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## Faith and Justice

Lawrence B. Solum


*Georgetown University Law Center, lbs32@law.georgetown.edu*

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## FAITH AND JUSTICE

*Lawrence B. Solum\**

It strikes me that a religious belief could only be something like a passionate commitment to a system of reference. Hence, although it's *belief*, it's really a way of living, or a way of assessing life. It's passionately seizing hold of *this* interpretation.

—Ludwig Wittgenstein\*\*

### INTRODUCTION

What is the relationship between faith and justice? In particular, this Article will address the question of what a Justice of the United States Supreme Court should do, when her religious faith suggests that a case should be resolved in a way that is either inconsistent with the law or not justified by nonreligious, public reasons. May she rely on her religious beliefs to resolve a hard case? May she write an opinion that uses religious grounds to justify her decision?

In this Article, I will undertake to elaborate and defend a distinctively liberal position concerning faith and justice. My thesis is that respect for the diversity of faiths requires that judicial decisions not be made or justified on the basis of religious faith. Rather, judicial decisions should be made and justified by public reasons that could be accepted by individuals from a diversity of faiths or no faith at all.

On one interpretation, this thesis may seem paradoxical. Instead of respecting religious diversity, liberal political theory might seem to privilege law over morality, to subordinate religious faith to constitutional faith, to elevate individuals over communities, and to relegate our deepest concerns, our transcendental interests, to a private sphere. One version of this paradox is illustrated by Sanford Levinson's suggestion<sup>1</sup> that the Constitution of the United States should be understood as the canonical text for a civic religion

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\* Professor of Law and Rains Fellow, Loyola Law School, Loyola Marymount University, Los Angeles, California. An earlier version of these comments was delivered at the Third Annual Charles S. Cassasa, S.J., Conference: The American Constitutional Republic: Triumphs and Dilemmas, Loyola Marymount University, Los Angeles, California (Mar. 9, 1989). I am grateful to David Blake, Barbara Hermann, and Sanford Levinson for their illuminating remarks at the Cassasa Conference. I owe additional thanks to Ken Anderson, Don Brosnan, and Sharon Lloyd for discussion concerning the themes of this Article. Finally, I am indebted to Kent Greenawalt, Sam Pillsbury, Mark Tushnet, and Paul Weithman for comments on a draft of the Article and to Shelley Marks for her editorial suggestions.

\*\* L. WITTGENSTEIN, *CULTURE AND VALUE* 64e (P. Winch trans. 1980) (original emphasis).

1. See Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047 (1990).

or *Constitutional Faith*.<sup>2</sup> Thus, Levinson portrays the process of nominating and confirming a Supreme Court Justice as "a highly stylized ceremony" of "the American civil religion"; the Justices are "high priests of the sacred constitutional texts."<sup>3</sup>

Although the analogy between interpretation of the Constitution and interpretation of sacred texts is a source of rich insights into the most fundamental issues in constitutional theory,<sup>4</sup> this analogy does not provide the best interpretation of our constitutional order. That interpretation is rooted in the liberal political tradition associated with Locke<sup>5</sup> and exemplified by the ongoing work of John Rawls.<sup>6</sup> On this liberal interpretation, our constitutional tradition does not subordinate faith to justice. This Article elaborates a theory of justice that gives to communities of religious faith the greatest possible respect consistent with the constraints imposed by the facts of modern political life.

2. See S. LEVINSON, *CONSTITUTIONAL FAITH* (1988).

3. Levinson, *supra* note 1, at 1048.

4. See Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599 (1989); Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U.L. REV. 54, 58-62 (1989).

5. See J. LOCKE, *TWO TREATISES OF GOVERNMENT* (P. Laslett ed. 1988); 6 J. LOCKE, *THE WORKS OF JOHN LOCKE 1-574* (1823) (containing *A Letter Concerning Toleration*, *A Second Letter Concerning Toleration*, *A Third Letter for Toleration*, and *A Fourth Letter for Toleration*).

6. See J. RAWLS, *A THEORY OF JUSTICE* (1971); Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233 (1989); Rawls, *Themes in Kant's Moral Philosophy*, in *KANT'S TRANSCENDENTAL DEDUCTIONS: THE THREE CRITIQUES AND THE OPUS POSTUMUM* 81 (E. Förster ed. 1989); Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 251 (1988); Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. OF LEGAL STUD. 1 (1987); Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985); Rawls, *Social Unity and the Primary Goods*, in *UTILITARIANISM AND BEYOND* 159 (A. Sen & B. Williams eds. 1982); Rawls, *The Basic Liberties and Their Priority*, in 3 *THE TANNER LECTURES ON HUMAN VALUE 1* (S. McMurrin ed. 1982); Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515 (1980); Rawls, *The Basic Structure as Subject*, 14 AM. PHIL. Q. 159 (1977); Rawls, *The Basic Structure as Subject*, in *VALUES AND MORALS: ESSAYS IN HONOR OF WILLIAM FRANKENA, CHARLES STEVENSON, AND RICHARD BRANDT* 47 (A. Goldman & J. Kim eds. 1978) (revised version of immediately prior citation); Rawls, *Fairness to Goodness*, 84 PHIL. REV. 536 (1975); Rawls, *The Independence of Moral Theory*, 48 AM. PHIL. A. PROC. 5 (1975); Rawls, *A Kantian Conception of Equality*, 96 CAMBRIDGE REV. 94 (1975); Rawls, *Some Reasons for the Maximin Criterion*, 64 AM. ECON. REV. 141 (1974); Rawls, *Reply to Alexander and Musgrave*, 88 Q. J. ECON. 633 (1974); Rawls, *Distributive Justice*, in *ECONOMIC JUSTICE: SELECTED READINGS* (E. Phelps ed. 1973); Rawls, *Reply to Lyons and Teitelman*, 69 J. PHIL. 556 (1972); Rawls, *Justice as Reciprocity*, in *UTILITARIANISM: JOHN STUART MILL: WITH CRITICAL ESSAYS* 242 (S. Gorovitz ed. 1971); Address by John Rawls, *The Idea of Free Public Reason*, Inaugural Abraham Melden Lectures, Department of Philosophy, University of California at Irvine (Feb. 27 & Mar. 1, 1990); J. Rawls, *Justice As Fairness: A Briefer Restatement* (1989) (unpublished manuscript).

There are many other political theorists working in the liberal tradition. See, e.g., B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* (S. Hampshire ed. 1978); Scanlon, *Contractualism and Utilitarianism*, in *UTILITARIANISM AND BEYOND* 103 (A. Sen & B. Williams eds. 1982).

Part I of this Article outlines some critical perspectives on the relationship between faith and justice. The liberal conception of constitutional order seems to rely on questionable assumptions about the nature of public and private, sameness and difference, and the right and the good. These assumptions have been subjected to a sustained examination from the perspectives of critical legal studies, feminist jurisprudence, and critical race theory. Part II seeks to develop a liberal theory of the relationship between faith and justice that is responsive to this critique. The liberal case for excluding religious faith or any other comprehensive conception of the good from the process of judging rests on the idea that political justification in general, and legal argumentation in particular, should attempt to forge and sustain an overlapping consensus on a public conception of justice. Part III applies this liberal conception of the relationship between faith and justice to issues raised by Catholics becoming Justices. Finally, Part IV presents my concluding thoughts on the relationship between faith and justice.

### I. CRITICAL PERSPECTIVES ON FAITH AND JUSTICE

Liberal ideas about the relationship between faith and justice can be criticized from a variety of perspectives. One set of perspectives for criticism is within particular religious traditions that see strong connections between faith and justice, for example, fundamentalist Christianity, Roman Catholicism, or Orthodox Judaism. Another set of perspectives for criticism is located in the movements in modern legal thought that reject many liberal ideas about law and justice. This set includes the critical legal studies movement, feminist jurisprudence, and critical race theory.

Sanford Levinson's discussion of the relationship between faith and justice suggests the possibility that communities of faith may share some common ground with the critical legal scholars in opposition to liberalism. For example, Levinson remarks that the discourse in confirmation hearings:

[E]ncompasses a fear that the 'private' realm of religion . . . will illegitimately invade the public space of judicial decisionmaking. As a result, this concern about the 'private' invasion of the 'public' ends up by subtly forcing upon those who would become public officials a revision of one's 'private' identity as a religious being.<sup>7</sup>

Levinson's language echoes one of the central themes of the critical legal studies movement, an attack on the coherence of the public-private distinction. Critical scholars have argued that the distinction between public and private spheres that underlies liberal discourse cannot withstand close scrutiny.<sup>8</sup> As applied to the relationship between faith and justice, the argument

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7. Levinson, *supra* note 1, at 1048-49.

8. See M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 271 (1988); Casebeer, *Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379 (1983); Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

might be that divergent faiths are relegated to a private sphere while beliefs consistent with those of the powerful are accepted as part of the public political culture.

In addition, Levinson makes explicit<sup>9</sup> a connection between his investigation of the confirmation process for Catholic Justices and recent work in feminist jurisprudence—the issue of sameness and difference.<sup>10</sup> On the one hand, advocates of equal rights for religious believers may contend that they should be treated the “same” as anyone else; their religion should not be taken into account. On the other hand, these same advocates might contend that real equality requires that their “differences”—for example, the centrality of their religious beliefs to their very identity—be given explicit consideration.

Finally, Levinson invokes the views of Michael Sandel, a leading communitarian critic of liberal political theory.<sup>11</sup> Sandel’s attack is focused on the liberal distinction between the right and the good.<sup>12</sup> Sandel argues that this distinction is based on an implausible conception of human nature as somehow independent of the transcendental interests and community. Human personality is constituted by attachment to particular interests and communities.<sup>13</sup> The critical scholar, Mark Tushnet, echoed Sandel, when he suggested that the liberal tradition is incapable of understanding the role of faith in “mobiliz[ing] the deepest passions of believers in the course of creating institutions that stand between individuals and the state.”<sup>14</sup>

9. See Levinson, *supra* note 1, at 1052-53.

10. See Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1159-64 (1986) (sameness means generality or removing individuals from their context and connections, while difference takes account of such); Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1324-35 (1987) (discussing differences between sexes and suggesting model of equality called “equality as acceptance”); Minow, *The Supreme Court, 1986 Term: Forward: Justice Engendered*, 101 HARV. L. REV. 10, 17-31 (1987) (discussing three versions of Supreme Court’s attempt to deal with dilemma of sexual differences); Olsen, *From False Paternalism to False Quality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, 84 MICH. L. REV. 1518, 1521-23 (1986) (debate over sameness and difference has concerned “equal treatment” and “special treatment”); Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women’s Movement*, 61 N.Y.U. L. REV. 589, 604 n.68 (1986) (discussing application in feminist theory of difference in sameness, with respect to racial, class, and experience differences among women, and of sameness in difference, with respect to all women having been subordinated); Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 837-43 (1989) (discussing shift in feminist approach away from similarities to males and toward gender differences).

11. See Levinson, *supra* note 1, at 1065.

12. See M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); see also A. ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* 66-71 (1990); Fallon, *What is Republicanism and is it Worth Reviving?*, 102 HARV. L. REV. 1695 (1989); Fried, *Liberalism, Community, and the Objectivity of Values* (Book Review), 96 HARV. L. REV. 960 (1983); Griffin, *Reconstructing Rawls’s Theory of Justice: Developing a Public Values Philosophy of the Constitution*, 62 N.Y.U. L. REV. 715 (1987); Sagoff, *Can Environmentalists Be Liberals? Jurisprudential Foundations of Environmentalism*, 16 ENVTL. L. 775 (1986). For further explanation, see *infra* notes 24-25 and accompanying text.

13. See M. SANDEL, *supra* note 12, at 179-83.

14. M. TUSHNET, *supra* note 8, at 248.

These abstract critical concerns can be made concrete and particular. Take an abolitionist who opposed slavery on religious grounds. Suppose that she believed that she had a duty to God to bear public witness that slavery is sinful because it is contrary to God's law. Suppose, furthermore, that she considered her religious faith to be constitutive of her being; she could not imagine a "public" version of herself that would campaign against slavery with secular arguments.<sup>15</sup> What grounds could we have given her for forbearing from advancing her religious reasons for opposing slavery in pamphlets, newspaper articles, and election speeches—that is, in the public sphere?

The critic of liberalism might argue that one implication of the abolitionist example is that the liberal state cannot be neutral between conceptions of the good.<sup>16</sup> Rather than mediating the deep differences between our ultimate commitments, liberalism favors a particular conception of the human good, an atomistic, individualistic conception that destroys the basis for community and solidarity.<sup>17</sup> Constitutional faith may be the basis for our civic religion, the argument continues, but it is an empty faith, one that drains our lives of any transcendent meaning and requires us to subordinate our most sacred commitments to profane concerns.

## II. A LIBERAL VIEW OF FAITH AND JUSTICE

Can a liberal view of the relationship between faith and justice be defended against such criticism? In this Part, I will sketch a liberal theory that responds to critical concerns about public and private, sameness and difference, and the right and the good. I begin with the fact that religious and other differences make it impossible to reach public agreement about a comprehensive conception of the good or moral life for individuals and communities. My thesis is that accommodation of our differences requires a public conception of justice that can be the basis for an overlapping consensus between persons and communities with a wide range of beliefs about the good.

### A. *The Fact of Pluralism*

My argument for this thesis is contingent on historical circumstances. The epistemic foundation of the liberal theory that I will defend is its "rootedness

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15. M. PERRY, *MORALITY, POLITICS, AND LAW* 181-83 (1988); Carter, *The Religiously Devout Judge*, 64 *NOTRE DAME L. REV.* 932, 940 (1989).

16. See Perry, *Neutral Politics?*, 51 *REV. OF POLITICS* 479 (1989); Carter, *supra* note 15, at 937-38.

17. This charge has been a prominent feature of radical criticism of liberalism at least since Marx. See Marx, *On the Jewish Question*, in *KARL MARX: SELECTED WRITINGS* 39 (D. McLellan ed. 1977) (discussing need for human emancipation involving cessation of use of political forces to separate the individual from social forces).

in the here and now."<sup>18</sup> In particular, the theory is rooted in the conditions that prevail in the modern North Atlantic constitutional democracies. These conditions include the following general facts concerning political life: (1) individuals have comprehensive religious, philosophical, and moral beliefs about what is ultimately good or meaningful; (2) these beliefs are diverse or plural; and (3) there is no method available for achieving wide social agreement about the good, short of the repressive use of state power.

John Rawls summarizes these conditions as the fact of pluralism: there is a "plurality of conflicting and indeed incommensurable conceptions of the meaning, value and purpose of human life."<sup>19</sup> Moreover, the fact of pluralism "is not a mere empirical condition that will soon pass away; it is . . . a permanent feature of the public culture of modern democracies."<sup>20</sup> This fact is rooted in the history of Western Europe, in particular in the persistence of disagreement over matters of faith since the Protestant Reformation and in the bloody tragedy of the religious wars of the sixteenth century.<sup>21</sup>

The fact of pluralism is of crucial importance because some of our concerns, especially our religious concerns, constitute transcendent interests.<sup>22</sup> These interests transcend our ordinary interests in our own material welfare; there are some things for which we are willing to risk our lives and our fortunes. The history of Western Europe and the reality of contemporary Beirut remind us that people are willing to fight and to die for their transcendent interests in religious faith. Moreover, some transcendent interests are other-regarding; I may believe that morality requires me to do everything possible to ensure that your soul is saved. When such other-regarding transcendent interests come into conflict, social stability may shake and even crumble. Hobbes's contribution to political philosophy was to call our attention to this, the dark side of the fact of pluralism.<sup>23</sup>

The fact of pluralism motivates liberal political theory. This fact provides those of us who live in plural societies with a reason to search for common ground, for principles that we can affirm from our own perspective and that

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18. Raz, *Facing Diversity: The Case of Epistemic Abstinence*, 19 *PHIL. & PUB. AFF.* 3, 6 (1990).

19. Rawls, *The Idea of an Overlapping Consensus*, *supra* note 6, at 4.

20. *Id.*

21. See Holmes, *Jean Bodin: The Paradox of Sovereignty and the Privatization of Religion*, in *RELIGION, MORALITY, AND THE LAW: NOMOS XXX 5* (J. Pennock & J. Chapman eds. 1988) (discussing pluralism in context of Bodin's belief that a religiously tolerant sovereign is more powerful than a sovereign which imposes religious beliefs on its subjects); Rawls, *Justice as Fairness: Political Not Metaphysical*, *supra* note 6, at 225 (arguing that after the religious wars and development of toleration, "as a practical matter no general moral conception can provide a publicly recognized basis for a conception of justice in a modern democratic state" because of fact of pluralism).

22. My understanding of transcendent interests is based on the work of Sharon Lloyd. See S. Lloyd, *Interpreting Hobbes's Leviathan* (unpublished thesis, Harvard University 1987) (forthcoming from Cambridge University Press as S. LLOYD, *IDEALS AS INTERESTS IN HOBBS'S LEVIATHAN: A CASE OF MIND OVER MATTER*).

23. See T. HOBBS, *LEVIATHAN* (C. B. MacPherson ed. 1968).

will provide a basis for stable compromise. The next step is to develop a partial account of a theory of justice that provides for a principled resolution of the possible conflict between faith and justice.

*B. The Requirement of Public Reason*

The task at hand is to sketch the part of a theory of justice that will address the particular conflicts between faith and justice that arise for judges. In particular I will argue for a requirement that judicial decisions be made and justified on the basis of public reasons. This requirement is part of a liberal theory of justice that makes a political (but not a metaphysical) distinction between the right and the good.<sup>24</sup>

This distinction forms the background for the fragment of liberal political theory I will describe, but the distinction is itself deeply controversial. Moreover, the precise distinction that I make is not always or even usually reflected in ordinary usage. I offer the following definitions and examples for clarification. A conception of the good is a conception of what an individual or community should aim for; such a conception will specify both plans of life for individuals and forms of communal life for groups. A conception of the good might be self-regarding: for some the good life may consist of contemplation and prayer. But the good may be other-regarding: the good life may consist of works of charity.

By way of contrast, a conception of the right deals with only a subset of the good. In particular, a political conception of justice deals with basic structure of society, with political, social, and economic institutions. Such a conception is limited in scope: it refrains from addressing the question of what individuals ought to aim for in life. In a liberal conception of justice, the right is prior to the good. Our political conception of justice is regarded as a limit on our pursuit of our differing conceptions of the good life.<sup>25</sup>

With this distinction between the right and the good in place, I will mention a number of principles relevant to the relationship between faith and justice. For example, justice requires the toleration of religious belief, a right to free exercise of religion, and a rule against the establishment of any religion by the state. Such principles are embodied in the first amendment to the United States Constitution.<sup>26</sup>

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24. See J. Rawls, *A THEORY OF JUSTICE*, *supra* note 6, at 31-32, 446-452; Rawls, *The Priority of Right and Ideas of the Good*, *supra* note 6, at 251. The distinction between the right and the good should not be confused with the distinction between religious and secular beliefs or reasons. There can be religious beliefs about the right and secular beliefs about the good.

25. The priority of the right over the good is the result of a principled political choice. There is no metaphysical guarantee of this priority. From within our separate conceptions of the good, we choose to affirm a conception of justice that limits our right to pursue the good because this is a good thing, given the facts of pluralism.

26. U.S. CONST. amend. I.



In particular, justice requires that public institutions make and justify decisions on the basis of public reasons.<sup>27</sup> I will call this the *requirement of public reason*. The content of the requirement of public reason can be specified by answering three questions:

- (1) What does it mean to say that *public institutions* must make and justify decisions on the basis of public reasons?
- (2) What does it mean to make and justify a decision *on the basis of* public reasons?
- (3) What are *public* reasons?

What does it mean to say that *public institutions* must make and justify decisions on the basis of public reasons? The requirement of public reason applies to public institutions, that is, it applies to individuals when they act in their capacities as officials of public institutions. Thus, the requirement of free public reason does not forbid political advocacy on religious grounds by churches, by individuals, or by political candidates. It does apply to members of legislative bodies in the course of official public deliberation, to executive officers in the course of their official duties, and to judges and other adjudicators.

What does it mean to make and justify a decision *on the basis of* public reasons? This is a difficult question. I will begin my answer by ruling out

27. For discussion of similar requirements, see K. GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 56-76 (1988); Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 *PHIL. & PUB. AFF.* 259, 277-86 (1989); Address by John Rawls, *The Idea of Free Public Reason*, *supra* note 6; P. Weithman, *The Separation of Church and State: Some Questions for Professor Audi* (unpublished manuscript 1989) (on file with the author).

The requirement of public reason that I elaborate and defend is narrow in its scope of application when compared with Professor Audi's principles of political neutrality and secular motivation. The Institutional Principle of Political Neutrality requires churches to abstain from supporting candidates for political office or pressing for specific public policies. See Audi, *supra*, at 274. The Individual Principle of Political Neutrality requires clergy to observe a distinction between their own political views and those of their religious office. *Id.* at 277. The Principle of Secular Motivation forbids all citizens from advocating or promoting any restriction on liberty unless the citizen is motivated by an adequate secular reason. *Id.* at 284.

I agree with Paul Weithman's conclusion that Audi's principles are too broad in scope. Weithman observes that there are major currents of religious thought that reject the claim that faith and justice can be separated, citing the views of Reinhold Niebuhr, and that there are other religious traditions that include the belief that faith and justice should not be separated, citing the work of Aquinas. See Weithman, *supra*, at 15-16. He concludes that compliance with Audi's principles is impracticable. *Id.* at 18.

Moreover, the Principle of Secular Motivation may actually be counterproductive to two goals: (1) fostering the liberal virtue of tolerance; and (2) promoting stability. There may be significant benefits from public debate that includes religious arguments from perspectives that can form an overlapping consensus on a political conception of justice. The most obvious example would be the inclusion of religious arguments for toleration in public discourse. Such arguments, when made by persons in their capacities as private citizens, display the basis on which a political conception of justice can become the subject of an overlapping consensus between a variety of religious and secular perspectives. See *infra* text accompanying notes 37-41. This point was brought to my attention by Sharon Lloyd.

some answers that are clearly not correct. First, "making and justifying a decision on the basis of public reasons" does not mean that only public reasons may play a *causal* role. It would be impossible for public officials to prevent their comprehensive religious, philosophical, or moral views from influencing the way they view the policy, law, or justice. A devout Catholic's view of the world will inevitably be influenced by her Catholicism; a devout Lutheran's *weltanschauung* will surely be causally influenced by her Protestantism.

Second, "making and justifying a decision on the basis of public reasons" does not mean that nonpublic reasons must be excluded from any foundational role in deliberation. There are religious foundations for beliefs that would qualify as public reasons. For example, "the killing of innocent persons is a great wrong" counts as a public reason, because this principle is firmly rooted in our public political culture. However, a particular public official might believe "the killing of innocent persons is a great wrong" for a religious reason, e.g. that such killing is forbidden by the revealed word of God. The fact that a public reason has a deeper foundation in religious belief does not make the reason a nonpublic one. Nor do deeper foundations imply that decisions grounded on the reason are not made and justified on the basis of a public reason. The deep foundations of public reasons in religious belief can play a role in deliberation, so long as the decision is grounded directly on the public reason and not directly on the deeper foundation.

With these two negative points about the meaning of "making and justifying a decision on the basis of public reasons" established, I will try to provide a more positive definition. The requirement that decisions be made and justified on the basis of public reasons can be restated as follows: for a given political decision, the deliberative and justificatory process must include the public reason and exclude direct reliance on any religious foundation for the public reason.<sup>28</sup>

What are *public* reasons? Public reasons include such basic tools of reasoning as logic and common sense, knowledge of uncontroversial facts and those established by science, and values that can be derived from the public political culture of society. Our public political culture includes, for example, the Declaration of Independence, the constitutions of the several states and of the United States, and the Gettysburg Address. Public reasons

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28. The criterion for satisfaction of the requirement of excluding nonpublic reasons from justification is clear because justifications are themselves public acts: statements made as official statements of reason for a political action cannot include nonpublic reasons. The criterion for satisfaction of the requirement of exclusion from deliberation is more problematic: ultimately, only the decisionmaker has access to her private deliberative processes. The exclusion of nonpublic reasons from justification could be legally or socially enforced. The exclusion of nonpublic reasons from deliberation could not be legally enforced, although a pattern of decisions might provide public evidence that a particular judge was deliberating on the basis of nonpublic reasons. This aspect of the requirement of public reason must be adopted by officials from the internal point of view.

exclude particular comprehensive conceptions of the good. Such comprehensive conceptions include systems of religious belief as well as comprehensive moral or philosophical doctrines. Thus, Secular Humanism, Utilitarianism, or Kantianism, as comprehensive moral views, do not provide public reasons. It would be inconsistent with the requirement of public reason for a public official to justify coercive action of the state on the ground that hedonistic act utilitarianism is the correct view about what is ultimately good and right.

To summarize, the requirement of public reason is a requirement that: (1) officials of public institutions acting in their official capacities; (2) engage in deliberative and justificatory processes that (a) include public reasons, such as (i) logic and common sense, (ii) knowledge of uncontroversial facts and those established by science, and (iii) values that can be derived from the public political culture of society, and (b) exclude explicit direct reliance on nonpublic reasons, such as religious beliefs, but (c) may (i) include indirect or foundational reliance on nonpublic reasons and (ii) be causally influenced by such nonpublic reasons.

This requirement relies on a version of the public-private distinction. Critical legal scholars are right to argue that this is a political distinction. I am not claiming that the separation between public and private realms is required by any ultimate truths; the distinction is not advanced on the ground that it is underwritten by metaphysics, nature, or ultimate Truth.<sup>29</sup> Moreover, the conception of the public that is deployed in the requirement of public reason is historically contingent; it is a conception that is appropriate for us, given the fact of pluralism.

There are two related justifications for the requirement of public reason: one based on the notion of respect for citizens as free and equal and the other based on considerations of stability.<sup>30</sup>

### C. *Respect for Free and Equal Citizens*

The first argument for the requirement of public reason can be called the argument from respect for citizens as free and equal. The premise for this argument is that society should respect the freedom and equality of citizens.

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29. This is not to say that the requirement of public reason is inconsistent with the existence of moral reality or ultimate Truth. Many reasonable conceptions of the good do hold that their moral propositions bear truth values. It is to say that given the fact of pluralism, we cannot rely on the deep foundations of our moral beliefs for public decisions. Thus, the liberal theory I outline neither affirms nor denies moral realism. It is likely, however, that liberal political theory rules out the use of moral realist premises in legal justification and deliberation. For an eloquent statement of the moral realist position, see Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989); Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985); Moore, *Moral Reality*, 1982 WIS. L. REV. 1061.

30. There are, of course, objections to the requirement. See Perry, *supra* note 16, at 479. I will postpone consideration of such objections until I consider the application of the requirement of public reason to the problem of religious faith posed for a Supreme Court Justice.

This premise is strongly rooted in our political culture; it has figured prominently in political discourse at least since Locke.<sup>31</sup> Because the argument that I am making is political, I cannot provide any ultimate foundation for this premise. Such foundations can only be provided from within the various religious and moral traditions that constitute our culture.

My argument is that judicial decisions made or justified on the basis of reasons that are not publicly accessible, for example, on the basis of sectarian religious premises, would be disrespectful of the freedom and equality of citizens. I will begin by discussing justification. Imagine that a public official justifies a political decision with her own religious beliefs. Perhaps she appeals to a passage in the New Testament and to her belief that Jesus of Nazareth was the Son of God, or perhaps to a passage in the Koran and to her belief that Mohammed is the true prophet of God. Such reasons could not be accepted by citizens that did not share her religious beliefs. One aspect of respect for fellow citizens as free and equal is the giving of reasons that allow one's fellows to accept the government action as reasonable.

In addition, the use of religious reasons by a public official as the justification for the action of a public institution would reasonably be seen as official endorsement of the truth of the public official's belief and as a denial of the beliefs of others. There is a significant difference between religious disagreement among citizens and religious disagreement between citizens and officials of public institutions. If another citizen denies the truth of my religious beliefs, we still stand to one another, at least formally, in a relation of equality. But if the government endorses one set of religious beliefs, then this relationship of equality is denigrated.<sup>32</sup> Initially, we are no longer equal; your belief is the official belief, while mine is not. Moreover, my freedom is constrained on the basis of grounds that I cannot accept as reasonable. The state uses its coercive power and perhaps my money to take actions advancing your religious beliefs.

The requirement of public reason applies to both the justification and making of political decisions. Why should the deliberation of public officials

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31. See J. LOCKE, *TWO TREATISES OF GOVERNMENT*, *supra* note 5, at 269 (positing that state of nature is a state of freedom and equality); see also I. KANT, *ON THE OLD SAW: THAT MAY BE RIGHT IN THEORY BUT IT WON'T WORK IN PRACTICE* 290 (E.B. Ashton trans. 1974) (positing that the civil state is based on the freedom of each member as a human being and the equality of each member with every other member); *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776) (declaring that "all men are created equal" and that they have inalienable rights "to life, liberty and the pursuit of happiness").

32. It could be argued that equality is not denied by official endorsement of your religious belief and not mine, anymore than equality is denied by official endorsement of your political views and not mine. See Letter from Mark Tushnet to Lawrence Solum (Mar. 16, 1990) (on file with author). This response assumes that endorsement of public reasons does not differ from endorsement of nonpublic reasons such as religious beliefs in a way that is relevant to equal citizenship. I believe that in our political culture, most citizens share an intuition that there is a relevant difference. In this sense, religion is like race or national origin.

be limited by this requirement? After all, deliberations can be kept secret.<sup>33</sup> Let us consider the possibilities. When decisions are made on nonpublic reasons the decisionmaker has only three options with respect to justification: (1) give the nonpublic reason for the action; (2) give a public reason; and (3) give no reason. The first option would offend the freedom and equality of citizens for the reasons given above.

The second option, give a public reason, raises issues that are more complex. There are several circumstances in which one could give a public reason for a decision that was made on the basis of deliberations that included nonpublic reasons. First, the nonpublic reason could be a post hoc justification that the decisionmaker does not believe. In this case, giving a public reason would be lying. Lying to citizens by public officials is wrong. Second, the nonpublic reason could be a post hoc justification that the decisionmaker does believe in. In this case, there are two further possibilities to distinguish: One, the decisionmaker could believe that the public reason provides added support for the decision, but is not itself either necessary or sufficient to provide an adequate justification; in this case, giving the public reason as the sole justification for the political action is misleading and wrong. Or two, the decisionmaker could believe that the public reason is sufficient (and either necessary or unnecessary) to justify the action; if honestly held, this belief would warrant giving the public reason.<sup>34</sup>

The third option is to give no reason for the public decision. Some officials, however, cannot make decisions without providing reasons. For example, judges are required to write opinions justifying their decisions. It is true that judges sometimes can choose not to publish their opinions, or to write very brief opinions that give only conclusory reasons, but the usual rule for appellate judges at least frowns on regular use of these avoidance mechanisms. Other officials have the option to keep the reasons for their actions secret. For example, members of Congress cannot be legally required to

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33. Kent Greenawalt draws this distinction, see Greenawalt, *Religious Convictions and Political Choice: Some Further Thoughts*, 39 DEPAUL L. REV. 1019 (1990), but confesses that he is disturbed by it. *Id.* at 1020. Stephen Carter also endorses the distinction, arguing that religious conviction "would enter into the deliberative process, but not the process of justification." Carter, *supra* note 15, at 943. I am not sure whether or not Carter and I disagree. Carter does not make the distinctions, that I do, between direct and indirect as well as foundational and nonfoundational reliance on religious or nonpublic reasons. He does state that "an opinion is not an *explanation* of how a decision was reached, but rather a formalized *justification* for it, reining in the judge by forcing her to articulate her decision in a professionally responsible way." *Id.* (emphasis added). If Carter would accept a sincerity condition—the justification must sincerely be believed to justify the outcome—as I think he would, then we may not disagree at all.

34. The point is perhaps too subtle to merit further discussion, but I think that if a decisionmaker believes the public reason is sufficient to justify the decision, then she can honestly state that the decision was made on the basis of public reason. This is true, I think, even if her private deliberations included the nonpublic reason at an early stage in which she was still "deciding" and even if the public reason did not become clear to her until after her decision had been "made" in a tentative or preliminary way.

justify their votes. But reasons for official decisions should be made public wherever possible.<sup>35</sup> There are two reasons for rejecting the option of privately deciding on religious grounds and then declining to give any reason for one's decision. First, making public the reasons for official actions respects the freedom and equality of citizens. Treating someone with dignity and respect usually requires giving them reasons. Second, public officials should not make decisions that citizens could not accept as reasonable if the reasons for the decision were disclosed. Making decisions under these circumstances treats citizens as means only, and not as ends in themselves.<sup>36</sup> Acting on the basis of reasons that would not be acceptable and then keeping the reason secret is manipulative. It is disrespectful of the freedom and equality of citizens.

Finally, whatever option the public official chooses—to give the nonpublic reason, to give a public reason, or to give no reason at all—respect for the freedom and equality of citizens requires that decisions be made on the basis of public reason.

#### D. Stability

The second reason for the requirement of public reason can be called *the argument from the need for stability*. The requirement of public reason must be part of any public conception of justice that is stable. The argument for this conclusion is related to Rawls's idea of overlapping consensus.<sup>37</sup> In order for a constitutional regime founded on principles of justice to be stable, it must be more than a mere *modus vivendi*. Stability requires more than an uneasy compromise between opposing forces waiting for the opportunity to institute a constitutional regime that reflects their own beliefs. For an overlapping consensus to be achieved, the public conception of justice must be affirmed from within each comprehensive conception of the good.

How might a political conception of justice be affirmed from within a variety of religious and nonreligious moral views? The answer will depend on the particular conception of the good. Liberal principles such as toleration can be embraced from within a variety of comprehensive conceptions of the good, and from within a variety of religious faiths. For example, Paul Weithman has written, "Catholic theologians could argue that Rawls's two principles guarantee that each individual will have the social bases of the

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35. There are, of course, cases in which the actual reasons for official actions should not be disclosed. For example, information garnered from a confidential source may provide the basis for a foreign policy decision. On the point made in text, see Fallon, *Of Speakable Ethics and Constitutional Law: A Review Essay*, 56 U. CHI. L. REV. 1523, 1549-50 (1989). For a general defense of judicial candor, see Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

36. I. KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 95 (H. Paton ed. 1956); see also I. KANT, *PERPETUAL PEACE* 47 (L. Beck ed. 1957) ("All actions relating to the right of other men are unjust if their maxim is not consistent with publicity.").

37. See Rawls, *The Idea of an Overlapping Consensus*, *supra* note 6, at 1.

dignity to which she is entitled as a creature made in God's image and likeness."<sup>38</sup> Similarly, the Christian theologian Harlan Beckley writes "that the distinctively Christian moral ideal of love obligates those who adhere to it to embrace the beliefs which undergird John Rawls's idea of justice as fairness."<sup>39</sup>

Thus, an overlapping consensus represents a convergence of rational support for principles of justice from "the separate motivational standpoints of distinct individuals."<sup>40</sup> It does not "seek a common standpoint that everyone can occupy, which guarantees agreement on what is acceptable."<sup>41</sup>

The justification of official action on nonpublic grounds would undermine political stability. Consider the following thought experiment. Suppose that the President justified the decision to invade a Latin American country on the ground that the invasion was required by the revealed will of God in the New Testament as interpreted by a prominent Protestant preacher. Catholics, Jews, Moslems, Buddhists, and atheists would certainly not be persuaded and might well be gravely offended. Suppose further that sectarian religious justifications became a regular practice. A reasonable response would be to compete for political power along religious lines. A possible result of explicitly religious political competition might be the undermining of religious toleration, which in turn might engender further religious divisiveness.

How far might political stability be undermined? It might be contended 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 to the religious wars of the sixteenth century that we no longer need worry about religious divisiveness as a source of substantial social conflict.<sup>42</sup> But I think that we cannot be confident about these optimistic possibilities. A survey of world history and contemporary experience reveals that seemingly unshakable stability can rapidly degenerate into strife and even chaos. There is, of course, another alternative. The proponents of a

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38. P. Weithman, *Basic Ideas and Moral Ideas: The Political Justification of Justice as Fairness* (unpublished manuscript 1990) (on file with the author). John Finnis has noted that the Roman Catholic Church has endorsed the freedom of religion from within a comprehensive conception of the good based on a strong theory of natural law. See J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 215-16 (1980) ("the Second Vatican Council, in proclaiming the right to freedom of religious belief, profession and practice, found that all the necessary limitations on this right could be expressed in terms of public order").

39. Beckley, *A Christian Affirmation of Rawls's Idea of Justice as Fairness—Part I*, 13 *J. OF RELIGIOUS ETHICS* 210, 212 (1985); Hauerwas, *A Christian Critique of Christian America*, in *RELIGION, MORALITY, AND THE LAW: NOMOS XXX* 110, 119-20 (J. Pennock & J. Chapman eds. 1988). Similarly, one could affirm a political conception of justice from within moral conceptions that included a variety of metaethical beliefs. Moral skeptics and moral realists could adhere to the same political conception of justice.

40. Nagel, *Moral Conflict and Political Legitimacy*, 16 *PHIL. & PUB. AFF.* 215, 218 (1987).

41. *Id.*

42. Carter, *supra* note 15, at 939.

particular conception of the good may gain sufficient power to impose their conception through force and violence. In any event, the need to maintain the stability of a just order should be taken seriously.

### III. FAITH AND THE JUSTICES

How does this liberal theory apply to possible conflicts of faith and justice for a judge deciding a case? The general requirement of public reason applies to judges faced with a conflict between faith and justice. Judges are officials of public institutions. Their deliberations result in political action by such institutions; their opinions constitute the justification for such actions. Therefore, judges should limit their deliberations to public reasons, and judicial opinions should not contain religious premises.

This Part of the Article applies the theory to the problem of a nominee to the position of Supreme Court Justice who must consider what role her religious convictions should play in her future actions on the Court. Two issues must be confronted in applying liberal political theory to the role of faith in judging. The first issue is whether it is possible to exclude religious convictions from the process of making legal decisions. The second issue is whether judges ought to exclude such convictions, even if it is possible to do so.

#### A. *The Possibility of Excluding Religion from Judging*

It could be argued that it is not possible for officials of public institutions to make political decisions or to justify them without relying on their own comprehensive religious, moral, or philosophical beliefs. If our conceptions of the good and our memberships in particular communities are constitutive of our identity, how can we make any decisions without taking these constitutive facts into account? How can we justify our decisions honestly and with integrity if we exclude our deepest convictions from the reasons we give? More particularly, is it possible to exclude religion from judging?

These questions have become public in the process of Senate confirmation of Justices. The issue of faith and justice has been raised explicitly in the confirmation hearings of two of the three sitting Catholic Justices, Justice Brennan and Justice Scalia. Sanford Levinson concludes his sensitive and insightful analysis of the confirmation of these Catholic Justices with the assessment that "we do a fairly terrible job"<sup>43</sup> in the process of confirming Justices to the Supreme Court. Levinson's warrant for this assertion is that Justice Brennan and Justice Scalia were led to say things "that they cannot possibly wish to have represented as their genuine reflections on complex and important matters."<sup>44</sup> In particular, both Scalia and Brennan made strong statements to the effect that their duty to apply the law implied a

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43. Levinson, *supra* note 1, at 1080.

44. *Id.*



duty to exclude convictions of faith from any influence on their decisions.<sup>45</sup>

How are we to interpret Justice Brennan's assertion that he "had an obligation under the Constitution which could not be influenced by any of [his] religious principles"?<sup>46</sup> What are we to make of Justice Scalia's statement that he would recuse himself from a case if he felt unable to separate his personal moral feeling from his duties as a servant of the law?<sup>47</sup> In particular, is it possible "not [to] be influenced by any of [one's] religious principles"?

Levinson accepts the proposition that a Justice of the Supreme Court may sometimes find that the only plausible interpretation of the Constitution will be inconsistent with morality or justice; he cites slavery as an example.<sup>48</sup> In these circumstances, Levinson believes it is possible to decide contrary to one's own beliefs or to abstain from decision. What Levinson finds implausible is the suggestion that "morality is irrelevant to legal analysis."<sup>49</sup> At this point, it is important to be precise about exactly what sort of "morality" is at stake and what we mean by saying it is "irrelevant" to legal analysis.

Initially, it should be clear that Scalia and Brennan could not have been contending that their religion must be irrelevant (or without influence) in the sense that it not be allowed to play any causal role, even an unconscious role, in their decisionmaking. "Irrelevant" in this context and charitably interpreted means "irrelevant as a reason for decision."

Moreover, from the liberal perspective, it is important to be clear as to what sort of "morality" is said to be irrelevant. Let me separate two senses of the term: (1) "morality" could refer to the individual judge's conception of the good; or (2) "morality" could refer to the judge's conception of the

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45. It is this question, whether Brennan or Scalia could have formulated their statements on the basis of deep reflection on their role as Supreme Court Justices, that will serve as the focus for my discussion. But first I want to share my reasons for sympathizing with Levinson's discomfort with the process. There is reason to believe that Catholics and Jews have been singled out for special scrutiny not because their beliefs are less compatible with our public conception of justice than those of Protestants, but because some Protestants insist that our public conception of the right should be essentially a Protestant and Christian conception. Indeed, at one time, there may have been a general consensus on this view. But such sectarianism is no longer consistent with a view of political justice that accounts for the facts of religious pluralism.

46. Leeds, *A Life on the Court*, N.Y. Times, Oct. 5, 1986, (Magazine), at 25, 79. Responding to a question in an interview that asked if he ever had difficulty dealing with his religious beliefs in deciding cases, Justice Brennan stated:

I had settled in my mind that I had an obligation under the Constitution which could not be influenced by any of my religious principles. As a Roman Catholic I might do as a private citizen what a Roman Catholic does, and that is one thing, but to the extent that conflicts with what I think the Constitution means or requires, then my religious beliefs have to give way.

*Id.*

47. *Hearings Before the Committee on the Judiciary, UNITED STATES SENATE, ON THE NOMINATION OF JUDGE ANTONIN SCALIA, 99th Cong., 2d Sess. 43-47 (August 5-6, 1986).*

48. Levinson, *supra*, note 1, at 1076.

49. *Id.* at 1077.

right—considerations of justice that can be publicly shared and are grounded in the public political culture.

I agree with Levinson that there are cases that a judge cannot decide without resorting to considerations of “morality” in at least one of the two senses. The legal realists made a compelling case against a strong deductive, formalist picture of judicial decisionmaking. Even a critic of the realists, H.L.A. Hart, maintained that judges have discretion outside of the core of a legal rule.<sup>50</sup> The critical legal studies movement has made the even stronger claim that the law is radically indeterminate.<sup>51</sup> If these claims are correct, then it does appear implausible to argue that a judge can make a legal decision without being influenced by some conception of political morality.

But it does not follow that judges must resort to “morality” in the sense that includes their own religious beliefs. Consider two different reasons for the conclusion that a judge is unable to put aside her own conception of the good: (1) as a matter of moral psychology, people cannot disregard personal knowledge or values in deliberation; or (2) as a matter of political philosophy, there are political decisions that simply cannot be made on the basis of public reasons, even if it were psychologically possible to do so. With respect to the first reason, I believe that the most plausible views of practical reason are consistent with the proposition that it is possible for a decisionmaker to set aside her own conception of the good in deliberation—to set it aside as required by the requirement of public reason. Certainly, it is a commonplace of the law that we ask juries and judges to set aside personal beliefs and values and to decide cases based on the legal record and legal standards. I am not sure whether everyone has the ability to do this well. It may be that no one can *completely* disregard nonpublic reasons but that some (perhaps many) can learn to deliberate in a way that substantially excludes such reasons. Thus, it may be that the judicial virtues require careful cultivation, and that not everyone has “judicial integrity.”<sup>52</sup>

The second reason that a judge might be unable to put aside her own comprehensive conception of the good requires that we consider the question whether public reason can provide a basis for resolving important political questions. I will explore this issue by evaluating Kent Greenawalt’s argument that “occasional reliance by judges on religious convictions is not improper.”<sup>53</sup>

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50. See H.L.A. HART, *THE CONCEPT OF LAW* 121-50 (1972).

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

52. The judicial virtues are those qualities of personality, or character, that facilitate good judging. See Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735 (1988); see also Brosnan, *Virtue Ethics in a Perfectionist Theory of Law and Justice*, 11 CARDOZO L. REV. 335 (1989) (exploring connections between virtue and law); Solum, *Virtues and Voices*, CHI. KENT L. REV. (forthcoming 1991) (same).

53. K. GREENAWALT, *supra* note 27, at 239. The discussion which follows is informed by reviews of Greenawalt’s fine book by Robert Audi, see Audi, *Religion and the Ethics of Political*

Greenawalt's argument relies on a series of propositions. First, judicial decision sometimes requires independent judgments of political morality;<sup>54</sup> the law underdetermines<sup>55</sup> the results of at least some cases. Second, not all questions of political morality can be resolved by public reasons; that is, there are some questions of political morality, such as the status of fetuses and animals that cannot be resolved by arguments that rely only on secular premises.<sup>56</sup> Third, religious convictions sometimes do provide grounds for resolving those questions of political morality that cannot be resolved by public reasons.<sup>57</sup> Fourth, it is fair to allow reliance on religious reasons to resolve those questions of political morality that must be resolved by some form of nonpublic reason.<sup>58</sup> Therefore, Greenawalt concludes, there are some judicial decisions for which it is appropriate to rely on religious convictions.<sup>59</sup>

My disagreement with Greenawalt concerns the relationship between his second proposition—that not all questions of political morality can be resolved by public reasons—and his conclusion—that it is legitimate for judges to resolve these questions by reference to their religious convictions. I believe that his argument contains an unarticulated premise—if public reasons are inconclusive, then judgments as to the morality or immorality (or justice or

*Participation*, 100 ETHICS 386 (1990), and Mark Tushnet, see Tushnet, *Religion in Politics* (Book Review), 89 COLUM. L. REV. 1131 (1989). Stephen Carter's position is stated more strongly than Greenawalt's: "[R]eliance by judges on their personal religious convictions is as proper as reliance on their personal moral convictions of any other kind." Carter, *supra* note 15, at 933.

54. K. GREENAWALT, *supra* note 27, at 240.

55. See Solum, *supra* note 51, at 473. Roughly, a case is underdetermined by the law if the outcome (including the formal mandate and the content of the opinion) can vary within limits that are defined by the legal materials. This approximation can be made more precise by considering the relationship between two sets of outcomes of a given appeal. The first set consists of all imaginable results—all the imaginable variations in the outcome of a case and in the reasoning of the opinion. The second set consists of the outcomes that can be squared with the law—the set or legally acceptable outcomes. The distinctions between indeterminacy, underdeterminacy and determinacy of the law with respect to a given case may be marked with the following definitions:

The law is determinate with respect to a given case if and only if the set of results that can be squared with the legal materials contains one and only one member.

The law is underdeterminate with respect to a given case if and only if the set of results that can be squared with the legal materials is a nonidentical subset of the set of all imaginable results.

The law is indeterminate with respect to a given case if the set of results that can be squared with the legal materials is identical with the set of all imaginable results.

These distinctions are discussed in greater detail in Solum, *supra* note 51, at 472-74.

56. K. GREENAWALT, *supra* note 27, at 98-172.

57. *Id.*

58. *Id.* at 144-45; see also Audi, *supra* note 53, at 392.

59. There is a further question, whether judges should rely on their own religious convictions or on those of a consensus (or majority) of the community. Greenawalt argues that there are some cases in which there will not be a community consensus, and therefore, that in some cases, a judge should rely on her own religious convictions. See K. GREENAWALT, *supra* note 27, at 241.

injustice) must be made on other grounds. It is this unarticulated premise with which I disagree.<sup>60</sup>

If it is truly the case that a legal decision is underdetermined by the existing law and public reasons, resolution on nonpublic grounds, including religious grounds, is not the only alternative. Rather, in such cases choice could be left to the conscience of individuals and voluntary communities, that is communities constituted by voluntary association. We could adopt a principle that a judge may not decide to impose civil or criminal liability on the basis of nonpublic reasons, including religious reasons.

These abstract considerations can be made more concrete by considering Greenawalt's examples and his analysis of them. Greenawalt considers two cases at the "borderlines of status"—animal rights and abortion. In both of these cases, he argues that public reasons underdetermine important questions of political morality—questions like, "what are our political obligations to fetuses and animals"?

There are, of course, legal issues that correspond to these questions; for example, whether fetuses deserve sufficient consideration to justify a state statute outlawing abortion? Let us suppose that this is a case in which neither the law nor public reasons provide a determinate resolution.<sup>61</sup>

Greenawalt reasons that "ordinary forms of reasoning leave open a number of possibilities about how far potentiality should count for the inherent worth of a being already living in some form, and thus leave open the way a fetus should be valued as it progresses."<sup>62</sup> It is the passage that follows which contains the crucial assumption:

If this conclusion is sound, then people must resolve the status of the fetus on grounds that go beyond commonly accessible reasons. If this is inevitable, the religious believer has a powerful argument that he should be able to rely on his religiously informed bases for judgment if others are relying on other bases of judgment that reach beyond common premises and forms of reasoning.<sup>63</sup>

Is Greenawalt correct in drawing this conclusion?

Greenawalt recognizes that he must consider the possibility that liberal political theory could respond to underdeterminacy in some way that does

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60. This is not to say that I endorse Greenawalt's third proposition. I am far from certain that he has established that publicly acceptable reasons cannot be used to resolve important questions of political morality.

61. Greenawalt does not contend that this case is not determined by law, but he does contend that it is not determined by publicly available reasons. My position is that the question whether women have the constitutional right to choose whether or not to have an abortion is resolvable by reference to publicly available reasons. Further, *Roe v. Wade*, 410 U.S. 113 (1973), was correctly decided. There are, however, better reasons for the result in *Roe* than those provided by Justice Blackmun. I am particularly sympathetic to the equality rationale discussed recently by Frances Olsen. See Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 118-19 (1989) (discussing applicability of equal protection principles to the "gender dimension" of the abortion debate).

62. K. GREENAWALT, *supra* note 27, at 136-37.

63. *Id.* at 137.

not rely on "grounds that go beyond commonly accessible reasons." Thus, he considers the possibility that such a case might be resolved by tie-breaking rules that are grounded in public reasons. Greenawalt argues that such tie-breaking rules do not resolve the uncertainty left by publicly available reasons:

Unfortunately, there are competing responses to such possible uncertainty. The first would be that in cases of doubt, people should be regarded as morally permitted to do what they think is *probably* morally permissible, especially if powerful reasons support their actions. Thus, for example, absent confident conclusion that the fetus has a right to life, a woman with strong reasons would be morally warranted in having an abortion, and a permissive legal approach to abortion would be called for. The contrary response is that the taking of innocent life should not be risked, at least barring the most extreme sort of justification, so that abortion, and perhaps killing of those animals with the highest capacities, is morally unwarranted and should generally be forbidden.<sup>64</sup>

Greenawalt's first proposal for the resolution of uncertainty, I will call the liberty principle. His second proposal, I will call the morality principle.

The liberty principle asserts that if a judge cannot resolve a case on the basis of the legal materials narrowly defined or on the basis of publicly available reasons, then the judge must preserve liberty, usually deciding for the defendant and leaving the moral choice to individuals or voluntary communities.<sup>65</sup> The morality principle, in its general form, asserts that when a case cannot be resolved on legal or publicly accessible grounds, then the judge should avoid the possibility that a great moral wrong will be permitted. Both the liberty and morality principles are potential tie-breaking rules within a publicly accessible conception of justice. Greenawalt believes that on the basis of public reasons, the liberty principle and the morality principle would have equal weight. Therefore, the abortion case has to be resolved on the basis of the individual judge's conception of the good, including the judge's transcendent interests or religious faith.

But the liberty principle and the morality principle are not of equal weight in the best publicly available conception of justice. The liberty principle, which asserts that the freedom of individuals and voluntary communities cannot be limited except on grounds that are publicly accessible, is at the very core of a liberal theory of justice. The morality principle is not. Or so I shall contend. But in order to do so, I need to leave the question whether it is possible to exclude religion from judging and take up the question whether it is fair to do so.<sup>66</sup>

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64. *Id.* at 148-49 (emphasis in original) (footnote omitted).

65. Compare Nagel, *supra* note 40, at 231-34 (advocating a version of the liberty principle) with Greenawalt, *supra* note 33, at 1044 (criticizing the principle) and Perry, *supra* note 16, at 486-88 (same).

66. The question whether the liberty principle should be judicially enforceable is more complex than the question whether the principle is itself correct as a matter of political

*B. The Fairness of Excluding Religion from Judging*

Is it fair to ask officials of public institutions to exclude their own philosophical, religious, or moral beliefs about the good from their political decisions? Is it fair to ask judges to exclude religious premises from their deliberations and their opinions? Yes, I believe it is. I have already argued this case at the abstract level of political philosophy; here, I want to take up these questions more particularly and contextually by extending my discussion of *Roe v. Wade*. My conclusion will be that it would be unfair for a judge to use her own religious beliefs as a reason for decision of the case.

Imagine that *Roe v. Wade* is reversed by the United States Supreme Court in a decision which holds that laws permitting abortion are unconstitutional because fetuses are persons within the meaning of the equal protection clause of the Constitution from the moment of conception. Imagine further that the opinion of the Court relies explicitly on religious premises in a passage that reads as follows:

We disagree with Justice Blackmun's conclusion that fetuses are not persons for the purposes of the fourteenth amendment. It is true that "those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus" regarding "the difficult question of where life begins."<sup>67</sup> The flaw in Justice Blackmun's reasoning was his unstated premise that a consensus is required before such a question can be answered. All views cannot be treated equally. Indeed, there is no neutral view about abortion. Either fetuses are human beings from the moment of conception or they are not. Either God gives each and every human an immortal soul at the moment of conception or He does not. We believe that He does. It would be impossible for us to disregard the teachings of the churches to which we belong on this essential point. We cannot condone murder on the ground that some members of our society have religious or philosophical beliefs that are different from ours.

Let me make it clear that so far as I know, no one who advocates the use of religious reasons in political deliberation or argument advocates this sort of opinion or this sort of decision. Moreover, it could be objected that my imaginary opinion is a red herring. If the Supreme Court does reverse *Roe v. Wade*, it is likely to do so on the ground that the judiciary should defer to legislative judgments. But this very fact reinforces rather than trivializes my point. The fact that we do not even consider the possibility of a religiously grounded reversal of *Roe* highlights the strength of our intuition that such opinions should not be written. This imaginary opinion violates the require-

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philosophy. See Letter from Kent Greenawalt to Lawrence Solum (Mar. 13, 1990) (on file with author). This more complex question is raised by the *Lemon v. Kurtzman*, 403 U.S. 602 (1971), "secular purpose" test. In my view, however, the question of judicial enforceability is of secondary importance. If there is an overlapping consensus on the requirement of public reason, judicial enforcement will rarely be necessary. Without such a consensus, the requirement will not be likely to survive.

67. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

ment of public reason.<sup>68</sup> But does fairness really require public reason in this case? I think that it does. If the state is going to tell a woman what to do with her body, then it has an obligation to give her reasons that she can accept as reasonable. The reasons given in the imaginary opinion can only be accepted as reasonable by a theist who shares a particular religious view of ensoulment. The state would not be treating a woman who did not share these views with the dignity appropriate to a free and equal citizen.

Suppose that a majority of the Justices came to the conclusion that the question whether or not a fetus is a person cannot be resolved on the basis of public reasons. Suppose they saw this as a hard question, underdetermined by the law and by the best political conception of justice. Recall the liberty principle—the principle that coercive action can only be taken if it can be justified by public reasons. Could not religious members of the Court object that resolution of the case on the basis of the liberty principle fails the test of neutrality? Two arguments might be given in support of this objection. First, requiring public reasons tilts the political process in favor of citizens who have a nonreligious conception of the good. Second, the liberty principle, as a tie-breaking rule, is biased in favor of the status quo.

The first argument is that the requirement of public reason is not impartial. Because liberals have conceptions of the good that do not rely on private religious premises, the requirement of public reason is biased in favor of comprehensive liberals.<sup>69</sup> This objection would be valid against any liberal who claims the right to rely on a nonreligious, comprehensive conception of the good as a public reason. Some Secular Humanist, Kantian, or Utilitarian liberals might be guilty of attempting to formulate the requirement of public reason in this blatantly partial fashion. But the requirement of public reason rules out reliance on Secular Humanist, Kantian, or Utilitarian beliefs about what is ultimately good, even if they are secular beliefs. It is only in this sense that the requirement of public reason is neutral or impartial. Even a political conception of justice is not neutral in the sense that it is impartial between all conceptions of the good. The requirement of public reason favors conceptions of the good that can participate in an overlapping consensus over those that cannot.

The second argument was that the liberty principle is itself biased as a tie-breaking rule. Michael Perry objects that such a principle “is, in effect, a question-begging presumption in favor of the social and economic status quo.”<sup>70</sup> Perry is quite right. The liberty principle is biased in this way in those cases in which the status quo preserves freedom of private action. The requirement of public reason is only a political principle; it does not provide an Archimedean point for the neutral resolution of all political controversy.

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68. For the purposes of this Article, I am not contending that a case could not be made for regarding fetuses as persons based on public reasons. The hypothetical opinion is only intended to illustrate the unfairness of not giving such public reasons.

69. See Perry, *supra* note 16, at 487-88.

70. *Id.* at 487.

This does not entail, however, the further proposition that a liberal conception of justice, when considered as a whole, is biased in favor of the social and economic status quo. Investigation of that proposition is well beyond the scope of this Article. My own view is that liberalism is not biased in that way. To put it another way, radical changes are required for our society to satisfy a liberal theory of justice.<sup>71</sup>

Why should we be willing to pay the price required by incorporation of the requirement of public reason and the liberty principle in our shared political conception of the good? I have already argued that we should accept these principles because they respect the freedom and equality of citizens and because of the need for a stable overlapping consensus on principles of justice. The requirement of public reason and its corollary, the liberty principle, are at the core of the best conception of justice that is available to us given the fact of pluralism.

#### IV. CONCLUSION

Let us return to Sanford Levinson's analysis of the confirmation process for Catholic Justices. Levinson's analysis of the issues raised by this process differs from mine. Levinson focuses on the sociology of confirmation; my focus has been on questions of political philosophy. There is, however, an important connection between our investigations. I think that Levinson is correct when he maintains that liberal institutions and liberal political culture have in fact led to "a significant redefinition in our culture of what it means to adhere to religion."<sup>72</sup> The question that Levinson raises is whether the "privatization of religious identity"<sup>73</sup> entails the subordination of religious difference as the means to promote a new sameness, a universal civic religion or constitutional faith.

At the level of political philosophy, my own position is quite clear. The point of the requirement of free public reason is respect for difference. Thus, in response to Sanford Levinson's question whether "human beings discern—and feel bound by—transcendent moral norms,"<sup>74</sup> I answer an emphatic "yes." Nonetheless, I am as emphatic in answering "no" to Levinson's question "whether constitutional adjudication in any important respect includes reference to moral norms of the kind claimed by the [Catholic] Church to exist—in other words, transcendental truths ascertainable through right reason."<sup>75</sup> The theory that unites my answer to Levinson's two questions is a political theory; it cannot itself be grounded in ultimate truths about human nature or the good.

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71. But this does not contradict my belief that some Western European countries represent the closest approximation to liberal justice yet achieved in human history.

72. Levinson, *supra* note 1, at 1059.

73. *Id.*

74. *Id.* at 1070.

75. *Id.* at 1074.



But at the level of sociology, the questions become more difficult. Is public discourse dominated by secular conceptions of the good? There are comprehensive liberals—liberals who construct a comprehensive conception of the good life from the tenants of liberal political philosophy. Some civil libertarians believe that freedom is valued, not so that individuals can realize the good, but because freedom is itself the good. There are those who do adhere to a constitutional faith, but I do not think they represent the mainstream of liberal thought or of the American political tradition. In the end, our constitution is not our faith. Our politics are not our religion.