless be good reasons for persons not to engage (or to engage) in the activity. There is much in Greenawalt's thoughtful book with which I am in substantial agreement and on which I do not comment here. In particular, I concur in most of Greenawalt's balanced but critical comments on the positions of several other contributors to the debate about religion in politics.

47. *Id.* at 156.

48. *Id.* at 157.

49. *Id.* at 132.

> be able to prevail in the political process. . . . That awareness may be discomforting. But is it the sort of phenomenon for which constitutional law can provide an efficacious remedy? Constitutional doctrine that stifles the message will not likely alter the reality—or a minority's awareness of that reality.[50]

Continuing to develop his first reason, Greenawalt writes:

> [A]t least for many religious arguments, the speaker seems to put himself or herself in a kind of privileged position, as the holder of a *basic* truth that many others lack. This assertion of privileged knowledge may appear to imply inequality of status that is in serious tension with the fundamental idea of equality of citizens within liberal democracies.[51]

It is true for many secular arguments, too, however, that the speaker seems to portray herself as the holder of basic truths or insights that many others lack—for example, basic truths about human nature or about the workings of society. In any event, I fail to see how such an "assertion of privileged knowledge" is in any way inconsistent with the fundamental idea of the equality of all citizens. This idea of equality is really two, related ideas:

- The idea of the *moral* equality of all persons: Every person, without regard to "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,"[52] is sacred.
- The idea of the *political* equality of all citizens: Because every person is sacred, every citizen is sacred, and therefore every citizen, without regard to race, sex, religion, etc., is entitled to participate in the politics and government of his or her society on an equal basis with every other citizen; moreover, no citizen may be treated with less respect or concern than any other citizen.

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50. STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 164-65 n.66 (1995). Smith quotes Mark Tushnet: "[N]onadherents who believe that they are excluded from the political community are merely expressing the disappointment felt by everyone who has lost a fair fight in the arena of politics." Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 712 (1986).

51. GREENAWALT, PRIVATE CONSCIENCES, *supra* note 7, at 157.

52. This is the antidiscrimination language of Article 2 of the Universal Declaration of Human Rights. 3 U.N. GAOR Res. 217 U.N. Doc. A/810 (1948).

This twofold idea of the fundamental equality of all citizens entails neither that all citizens are in the grip of the same convictions, religious or not, nor that all their different convictions are (or that they should act as if they are) equally correct. For a legislator to present a religious argument in public political debate is not necessarily for her to assert, imply, or presuppose a denial of the fundamental equality of all citizens. (This is not to deny that one of her convictions, religious or not—for example, the conviction that only white persons are entitled to vote—may itself assert, imply, or presuppose a denial of the fundamental equality of all citizens.)

According to Greenawalt, "When legislators speak on political issues, they represent all their constituents. Their explicit reliance on any controversial religious or comprehensive view would be inappropriate."[53] Yes, legislators should represent *all* their constituents. But the sense in which they should do so is that in making political choices, legislators should be concerned with the good or well-being of all their constituents. Indeed, ideally a legislator should aim, to the extent possible, at the good of every member of the political community, rather than at the good merely of some members—or, worse, at the good merely of the legislator herself.[54] *That* is the real sense in which legislators should represent all their constituents. It is not necessarily inconsistent with the duty of legislators to represent all their constituents for a legislator, in speaking on political issues, to invoke a "controversial religious or other comprehensive view"—for example, a religious belief about what is truly good for every member of the community.[55]

Moreover, it is virtually axiomatic that in a liberal democratic society the truthful disclosure of all the reasons why one's representative is inclined to stand where she does is an overriding, if infrequently honored, value. I suspect that most of us citizens of a liberal

53. GREENAWALT, PRIVATE CONSCIENCES, *supra* note 7, at 157.

54. Of course, it may happen to be the case, in a particular situation, that the best way to aim at the good of all is to attend to the needs, and therefore to the good, of some: Perhaps in a particular situation satisfying the needs of some is instrumentally related to achieving the good of all; or perhaps the needs of some are especially severe or have too long been neglected.

55. *Cf.* Edmund Burke, *From a Speech to the Electors of Bristol, on his being declared by the Sheriffs duly elected (3 November 1774)*, *in* EDMUND BURKE: ON GOVERNMENT, POLITICS, AND SOCIETY 157 (B. Hill ed., 1975): "Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."

democracy would be more than willing to endure some feeling of being "imposed upon" if that were the price for knowing all the reasons why our representatives stand where they do. Among other things, if we know all the reasons, we can respond more effectively—especially when our representatives are up for reelection—than if we know only some of them.

Especially because the truthful disclosure of all the reasons why an elected official stands where she does is an overriding value, a much more sensible way to minimize the extent to which *some* citizens might "feel imposed upon in the sense of being excluded"[56]—a much more proportionate way to minimize "the inequality and disrespect that members of minorities may feel . . . , the sense that they are being imposed upon as second class citizens"[57]—is for a legislator to feature, in public political debate, not only all the relevant arguments that she takes seriously, including religious arguments, but *all* the credible and not otherwise inappropriate arguments that might incline a citizen to support the political choice at issue. In that way, a legislator does not conceal the real bases of her support, but neither does she gratuitously marginalize or exclude reasons that may appeal to some of her constituents or to some citizens generally; instead, she "re-presents" all the relevant reasons, both those that are most important to her and those that might be most important to someone else. She thereby cultivates the bonds of political community even as she forthrightly indicates why she stands where she does. Obviously, strategic considerations should give any elected official ample incentive to do just what I recommend here.

Greenawalt's second basic reason for concluding that legislators should not present religious arguments in public political debate presupposes his first: Because a legislator's presentation of a religious argument will make citizens who reject the belief "feel imposed upon in the sense of being excluded," the position that legislators may present such arguments in public political debate "underestimates the harm of a religious politics in the present United States."[58] Greenawalt allows that "[i]ntense religious politics in the United States probably would not produce extensive outright violence, but we are still far from harmonious mutual respect and tolerance. Religious divisions are still very significant in many regions, and people are

56. GREENAWALT, PRIVATE CONSCIENCES, *supra* note 7, at 157.
57. *Id.* at 132.
58. *Id.* at 158.

acutely conscious of whether they are in a majority or minority."[59] Greenawalt's estimate of the likely "harm of a religious politics in the United States" is exaggerated. However one evaluates the phenomenon, religion has been, for the most part, domesticated in western liberal democratic societies.[60] As Greenawalt himself emphasizes, "There is a long history of religious involvement in politics in the United States, and most crucial facts are beyond dispute."[61] One crucial fact, beyond dispute, is that notwithstanding that long history of religious involvement in politics in the United States, the sky has not fallen. Indeed, "the risk of major instability generated by religious conflict is minimal. Conditions in modern democracies may be so far from the conditions that gave raise [sic] to the religious wars of the sixteenth century that we no longer need worry about religious divisiveness as a source of substantial social conflict."[62] Moreover, even if legislators may present religious arguments in public political debate, the fact remains that in a religiously pluralistic society like the United States, strategic considerations give politicians a powerful incentive to feature—to give pride of place to—secular arguments, if not indeed to present only secular arguments. All the more reason, then, why Greenawalt's fears about what will ensue if we countenance legislators presenting religious arguments in public political debate seem exaggerated: That they *may* feature such arguments does not mean that they *will* do so very often.

Note, too, that Greenawalt accepts David Hollenbach's argument that, quite apart from public argument specifically about political issues, there is an important place for religious discourse in the public culture of the United States.[63] Indeed, Greenawalt recommends that

> elected officials [do not] actually conceal the most fundamental grounds of their convictions, either when in office or running for office. In this respect, I think Jimmy Carter was

59. *Id.* at 157; *see also id.* at 130-31: "Although religious violence is now rare [in the United States], we are not yet close to a state of bland tolerance."

60. *See* Maimon Schwarzschild, *Religion and Public Debate in a Liberal Society: Always Oil and Water or Sometimes More Like Rum and Coca-Cola?*, 30 SAN DIEGO L. REV. 903 (1993).

61. GREENAWALT, PRIVATE CONSCIENCES, *supra* note 7, at 166.

62. Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083, 1096 (1990). Solum is stating the argument, not making it. Indeed, Solum is wary of the argument. *See id.* at 1096-97. Solum cites Stephen L. Carter as an example of the argument. *Id.* at 936 n.15 (citing Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977). For another instance, see Schwarzschild, *supra* note 60.

63. *See* GREENAWALT, PRIVATE CONSCIENCES, *supra* note 7, at 152.

> an apt example. In contrast to John Kennedy, he did not assert that his religious beliefs were irrelevant to his political functioning, and he made clear his deep Protestant evangelical beliefs.[64]

It is difficult to understand, then, why Greenawalt believes that an elected official's presentation of a religious argument in public political debate poses dangers not already posed—why, for example, it makes one who rejects the religious premise (or premises) of the argument feel more "imposed upon in the sense of being excluded" than she already does (if she does)—given that, if Greenawalt's recommendation is being followed, the official's embrace of the religious premise comes as no surprise to anyone.

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Neither of Greenawalt's two principal arguments against legislators presenting religious arguments in public political debate is persuasive. Greenawalt also argues that the presentation of religious arguments by legislators will not contribute much if anything to the deliberative quality of public political debate.[65] But, as I explained in the preceding section, secular arguments do not always fare better than religious arguments in that regard. It seems doubtful, in any event, that the airing of religious arguments by legislators is likely to so compromise the existing dialogic quality of public political debate—which, of course, is already often depressingly low—that we should want our representatives to be less than fully forthcoming about why they stand where they do.[66] Because our representatives

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64. *Id.* at 158.

65. *See id.* at 157.

66. In correspondence, Gerry Whyte of the Trinity College School of Law in Dublin, Ireland, has written:

> Taking the example of abortion, if I oppose abortion for religious reasons . . ., then unless I can publicly declare those reasons, I will not be able to defend my stance from allegations that I am, say, misogynist. (Divorce, in the Irish context, would probably be another good example of this point.) In other words, even where my religious beliefs cannot persuade my interlocutor to change his/her views, still I must be allowed to cite them if only to establish the bona fide nature of my motives. I think that this is important because one can still respect the sincerity of the fundamentalist (and pay his/her argument certain dues as a result) even if at the end of the day the argument is not persuasive; however one would have no time at all for the person whose motives are known to be less than honest.

Letter from Gerry Whyte to Michael J. Perry (July 12, 1994) (on file with the author).

should be fully forthcoming about why they stand where they do, and for the other reasons presented in this Essay, we should encourage the airing of religious arguments, even by legislators, in public political debate about the morality of human conduct.

If the better view is that legislators—who, after all, represent many citizens other than just themselves—may present religious arguments in public political debate, *a fortiori* citizens—who represent only themselves—may present such arguments. (To say that citizens represent just themselves is not to say that citizens, in making political choices, should aim to secure merely what they believe to be good for them; as an ideal matter, they should aim to secure what they believe to be the common good. *See* PERRY, CONSTITUTION IN THE COURTS, *supra* note 11, at 104-05. Of course, they may understandably believe—and in some cases they may even quite plausibly believe—that what is good for them, or good for them especially, is also in the common good.) Greenawalt, whose view is that legislators should not present religious arguments in public political debate, is more permissive for ordinary citizens than for legislators. He writes that in making arguments in support of political choices in the small settings in which they typically express themselves, ordinary citizens may rely, *inter alia*, on their religious beliefs. "Most citizens never get involved in advocacy of political positions, beyond talking to family, close friends, and associates. In those personal settings, people should feel free to express their reliance on any grounds they find compelling . . . ." GREENAWALT, PRIVATE CONSCIENCES, *supra* note 7, at 160. That Greenawalt's position is more permissive for ordinary citizens than for legislators is an instance of an instinct on the part of many persons to think that, with respect to making political choices or making public arguments in support of political choices or both, what is legitimate for citizens to do, because they represent only themselves, is not necessarily legitimate for legislators to do, because they represent many citizens. I agree with Jeremy Waldron, however, that, with respect to the matters under discussion here, it is a mistake to distinguish between what citizens may do and what their representatives may do. At least, it is a mistake to draw the distinction too sharply, or to put much weight on the distinction. *See* Waldron, *supra* note 43, at 827-31; *see also* Tushnet, *supra* note 20, at 199-201 (arguing that it does not make sense to distinguish between the grounds on which citizens may rely, in making political choices, and the grounds on which their elected representatives may rely). Although Greenawalt's position is permissive for ordinary citizens, it is not permissive for those whom Greenawalt calls "quasi-public citizens": media commentators, newspaper editors, presidents of large corporations, etc. According to Greenawalt, quasi-public citizens, like legislators, should avoid presenting religious arguments in public political debate. *See* GREENAWALT, PRIVATE CONSCIENCES, *supra* note 7, at 160-61. "One class of quasi-public citizens falls outside my conclusions here: those whose profession (chosen by others or self-chosen) is to speak from religious and other comprehensive perspectives." *Id.* at 161. I have indicated why I think Greenawalt is wrong to ask legislators to forgo presenting religious arguments in public political debate. If I am right about that, *a fortiori* Greenawalt is wrong in asking quasi-public citizens to forgo presenting religious arguments in public political debate. This is not to deny that such citizens, like legislators, often have strategic reasons for featuring, in their public political advocacy, secular reasons. But that legislators and others often have strategic reasons for downplaying religious reasons does not mean that they should forgo presenting religious arguments in public political debate if they want to do so. (In addition to citizens and legislators, Greenawalt discusses judges. I comment on that aspect of Greenawalt's position in the larger work from which this Essay is drawn.)

IV. RAWLS'S "IDEAL OF PUBLIC REASON"

Because it represents a prominent and influential position different from the one I have defended in this Essay, I now want to examine "the idea of public reason" John Rawls has espoused in his book, *Political Liberalism*.[67] The idea of public reason—or, as Rawls often puts it, "the *ideal* of public reason"[68]—is meant by Rawls to regulate, to govern, certain aspects of the politics of a society, like the United States, committed to political liberalism. In Rawls's view, the ideal of public reason is a constituent of political liberalism, and a commitment to the latter should therefore include a commitment to the former.[69]

The important distinction for Rawls is not between religious beliefs or reasons and secular reasons, but between public reasons and nonpublic reasons:

> [T]here are many nonpublic reasons . . . . Among the nonpublic reasons are those of associations of all kinds: churches and universities, scientific societies and professional

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67. *See* JOHN RAWLS, POLITICAL LIBERALISM 222-54 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM 1993]; *see also* Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729 (1993) [hereinafter Solum, *Constructing an Ideal*].

In his new introduction to the paperback edition of *Political Liberalism*, Rawls has revised his earlier discussion of the idea of public reason. In particular, Rawls writes:

> When engaged in public reasoning may we also include reasons of our comprehensive doctrines? I now believe . . . that reasonable [sic] such doctrines may be introduced in public reason at any time, provided that in due course public reasons, given by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support. I refer to this as the provision and it specifies what I now call the wide view of public reason.

JOHN RAWLS, POLITICAL LIBERALISM (paperback ed. forthcoming 1996) (manuscript on file with *Loyola of Los Angeles Law Review*) [hereinafter RAWLS, POLITICAL LIBERALISM 1996]. Then, in a footnote, Rawls says:

> [M]any questions need to be considered in applying the proviso. One is, when does it need to be satisfied, on the same day or on some later day? Also, on whom does the obligation to honor it fall? There are many such questions, I only indicate a few of them here. The point is that it ought to be clear and established how the proviso is to be appropriately satisfied.

Id.

68. *See, e.g.*, RAWLS, POLITICAL LIBERALISM 1993, *supra* note 67, at 215 (emphasis added).

69. Rawls's principal aim, however, is not to recommend a regime that the law should impose, but only a regime that citizens and public officials should impose on themselves. As with Kent Greenawalt, Rawls's aim is to recommend an informal arrangement for the United States and for relevantly similar societies; it is to recommend that a certain understanding, that certain expectations, be established in the political culture of such a society.

> groups. . . . [T]o act reasonably and responsibly, corporate bodies, as well as individuals, need a way of reasoning about what is to be done. This way of reasoning is public with respect to their members, but nonpublic with respect to political society and to citizens generally. Nonpublic reasons comprise the many reasons of civil society and belong to what I have called the "background culture," in contrast with the public political culture.[70]

Although, then, religious reasons are not, for Rawls, the only nonpublic reasons, they are a paradigmatic example of nonpublic reasons. In limiting the political role of nonpublic reasons, Rawls's ideal of public reason limits the political role of religious reasons (among other nonpublic reasons).

Rawls means the ideal to govern not "all political questions but only to those involving what we may call 'constitutional essentials' and questions of basic justice."[71] Rawls gives, as examples of "such fundamental questions," "who has the right to vote, or what religions are to be tolerated, or who is to be assured fair equality of opportunity, or to hold property. These and similar questions are the special subject of public reason."[72] However, Rawls limits the jurisdiction of the ideal of public reason to such questions only provisionally, mainly as a matter of argumentative strategy:

> [M]y aim is to consider first the strongest case where the political questions concern the most fundamental matters. If we should not honor the limits of public reason here, it would seem we need not honor them anywhere. Should they hold here, we can then proceed to other cases. Still, I grant that it is usually highly desirable to settle political questions by invoking the values of public reason.[73]

I shall discuss the ideal of public reason, therefore, as if it applied to political questions beyond just "'constitutional essentials' and questions of basic justice." (Larry Solum, who is sympathetic to Rawls's project, has argued that the ideal of public reason should not

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70. RAWLS, POLITICAL LIBERALISM 1993, *supra* note 67, at 220. Rawls adds: "These reasons are social, and certainly not private." *Id.* Then, in a footnote, he says: "The public vs. nonpublic distinction is not the distinction between public and private. This latter I ignore: there is no such thing as private reason." *Id.* at 220 n.7.

71. *Id.* at 214.

72. *Id.*

73. *Id.* at 215. Rawls adds: "Yet this may not always be so." *Id.*

be limited to the resolution of what Rawls calls "political questions concern[ing] the most fundamental matters," but should "extend . . . to all coercive uses of state power."[74])

Rawls means the ideal of public reason to govern not only the elected representatives of the people (and judges),[75] but all citizens.[76] According to the ideal, neither citizens nor their representatives should make a political choice unless it can be justified on the basis of public reasons, and the public justification of a political choice should be on the basis of public reasons.[77] My principal concern in this Essay is the role of religious arguments in public political debate. (In the larger work from which this Essay is drawn, I turn to the question of the role of such arguments as basis of political choice.) Nonetheless, because Rawls means the ideal of public reason to govern the making as well as the public justification of political choices, I comment here on the ideal as it applies both to the making of and to the public justification of political choices.

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74. Solum, *Constructing an Ideal of Public Reason*, *supra* note 67, at 738-39; *cf.* GREENAWALT, PRIVATE CONSCIENCES, *supra* note 7, at 117-20 (arguing that Rawls's two-track approach—public reason for political questions that concern "the most fundamental matters" but not for other political questions—gives rise to "[s]erious technical problems . . . [that] raise[] further doubt about the theoretical defensibility of his position and about the feasibility of its practical application").

75. I comment on Rawls's position with respect to judges in the larger work from which this Essay is drawn. *See* PERRY, RELIGION IN POLITICS, *supra* note 17.

76. *See supra* note 62.

77. *See* RAWLS, POLITICAL LIBERALISM 1993, *supra* note 67, at 215-16:

> Another feature of public reason is that its limits do not apply to our personal deliberations and reflections about political questions, or to the reasoning about them by members of associations such as churches and universities, all of which is a vital part of the background culture. Plainly, religious, philosophical, and moral considerations of many kinds may here properly play a role. But the ideal of public reason does hold for citizens when they engage in political advocacy in the public forum, and thus for members of political parties and for candidates in their campaigns and for other groups who support them. It holds equally for how citizens are to vote in elections when constitutional essentials and matters of basic justice are at stake. Thus, the ideal of public reason not only governs the public discourse of elections insofar as the issues involve those fundamental questions, but also how citizens are to cast their vote on these questions. Otherwise, public discourse runs the risks of being hypocritical: citizens talk before one another one way and vote another.
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> . . . [T]he ideal of public reason . . . applies in official forums and so to legislators when they speak on the floor of parliament, and to the executive in its public acts and pronouncements.

Rawls adds that the ideal of public reason "applies . . . in a special way to the judiciary and above all to a supreme court in a constitutional democracy with judicial review." *Id.* at 216.

Of course, Rawls means for the ideal of public reason to constrain citizens and their representatives, both in making and in publicly justifying political choices, to rely on public, rather than on nonpublic, reasons. But what, according to Rawls, are public reasons? Although Rawls does not distinguish between normative and nonnormative reasons in developing the ideal of public reason, it is, I think, useful to do so. Nonnormative reasons or premises are claims of fact, claims about the way things are (or were, or will be). Normative premises are claims of value, claims about the way things should be. (Although many religious premises are normative, many others are nonnormative; many religious premises are claims about the ways things are.) With respect to nonnormative premises, public reasons are "the plain truths now widely accepted, or available, to citizens generally."[78] Rawls includes here the "conclusions of science when these are not controversial."[79] With respect to normative premises, public reasons are "the ideals and principles expressed by society's conception of political justice."[80] Finally, public reasons include "guidelines of inquiry: principles of reasoning and rules of evidence in the light of which citizens are to decide whether substantive principles properly apply and to identify laws and policies that best satisfy them."[81] Rawls mentions, in particular, "forms of reasoning found in common sense, and the methods . . . of science when these are not controversial."[82] Rawls does not suppose—and it is obviously not the case—that a consensus has been achieved in the United States about what the constituents of a conception of political justice are. What does Rawls mean, then, by saying that (on the normative side) public reasons are limited to "the ideals and principles expressed by society's conception of political justice?"

> The point of the ideal of public reason is that citizens are to conduct their fundamental discussions within the framework

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78. *Id.* at 225.

79. *Id.* at 224.

80. *Id.* at 213; *see also id.* at 169 ("political values expressed by the political conception [of justice] endorsed by the overlapping consensus").

81. *Id.* at 224.

> Now it is essential that a liberal political conception include, besides its principles of justice, guidelines of inquiry that specify ways of reasoning and criteria for the kinds of information relevant for political questions. Without such guidelines substantive principles cannot be applied and this leaves the political conception incomplete and fragmentary.

Id. at 223-24.

82. *Id.* at 224.

> of what each regards as a political conception of justice based on values that the others can reasonably be expected to endorse and each is, in good faith, prepared to defend that conception so understood. This means that each of us must have, and be ready to explain, a criterion of what principles and guidelines we think other citizens (who are also free and equal) may reasonably be expected to endorse along with us. We must have some test we are ready to state as to when this condition is met. . . .
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> Of course, we may find that actually others fail to endorse the principles and guidelines our criterion selects. That is to be expected. The idea is that we must have such a criterion and this alone already imposes very considerable discipline on public discussion. Not any value is reasonably said to meet this test, or to be a political value; and not any balance of political values is reasonable. It is inevitable and often desirable that citizens have different views as to the most appropriate political conception [of justice]; for the public political culture is bound to contain different fundamental ideas that can be developed in different ways. An orderly contest between them over time is a reliable way to find which one, if any, is most reasonable.[83]

Rawls's point, then, seems to be this. The ideal of public reason constrains a citizen to rely on, on the nonnormative side, only "the plain truths now widely accepted, or available, to citizens generally"[84] and, on the normative side, only those normative premises (ideals, principles, values) that are part of a conception of political justice that (1) she reasonably believes other (free and equal) citizens reasonably could accept and (2) she is prepared to defend to other citizens as one they reasonably could accept.[85] (The ideal of public reason also constrains a citizen to accept certain "guidelines of inquiry

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83. *Id.* at 226-27.

84. *Id.* at 225.

85. In the introduction to the paperback edition of *Political Liberalism*, Rawls writes:

> Note that 'reasonably' [sic] occurs at both ends in this formulation: in offering fair terms we must reasonably think that citizens offered them might also reasonably accept them. And they must be able to do this as free and equal, and not as dominated or manipulated, or under the pressure of an inferior political or social position.

RAWLS, POLITICAL LIBERALISM 1996, *supra* note 67.

... [e.g.,] forms of reasoning found in common sense, and the methods ... of science when these are not controversial.")[86]

It seems quite uncontroversial that if a citizen can justify a political choice on the basis of premises, normative or nonnormative or both, that she believes other citizens reasonably could accept and that she is prepared to defend to them as premises they could accept, she should do so. Strategically, she is much better off doing so than relying on premises she believes other citizens could not accept. Morally, she is much better off doing so, in this sense: She cultivates rather than subverts the bonds of political community (or, as Rawls prefers, "social unity"[87]) by relying on premises that in her view unite, or could unite, the citizenry rather than on premises that divide them. (I have discussed the nature of political community, understood as a "community of judgment," elsewhere—and I have explained why political community, thus understood, is a good.[88])

But, of course, it is not necessarily the case that a citizen can justify a political choice she wants to make—and perhaps even believes herself morally obligated to make—on the basis of premises that she believes other citizens could reasonably accept (and that she is prepared to defend to them as premises they could accept): The relevant premises (that she believes other citizens could reasonably accept) may be indeterminate (or, more precisely, underdeterminate[89]); they may well be inconclusive with respect to the issue at hand. What is she to do when the relevant premises—and therefore the political conception of justice they constitute—are indeterminate? If Rawls believes that such indeterminacy is a marginal reality and therefore a minor problem, as in a recent writing he suggests,[90] he

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86. RAWLS, POLITICAL LIBERALISM 1993, *supra* note 67, at 224.

87. *Id.* at 133-72.

88. *See* PERRY, LOVE AND POWER, *supra* note 3, at 83-127.

89. *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

90. In the new introduction of the paperback edition of *Political Liberalism*, Rawls writes:

> One objection to the wide view of public reason is that it is still too restrictive. However, to establish this, we must find pressing questions of constitutional essentials or matters of basic justice that cannot reasonably be resolved by political values expressed by any of the existing reasonable political conceptions, nor also by any such conceptions that could be worked out. Political Liberalism doesn't argue that this can never happen; it only suggests that it rarely does so. Whether public reason can settle all, or almost all, political questions by a reasonable ordering of political values cannot be decided in the abstract independent of actual cases.

RAWLS, POLITICAL LIBERALISM 1996, *supra* note 67.

is simply wrong. As American constitutional materials powerfully confirm, the underdeterminacy of some of our political-moral norms is a central reality.[91] In his Presidential Address to the American Philosophical Association, Philip Quinn has emphasized, with particular reference to the matter of abortion, the problem of indeterminacy that confronts Rawls's ideal of public reason.[92]

But even if for the sake of argument we put aside the problem of indeterminacy, which is a substantial problem for Rawls's position, this more fundamental question remains: If the premises that a citizen believes other citizens could reasonably accept (and that she is prepared to defend to them as premises they could accept) do not support a political choice she wants to make, why shouldn't she defend the choice—and make it—on the basis of nonpublic premises that in her view do support the choice? Imagine, for example, that because of one or more of her religious beliefs—which, for Rawls, are nonpublic reasons—a citizen is convinced that a political choice is the right political choice, the correct one, but that she also believes (perhaps mistakenly) that the choice is not one she can justify on the basis of public reasons. (Religious premises may be nonnormative—they may be beliefs about the ways things are—as well as normative.) Why should she acquiesce in Rawls's view that the ideal of public reason trumps what she is convinced to be the right political choice? Or, as Rawls himself has an imaginary interlocutor state the question:

> [W]hy should citizens in discussing and voting on the most fundamental political questions honor the limits of public reason? How can it be either reasonable or rational, when basic matters are at stake, for citizens to appeal only to a public conception of justice and not to the whole truth as they see it? Surely, the most fundamental questions should be settled by appealing to the most important truths, yet these may far transcend public reason![93]

Rawls responds to this, the most fundamental question we can ask about his ideal of public reason, by invoking what he calls "the liberal principle of legitimacy," according to which not even a

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91. I have discussed this state of affairs—and how the judiciary should respond to it—elsewhere. *See generally* PERRY, CONSTITUTION IN THE COURTS, *supra* note 11, at 70-115.

92. *See* Philip L. Quinn, *Political Liberalisms and Their Exclusions of the Religious*, 69 PROC. & ADDRESSES OF THE AM. PHIL. ASS'N. 35, 40-46 (1995).

93. RAWLS, POLITICAL LIBERALISM 1993, *supra* note 67, at 216.

majority of citizens may exercise coercive political power over any citizen unless a premise or premises that the citizen, understood as free and equal, could reasonably accept supports the majority's doing so.

> [W]hen may citizens by their vote properly exercise their coercive political power over one another when fundamental questions are at stake? Or in the light of what principles and ideals must we exercise that power if our doing so is to be justifiable to others [understood] as free and equal [citizens]? To this question political liberalism replies: our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principle of legitimacy. And since the exercise of political power itself must be legitimate, the ideal of citizenship imposes a moral, not a legal, duty—the duty of civility—to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason.[94]

The problem with this response—a conspicuous problem, in my view—is that it is question-begging: Rawls's answer presupposes the authority of that which is at issue. The question why a majority of citizens (we are talking about a democracy, after all) should abandon the coercive political choice they believe they should otherwise make just because, in their view, no premise that other citizens could (reasonably) accept supports the choice *is* the question why a majority of citizens may exercise coercive political power over a citizen only if a premise or premises that they believe the citizen (understood as free and equal) could accept supports the majority's doing so. It remains obscure why we do not show others the respect that is their due as human beings or, at least, as "free and equal citizens" when we offer them, in explanation, what we take to be our best reasons for acting as we do (so long as our reasons do not themselves assert, imply, or presuppose the inferior humanity of those to whom the explanation

94. *Id.* at 217. Rawls adds: "This duty also involves a willingness to listen to others and a fairmindedness in deciding when accommodations to their views should reasonably be made." *Id.*

is offered).[95] According to Robert Audi, "If you are fully rational and I cannot convince you of my view by arguments framed in the concepts we share as rational beings, then even if mine is the majority view I should not coerce you."[96] But *why*?

> There is a gap between a premise which requires the state to show equal concern and respect for all its citizens and a conclusion which rules out as legitimate grounds for coercion the fact that a majority believes that conduct is immoral, wicked, or wrong. That gap has yet to be closed.[97]

Merely invoking "the liberal principle of legitimacy" as if it were an axiom of American political morality does not advance the discussion; it does not close the gap. Invoking the principle without defending it will work only for those who already accept the principle. Invoking the principle without defending it does not tell anyone who does not already accept the principle why she should accept it; it does not give anyone reasons, public or otherwise, for accepting it.

The point is not that if a citizen can explain a political choice she wants to make on the basis of premises she believes other citizens could accept, or could reasonably accept, she should not do so. To the contrary, she *should* do so. We have reasons—both a strategic reason and a moral one—for *that* position, as I indicated a few paragraphs back. What we do not yet have are reasons—what Rawls has not given us is an argument—for a different position: the position that if no premises that a citizen believes other free and equal citizens

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95. *See* WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 108-09 (1991). Commenting critically on Rawls's *Political Liberalism*, Michael Sandel has observed:

> On the liberal conception [of mutual respect], we respect our fellow citizens' moral and religious convictions by ignoring them (for political purposes), by leaving them undisturbed, or by carrying on political debate without reference to them. To admit moral and religious ideals into political debate about justice would undermine mutual respect in this sense.

Sandel, *supra* note 43, at 1794. Sandel then remarks:

> [T]his is not the only, or perhaps even the most plausible way of understanding the mutual respect on which democratic citizenship depends. On a different conception of respect . . . we respect our fellow citizen's moral and religious convictions by engaging, or attending to them—sometimes by challenging and contesting them, sometimes by listening and learning from them—especially if those convictions bear on important political questions.

Id.

96. Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677, 701 (1993).

97. Gerald Dworkin, *Equal Respect and the Enforcement of Morality*, 7 SOC. PHIL. & POL'Y 180, 193 (1990).

could reasonably accept, and that she is prepared to defend them as premises they could reasonably accept, support a political choice she wants to make, she should abandon the choice. We need an (non-question-begging) argument for the position that "when basic matters are at stake," a citizen should "appeal only to a public conception of justice and not to the whole truth as they see it." Surely the presumption must be (until Rawls or someone else develops an argument rebutting the presumption) that even "the most fundamental questions should be settled by appealing to the most important truths, [which] may far transcend public reason."[98] Commenting on Rawls's ideal of public reason, John Langan has written:

> [I]t is . . . important for [religious groups in a pluralistic society] to retain a certain transcendence in relation to any specific constitutional system, a transcendence which will enable them to protest the atrocities and idolatries of which states have always been capable. To place an idealized form of state over admittedly imperfect communities of faith in our determination of the range of acceptable moral considerations seems to me to be both dangerous and unfaithful, and it is at best a dubious contribution to civic peace.[99]

We can all agree, surely, that it is good to cultivate the bonds of political community; it is good to promote what Rawls calls "social unity." But contrary to what Rawls seems to presuppose, social unity is not all-or-nothing; it is more-or-less. The serious inquiry, as Langan's comment suggests, is this: How much social unity—and at what cost or costs? What if, in the view of some citizens—for example, those on the "pro-life" side in the abortion controversy—the lives of innocent human beings hang in the balance? Does Rawls really believe that such citizens should prize an incremental addition to social unity over innocent human life?[100] Instead of Rawls's seem-

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98. *See* Timothy P. Jackson, *Love in a Liberal Society: A Response to Paul J. Weithman*, 22 J. RELIGIOUS ETHICS 29 (1994).

99. John Langan, S.J., *Overcoming the Divisiveness of Religion: A Response to Paul J. Weithman*, 22 J. RELIGIOUS ETHICS 47, 51 (1994); *cf.* Paul F. Campos, *Secular Fundamentalism*, 94 COLUM. L. REV. 1814 (1994).

100. *See* Sandel, *supra* note 43, at 1776-77:

> Where grave moral questions are concerned, whether it is reasonable to bracket moral and religious controversies for the sake of political agreement partly depends on which of the contending moral or religious doctrines is true.
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> . . . .
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> . . .[E]ven granting the importance of securing social cooperation on the basis of mutual respect, what is to guarantee that this interest is always so

ingly either/or approach, why not a more nuanced, middle position, according to which, in the interest of promoting social unity, of cultivating rather than subverting the bonds of political community, we try to justify political choices we want to make, as much as possible, on the basis of political "ideals, principles and values that we may reasonably suppose all citizens could accept"—but according to which we do not *invariably* let the inability of a political choice to be justified on such a basis preclude us from making the choice, or from publicly supporting it, on the basis of what we take to be our best reasons, even though, alas, they are what Rawls terms "nonpublic?"

Moreover, given the intractable problem of indeterminacy mentioned earlier, following the path of public reason does not always lead to one and only one position on a contested issue. With respect to many contested issues, it will be necessary, after following the path of public reason to the end, to go on from there on the basis of one or more nonpublic reasons, whether religious or nonreligious (secular). Rawls believes that the abortion controversy—the question of what public policy regarding abortion ought to be—should be resolved according to the ideal of public reason.[101] (That the abortion controversy presents the sort of fundamental political issue Rawls means to be resolved according to the ideal of public reason is obvious. At the heart of the abortion controversy, after all, is a fundamental—perhaps the fundamental—political issue: Who is a subject of justice?[102]) But the ideal of public reason is conspicuously indeterminate (underdeterminate) with respect to the abortion controversy. This is reflected by the fact that many persons on *both* sides of the controversy—many persons who are "pro-life" *and* many

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important as to outweigh any competing interest that could arise from within a comprehensive moral or religious view?

101. *See, e.g.*, RAWLS, POLITICAL LIBERALISM 1996, *supra* note 67.

102. Robert George has written: "Opponents of abortion . . . view all human beings, including the unborn . . . as members of the community of subjects to whom duties in justice are owed . . . . The real issue of principle between supporters of abortion . . . and opponents . . . has to do with the question of who are subjects of justice." Robert P. George, Book Review, 88 AM. POL. SCI. REV. 444, 445 (1994) (reviewing RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993)). In George's view, "The challenge to the orthodox liberal view of abortion . . . is to identify nonarbitrary grounds for holding that the unborn . . . do not qualify as subjects of justice." *Id.* George adds: "Frankly, I doubt that this challenge can be met. In any event, Dworkin here fails to make much progress toward meeting it." *Id.* at 446; *cf.* Mary Warnock, *The Limits of Toleration*, *in* ON TOLERATION 123, 125 (Susan Mendus & David Edwards eds., 1987) (commenting on John Stuart Mill's failure to address, *inter alia*, the question "Who is to count as a possible object of harm?").

persons who are "pro-choice"—affirm these two relevant, fundamental "public" values: the great worth of human life and the full and therefore equal humanity of women. With respect to the abortion controversy, it is necessary, after following the ideal of public reason to the end, to go on from there on the basis of one or more nonpublic reasons. Some citizens believe that *all* human life, *including unborn human life*, is sacred. What would Rawls have the citizen do who sincerely believes that innocent lives hang in the balance? It bears emphasis here that following the path of public reason does not lead, without the intervention of nonpublic reasons, to the "pro-choice" position in the abortion controversy any more than it leads to the "pro-life" position. The path of public reason runs out before the "pro-choice" position is reached.[103] Reliance partly on a nonpublic reason or reasons, whether religious or secular, is necessary for those on the "pro-choice" side of the debate no less than for those on the "pro-life" side: for example, "A human fetus is not a 'person' and therefore does not have the rights that persons have."

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103. *See* Quinn, *supra* note 92 at 40-46. A default position in favor of a noncoercive public policy is deeply problematic. *See* PERRY, LOVE AND POWER, *supra* note 3, at 13-14.

In the new introduction to the paperback edition of *Political Liberalism*, Rawls seems to think that the abortion controversy sometimes exemplifies (whatever else it exemplifies) not the problem of the underdeterminacy of public reason but rather a "stand-off" between two competing arguments, one of them "pro-life" and the other "pro-choice," each of which is consistent with public reason. JOHN RAWLS, POLITICAL LIBERALISM 1996, *supra* note 67).

> However, disputed questions, such as that of abortion, may lead to a stand-off between political conceptions and citizens must simply vote on the question. Indeed, this is the normal case: unanimity of views is not to be expected. Reasonable political conceptions do not always lead to the same conclusion; nor do citizens holding the same coception [sic] always agree on particular issues. Yet the outcome of the vote is to be seen as reasonable provided all citizens of a reasonably just constitutional regime sincerely vote in accordance with the idea of public reason. This doesn't mean the outcome is true or correct, but it is for the moment reasonable, and binding on citizens by the majority principle. Some may, of course, reject a decision, as Catholics may reject a decision to grant a right to abortion. They may present an argument in public reason for denying it and fail to win a majority. But they need not exercise the right of abortion in their own case. They can recognize the right as belonging to legitimate law and therefore do not resist it with force.

Id. As I have suggested in the text accompanying this note, however, the problem is not that (which Rawls calls "the normal case") of a "stand-off" between two arguments, each of which is consistent with the ideal of public reason. The problem, rather, is that of the underdeterminacy of public reason with respect to the policy issue of abortion. *See supra* text accompanying note 92.

Because of the role that religious arguments about the morality of human conduct inevitably play in the political process, it is important that such arguments, no less than secular moral arguments, be presented in—so that they can be tested in—public political debate. Moreover, it is impossible to construct "an airtight barrier" between, on the one side, public culture generally—in which religiously based moral discourse is undeniably proper—and, on the other, public debate specifically about controversial political issues. Because Kent Greenawalt and John Rawls have each defended a position less congenial to the airing of religious arguments in public political debate than the position—the *inclusivist* position—I have defended in this Essay, I have detailed here what I take to be the inadequacies both of the arguments Greenawalt gives for his position and of those Rawls gives for his.