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Like a Hole in the Head

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The Devil is the absence of doubt. He's what pushes people into suicide bombing, into setting up extermination camps. Doubt may give your dinner a funny taste, but it's faith that goes out and kills.[1]

Pride goes before destruction, and a haughty spirit before a fall.[2]

As its title suggests, this Essay will argue that any attempt to find a constructive place for religion "in"—as opposed to explicitly "distinct from"—constitutional democracies should be counted as a fool's errand. Unless, for the sake of political correctness, we seriously distort the definitions of "religion" and "constitutional democracy," this effort at reconciliation cannot meet basic tests of internal coherence, evidentiary credibility, and normative persuasiveness. Despite the understandable urge to do so, the challenge of reconciling religion and constitutional democracy faces several fatal obstacles.

Considered as ideal types, the properties underlying the terms "religion" (a concern, which depends on faith instead of a reason, with things unknowable in the universe) and "constitutional democracy" (a form of government that conforms to legal commands and pursues policy choices derived from the consent of the governed) are no more commensurate than are the properties of, say, "broccoli" and "manual transmissions."[3] We detect and measure their presence in distinctly different ways.

The internal characteristics of concrete religious practices contradict those of constitutional democracies, and these internal contradictions parallel those between "science" and "religion." Science depends on open-minded skepticism, rigorous methods of empirical validation, and an eagerness to find new knowledge that will displace

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1. JOHN UPDIKE, ROGER'S VERSION 85 (Ballantine Books 1987) (1986) (words spoken by Roger Lambert, a fictional theology professor).

2. *Proverbs* 16:18 (A Reader's Guide to the Holy Bible—Revised Standard Edition).

3. Dictionary definitions of "religion" illustrate the contradiction. *See, e.g.*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 988 (10th ed. 1996) (defining "religion" as "the service and worship of God or the supernatural" or "commitment or devotion to religious faith or observance").

the old.[4] Similarly, democratic systems necessarily entail crude empirical tests of whether policies succeed or fail—such as public opinion polls in electoral politics and various rationality tests in due process and equal protection jurisprudence—and methods by which to change them. Religion, on the other hand, necessarily entails faith in received doctrine and acceptance of mystery that "passes all understanding."[5] When "true believers" encounter political rejection of their positions—for example, in the teaching of evolution in public schools or the permissibility of adoption by same-gender couples—they react dogmatically.[6] When a religious order like the modern Episcopal Church in the United States moves to change its rules and policies, such as those regarding the place and relevance of gender and sexual orientation in its system, true believers have rebelled and then exited.[7]

Most fatal of all, the external consequences of religious behaviors directly undercut those of constitutional democracies, and vice versa. Both as a pretext for leaders and as a motivation for their followers, religion's insistence on the collective truthfulness and righteousness of a single way of life has routinely provoked and facilitated human brutality and warfare.[8] In clear contrast, constitutional democracy, which may be said to have evolved in reaction to Europe's religious wars, strives to keep the peace. Such democracy replaces substantive truthfulness and righteousness with procedural correctness—the rule of law—and an explicit encouragement of substantive compromise. Compromise and fluidity in politics offset the violent tendencies of religious commitment and certainty. Indeed, political compromise cannot happen until the contending parties agree about what they are compromising. In short, constitutional democracy needs religion, as the common phrase goes, "like a hole in the head."

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4. *See* PHILIP KITCHER, ABUSING SCIENCE: THE CASE AGAINST CREATIONISM 33, 65 (1982) (explaining that science advances claims about concepts that may be unobservable and that scientists correlate various methods of testing).

5. *Philippians* 4:7 (A Reader's Guide to the Holy Bible—Revised Standard Edition).

6. *See, e.g.*, Ethan Cole, *Christian Doctor Loses Position over Gay Adoption View*, CHRISTIAN POST, July 21, 2009, http://www.christianpost.com/article/20090721/christian-doctor-loses-position-over-gay-adoption-view/index.html (reporting that a physician on an adoption panel refused to vote on adoption cases for same-sex couples because "'[a]s a Christian,'" she deemed homosexuality an inappropriate lifestyle).

7. *See* Deborah Caldwell, *Where Anglicans Fear to Tread: Will a Schism Destroy the Episcopal Church?*, SLATE, Jan. 14, 2004, http://www.slate.com/id/2093811 (describing conservative protests within the Episcopal Church over the election of an openly homosexual bishop).

8. *See, e.g.*, BARRINGTON MOORE, JR., MORAL PURITY AND PERSECUTION IN HISTORY ix (2000) (noting the "bloody struggles" accompanying the establishment and spread of monotheism).

I. DEFINING TERMS

Like all arguments, this Essay depends on definitional choices. After all, one need not define religion as a sectarian commitment to received doctrine. Neither must one categorize religion as an orthodox observance of divinely inspired, as opposed to earthly inspired, law. Religion can refer to personal and individualized understandings about the meaning of life, perhaps as a means of affirming the commitment to living well in the face of one's certain death. Thus, "religion" presumably becomes a nearly universal feature of human cognition, a personal frame that maintains illusions of certainty in the face of the evident chaos in the universe.[9] Moreover, because humans are not naturally equipped to philosophize on such matters in isolation, institutions—including religious ones—that help individuals function with equanimity in the face of chaos presumably do good, or at least do no harm. Constitutional democracies thus properly "place" religion so conceived with other categories—for example, the security of a home, protection against ex post facto laws, and other private things that the government must "keep its hands off." On the other hand, when religion demands collective political action based on the commitment to one belief system, there is no significant observable difference between sectarian commitments to "true gods" and secular commitments to, for example, the "true principles" of "freedom" that served to justify the Bush/Cheney invasion of Iraq.[10]

Even the most clever feats of definitional craftiness will likely leave us concluding that phrases like "constitutional theocracy" are inherently oxymoronic. Of course, some political systems claim to be guided only by the "word of God" revealed through the Koran or the Holy Bible, so that such texts become constitutions.[11] But no known

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9. This definition of religion, however, necessarily includes conventionally amoral beliefs such as, "I only go around once in life, so I am going to take everything I can get as I go."

10. In recent times, these sectarian and secular commitments have crossed. *See Interview with Osama bin Laden*, FRONTLINE, May 1998, http://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/interview.html. In June 2003, President George W. Bush told Palestinian Prime Minister Abu Mazen that "God told me to strike at al-Qaida and I struck them; then he instructed me to strike at Saddam, which I did; and now I am determined to solve the problem in the Middle East." Sidney Blumenthal, *Bush and Blair—The Betrayal*, GUARDIAN, Nov. 14, 2003, http://www.guardian.co.uk/politics/2003/nov/14/iraq.iraq; *see also* Richard Rorty, *Universality and Truth*, *in* RORTY AND HIS CRITICS 1, 21–22 (Robert B. Brandom ed., 2000) (finding that religious fundamentalists, as well as proponents of secular liberalism, exhibit intolerance).

11. *See* Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1823 (2004) (discussing the 1980 amendment to the Egyptian Constitution, which transformed Egypt into an Islamic constitutional theocracy).

method of interpretation can apply such abstract and often internally contradictory words to resolve concrete and unique cases without replacing the word of God or the words of scripture by the words of popes, ayatollahs, and other interpreters.[12] If the universe and the human mind were such that humans could objectively demonstrate that their interpretations were singularly and universally correct, such a theocracy might meet a standard of constitutionality.

But mind and universe work in the opposite direction toward infinite numbers of plausibly correct answers, just as mathematical principles such as Cantor's theorem suggest.[13] In other words, the anti-essentialist quality of reality means that interpretations necessarily flow either from the will of rulers or from justifications that must comport with popular, and therefore shifting, standards of justificatory performances. Interpretations based upon the autocratic principle "because I, your ruler, say so" and those based upon the liberal principle "because this is what the law does and does not permit" cannot credibly count as theocratic rule in the name of God.

If the purpose of government is to minimize the conditions in which humans brutalize other humans via mass murder and other forms of indiscriminate aggression, then religion should have no place "in," as opposed to "distinct from," constitutional democracies. As broccoli would presumably gum up a transmission, religion clogs the political works of constitutional democracies. Thus, the First Amendment, regardless of the specific understandings of its Establishment Clause at the time of its ratification, rightly puts robust separation of church and state at the very beginning of our Bill of Rights.

II. ELABORATION

As set forth here, this Essay's argument depends on accepting the empirical claim that religion as a particular way of knowing and acting is inherently prone to violence. It also depends on the normative claim that the primary objective of political systems ought to be that of minimizing, at the very least, wanton human brutality against other humans. The anti-essentialist nature of reality prevents anyone from

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12. As Bishop Benjamin Hoadly of Bangor observed in 1717, "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them." JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 102 & n.2 (1921) (emphasis and internal quotation marks omitted).

13. W.V. QUINE, QUIDDITIES: AN INTERMITTENTLY PHILOSOPHICAL DICTIONARY 96 (1987) (describing Cantor's theory as the principle that classes of objects outnumber the individual objects in the set being classified).

demonstrating that such normative claims are objectively and universally correct. Thus, I confine myself to elaborating my empirical claim and leave it to readers to initiate objections to my normative claim and the anti-essentialist epistemology on which it rests. But if philosophers like Rorty and Quine, cited above,[14] express the most accurate understandings of reality, then all claims to have reached universal and objective certainties are philosophically untenable.

A group that believes another entity is insulting its belief system may respond in a detrimental fashion. For example, in November 2007, a British schoolteacher in Sudan was jailed for "insulting Islam's Prophet" after she permitted students to name a teddy bear "Muhammad."[15] In January 2009, parents who believed that faith alone would cure their ill daughter stood trial for reckless endangerment after the child died from failure to receive medical treatment.[16] At the macro level, these stories illustrate a historical pattern of human atrocities that have resulted from a group's response to a perceived affront to its principles—for example, the Crusades, the genocides of North American Indians, and the Khmer Rouge genocide.[17]

III. OBJECTIONS

This Essay's argument thus boils down to the claim that civilizing the human species requires us to deliberately move away from truth-based habits of thinking, be they sectarian or secular, and toward open and skeptical ways of thinking. At least three objections come readily to mind. First, polities, like individuals, may need a common "reality framework" that their members believe to be normatively true and beyond question in order to survive external threats. Second, political and social systems must inculcate some common moral order in their members before internal cooperation—civilization rather than the war of all against all—is possible. For example, the late Reverend Richard John Neuhaus observed that democracies depend on sharing

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14. *See supra* notes 10, 13.

15. *'Muhammad' Teddy Teacher Arrested*, BBC NEWS, Nov. 26, 2007, http://news.bbc.co.uk/2/hi/africa/7112929.stm (noting that fellow teachers "feared for [the arrested teacher's] safety" after men gathered outside the police station where she was held).

16. Dirk Johnson, *Trials for Parents Who Chose Faith over Medicine*, N.Y. TIMES, Jan. 20, 2009, at A23.

17. For a more extensive but nonexclusive list of similar atrocities emerging from this "righteousness-humiliation-brutality cycle," see Lief H. Carter, *Law and Politics as Play*, 83 CHI.-KENT L. REV. 1333, 1350 n.76 (2008).

specifically Christian morality (or something very much like it).[18] But of course Islamists, Leninist-Stalinists, Marxists, and Nazis have made comparable claims for their faiths. The better objection, then, holds that all nations must have *some* civil-religion equivalent before internal cooperation can happen. Third, human cognition in both its public and private arenas is inherently religious and not scientific. John Updike explained the point this way on National Public Radio:

> Cosmically, I seem to be of two minds. The power of materialist science to explain everything from the behavior of the galaxies to that of molecules, atoms and their sub-microscopic components seems to be inarguable and the principal glory of the modern mind. On the other hand, the reality of subjective sensations, desires and may we even say illusions, composes the basic substance of our existence, and religion alone, in its many forms, attempts to address, organize, and placate these. I believe, then, that religious faith will continue to be an essential part of being human, as it has been for me.[19]

The first two objections are, at least as I have worded them, without merit. Tribes presumably need some common markers to define "who is with us and who is against us," but these identifiers need only be visible markers such as flags, uniforms, logos, hair and body-paint styles, and so on.[20] People easily identify themselves as Buckeyes or British soldiers or citizens of France or Texans without resorting to theologies or abstract moral frameworks for doing so.

Furthermore, the factors that promote interpersonal cooperation within groups do not seem necessarily rooted in any kind of moral norm that obligates one to cooperate. The utilitarian benefits from cooperation—the obvious efficiency of transactions, greater predictability of the future, and reduced stress levels that follow from trust—are well documented. Atheists who have never heard of the Kantian imperative cooperate just as well as theists do. Note the generosity and honesty of Warren Buffett, who is agnostic.[21]

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18. *See* RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 20 (1984) (explaining his belief that Christians are responsible for "advanc[ing] a social vision").

19. John Updike, *All Things Considered: Updike's 'This I Believe' Essay* (National Public Radio broadcast Jan. 27, 2009) (transcript on file with the Maryland Law Review).

20. *See, e.g.*, DESMOND MORRIS, THE SOCCER TRIBE 256 (1981) (describing how soccer fans are often found "waving . . . a forest of coloured flags").

21. John Lofton, *Warren Buffet "Agnostic," Bill Gates Rejects Sermon on the Mount, Not "Huge Believer" in "Specific Elements" of Christianity*, AM. VIEW, July 3, 2006, http://www.theamericanview.com/index.php?id=649 (quoting an e-mail from Warren Buffet's assistant regarding his religious beliefs: "Mr. Buffett is agnostic."). Warren Buffett is not the

The third objection, however, does accurately describe human cognition. The human brain does not operate as a binary digital processor.[22] Professor Bruce Hood suggests that human beings entertain irrational beliefs because the human brain is wired for supernatural modes of reasoning.[23] Thus, the critical question for modern political theory becomes the following: If liberalism's assumptions about man's capacity for reason fail empirically while the thrust of both research and daily experience reaffirm the persistence of destructive and irrational political forms, how can humans ever achieve liberalism's pacific goals?

As illustrated in my previous work, *Law and Politics as Play*,[24] an argument about play may rescue liberalism. People across cultures understand that the qualities of good sports and games stem not from an abstract moral theory, but from characteristics such as equal resources for players and obedience to the judgment of umpires.[25] These characteristics short circuit the cycle of righteousness, humiliation, and brutality.[26] This happens in no small part because competitive sports remove the stigma of losing.[27] Indeed, the very process of trying to win undercuts a mentality of moral righteousness.[28] No one, if they seek to win, selects a pitch or chooses a play because the choice is the righteous one.

For roughly two centuries, Anglo-American common law and western democratic political forms have visibly moved in the direction of replicating the characteristics of good games.[29] In law, key developments like *Gideon v. Wainwright*[30] and footnote four of *United States v.*

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only billionaire philanthropist who is a non-believer. *See* Peter Singer, *What Should a Billionaire Give—and What Should You?*, N.Y. TIMES, Dec. 17, 2006, § 6 (Magazine) (noting that "three of the four greatest American Philanthropists"—Buffett, Bill Gates, and Andrew Carnegie—are or were atheists or agnostics).

22. STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 5 (2001) (explaining that cognition involves "imaginative, associative, and analogical" processes rather than computational operations).

23. James Randerson, *Humans 'Hardwired for Religion,'* GUARDIAN, Sept. 4, 2006, *available at* http://www.guardian.co.uk/world/2006/sep/04/religion.uk (describing an experiment in which subjects withdrew their willingness to don a cardigan after Professor Hood falsely informed them that a notorious murderer had previously owned the sweater).

24. Carter, s*upra* note 17.

25. *Id.* at 1363–64.

26. *Id.* at 1361.

27. *Id.*

28. *See id.* at 1362 ("Winning teams *never* believe that their 'moral purity' entitles them to win. Wise competitors do not talk of their side's righteousness.").

29. *See id.* at 1368–76 (applying the characteristics of competitive games to law and politics).

30. 372 U.S. 335, 344 (1963) (finding that an indigent criminal defendant's right to counsel is "fundamental and essential to fair trials" in the United States).

Carolene Products Co.[31] can be read simply as steps toward equalizing the chances that each side can win the adversarial legal contest.[32] The Bush administration was roundly criticized for its secrecy and for its extra-legal activity.[33] The Obama administration openly and repeatedly praises the importance of governmental transparency and the rule of law.[34] Thus, in a nutshell, I argue that constitutional democracy itself aspires to be nothing more than a good game.

IV. AFTERTHOUGHT: FIRST AMENDMENT LEGAL TESTS

By taking the anti-essentialist quality of reality as a given, I cannot in good faith argue for any single and demonstrably correct "proper interpretation" of the United States Constitution's Religion Clauses. I am deeply skeptical that any abstract rule or legal doctrine can wisely resolve the nearly infinite context-specific varieties of fact situations that can arise in law and life. I believe that the genius of common law lies in its ability to accommodate and thrive in such realities without a foundation. Instead, in the spirit of the good competitive play of ideas, I suggest the following First Amendment guidelines and encourage readers to counter them.

First Amendment jurisprudence should be anchored in the familiar legal tool of the placement of the burdens of proof and persuasion on one side or the other. Using something like a probing rational basis test that Justice Stevens advocated when he concurred in *Cleburne v. Cleburne Living Center, Inc.*,[35] courts should actively reject any policy choice when its advocates only present religious/moral, and therefore immeasurable, arguments to support it. Establishment jurisprudence should require proponents of public policies to carry the burden of showing that policies can or plausibly will deliver measurable tangible benefits for people. Policies whose defense rests only on intangible

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31. 304 U.S. 144, 152–53 n.4 (1938) (suggesting that courts should apply a heightened standard of scrutiny when confronting "prejudice against discrete and insular minorities").

32. *See, e.g.*, Carter, *supra* note 17, at 1369–70 (detailing the elements of competitive game theory found in *Carolene Products* footnote four).

33. *See, e.g.*, Daniel J. Solove, *Data Mining and the Security-Liberty Debate*, 75 U. CHI. L. REV. 343, 360 (2008) ("Many of the security measures taken by the Bush Administration following September 11 were done under the cloak of secrecy.").

34. *See, e.g.*, Sheryl Gay Stohlberg, *On First Day, Obama Quickly Sets a New Tone*, N.Y. TIMES, Jan. 22, 2009, at A1 (quoting President Obama at a swearing-in ceremony for government officials on the first day of his term as President: "For a long time now there's been too much secrecy in this city . . . . Transparency and rule of law will be the touchstones of this presidency.").

35. *See* 473 U.S. 432, 451–52 (1985) (Stevens, J., concurring) (criticizing the explanation of "well-defined" tiers of scrutiny because the rational basis test sufficiently includes "elements of legitimacy and neutrality").

religious and moral beliefs should fail. Under such a test, litigation over same-gender adoption policies would focus on the results of adoption outcome studies. As research illustrates, same-gender two-parent adoptions produce outcomes close to those produced by heterosexual parent couples.[36] With respect to policies that interfere with voluntary religious and moral practices, whether sectarian or not, courts should seriously consider the requirement that proponents of such policies must demonstrate evidence that it is narrowly tailored to advance a compelling state interest. This test, when applied to the Amish, would reaffirm their freedom to end their children's formal education after the eighth grade.[37] Policies opposing the civil unions of same-sex couples, just as policies that require churches to sanctify such marriages, would most likely fail these tests. But all such matters, including whether a state that legally applies the term "marriage" to same-sex unions undercuts the quality of marriage for believers, should be litigated not on the basis of what professors write, but on good adversarial contests about the facts.

36. *See, e.g.*, Ellen C. Perrin, Committee on Psychosocial Aspects of Child and Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 343 (2002) (concluding that "there is no systematic difference between gay and nongay parents in emotional health, parenting skills, and attitudes toward parenting").

37. *See* Wisconsin v. Yoder, 406 U.S. 205, 215, 234–36 (1972) (overturning a state law requiring Amish children to attend high school until age sixteen when the proffered state interest was not an "interest of the highest order" such that it could "overbalance [a] legitimate claim[ ] to the free exercise of religion").