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Religious Morality and Political Choice: Further Thoughts—And Second Thoughts—On Love and Power†

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In this Article, I return to an inquiry I joined in Love and Power.¹ Should we Americans accept an ideal of political choice according to which a citizen ought not make a controversial political choice — a choice that some fellow citizens oppose — if the choice cannot be defended without relying on a religious belief that at least some opponents of the choice reject? That is, should we accept it as an American ideal: an ideal for us Americans?²

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* Howard J. Trienens Chair in Law, Northwestern University. The precursor of this Article was originally prepared for the symposium on religion and politics organized by Larry Alexander and sponsored by the University of San Diego School of Law (Apr. 1992). I am grateful to have had the opportunity to discuss a draft of the Article with the other participants in the conference. I am grateful, too, to have had the opportunity to discuss a draft with several other groups: a faculty workshop at the UCLA School of Law (Apr. 1992); the Fifth Annual Symposium on Law, Religion, and Ethics, sponsored by the Hamline University School of Law (Oct. 1992); a forum at Georgetown University, "A New Era of Church-State Relations?: John Courtney Murray, S.J., and Religious Pluralism" (Jan. 1993); faculty and students at the Southern Methodist University School of Law (Mar. 1993); faculty and students at the T. C. Williams School of Law, University of Richmond (Apr. 1993); and a symposium at the University of Dayton, "The Role of Religious Morality in the Formation of Public Policy" (Apr. 1993).

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2. Let us assume, for present purposes, that some controversial political choices cannot be defended without relying on a religious belief that (some) opponents of the
I have suggested in *Love and Power* what it means to say that a belief is “religious.” For present purposes, it suffices to say that by a “religious” belief, I mean a belief whose content is at least partly religious: for example, a belief that God commands us to do something, or a belief that the cosmos is, or a belief about how it is, ultimately meaningful.

I. WHAT ROLE SHOULD RELIGIOUS MORALITY PLAY, IF ANY, IN POLITICAL CHOICE?

Experience has taught me that the question of the role religious morality should play in political choice is extraordinarily vulnerable to misunderstanding. I want to begin, therefore, by clarifying the question.

The question is not whether a citizen may rely on a religious belief in making a political choice. That a political choice is defensible on the basis (or partly on the basis) of a religious belief does not mean that the choice is not also defensible on a nonreligious basis. Indeed, one or another political choice that some citizens might make on a religious basis might be made by other citizens on a nonreligious basis. The question is whether a citizen may make a political choice that is not defensible on a nonreligious basis, a choice *that cannot be defended without relying on a religious belief that opponents of the choice, or at least some of them, reject*.

It bears emphasis that that question is distinct from the question whether a citizen may rely on a religious belief to make a “public” political argument — an argument directed not just to the members of a particular religious community, or to the members of any religious community within a particular range of communities, or just to citizens who consider themselves religious, but to all citizens, including those who do not consider themselves religious. It is true that

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3. See Perry, *supra* note 1, at 66-82.

4. Robert Audi has defended, as a requirement of political choice, the requirement of “an adequate secular rationale.” He has also defended the requirement of “an adequate secular motivation.” See Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677, 691-97 (1993). If, as I argue in part III of this Article, we should not accept anything like the requirement of an adequate secular rationale, *a fortiori* we should not accept the requirement of an adequate secular motivation.

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strategic considerations may counsel a religious citizen to make her appeal on a nonreligious basis, if one is available. But there is no reason to doubt that, as a matter of ideal American political morality, she may forsake strategic considerations and make her appeal on a religious basis.

Even if people are exposed in argument to ideas over which they are bound to disagree — and how could any doctrine of public deliberation preclude that? — it does not follow that such exposure is pointless or oppressive. For one thing, it is important for people to be acquainted with the views that others hold. Even more important, however, is the possibility that my own view may be improved, in its subtlety and depth, by exposure to a religion or a metaphysics that I am initially inclined to reject. . . . I mean to draw attention to an experience we all have at one time or another, of having argued with someone whose world view was quite at odds with our own, and of having come away thinking, “I’m sure he’s wrong, and I can’t follow much of it, but, still, it makes you think . . .”. The prospect of losing that sort of effect in public discourse is, frankly, frightening — terrifying, even, if we are to imagine it being replaced by a form of “deliberation” that, in the name of “fairness” or “reasonableness” (or worse still, “balance”) consists of bland appeals to harmless nostrums that are accepted without question on all sides. That is to imagine open-ended public debate reduced to the formal trivia of American televisions networks.

The serious question is not whether a citizen may rely on a religious belief in making a public political argument. The question worth taking seriously is whether, when the time for choice (and not merely argument) is at hand, she may make a political choice that cannot be defended without relying on one or more religious beliefs that at least some citizens who oppose the choice reject.

There are variations on this question about the ideal of political choice we Americans should accept. For example: Should we accept an ideal according to which a citizen may not make a political choice that cannot be defended without relying on one or more religious beliefs that

5. Cf. Mark Tushnet, The Limits of the Involvement of Religion in the Body Politic, in The Role of Religion in the Making of Public Policy 191, 213 (James E. Wood, Jr. & Derek Davis eds., 1991): [T]he distinction between principle and prudence should be emphasized. The fundamental question is not whether, as a matter of prudent judgment in a religiously pluralist society, those who hold particular religious views ought to cast their arguments in secular terms. Even an outsider can say that the answer to that question is clearly, ‘Yes, most of the time,’ for only such a course is likely to be successful overall.

Id. Tushnet is wrong to imply — though perhaps I overread him here — that the principal point of a public political argument is always to persuade. Sometimes the principal point, if not often the only point, of a particular public political argument, especially one based on religious convictions, is simply to bear witness.

(some) opponents of the choice *reasonably* reject? Another variation: Should we accept an ideal according to which a citizen may not make a *coercive* political choice — a choice requiring or forbidding someone to do something — that cannot be defended without relying on a religious belief that (some of) those who would be coerced by the choice, and who oppose it, reject? Still another variation: Should we accept an ideal according to which a citizen may not make a political choice of *a certain sort* (for example, what Charles Larmore has called "the determination of the principles of political association") that cannot be defended without relying on a religious belief that opponents of the choice reject? The differences among these questions are not important for present purposes: The arguments I make in this essay are applicable to each of the variations.

A further clarification is in order. The inquiry here is not about what citizens should be legally permitted to do: permitted to do as a matter of constitutional (or other) law. Rather, the inquiry is about what, within the confines of what they are, or should be legally permitted to do, citizens should do as a matter of *political morality*. To say that, as a matter of political morality, citizens should be legally permitted to do something (e.g., use racial epithets) is not to say that, as a matter of morality, political or otherwise, they should do it.

A principal occasion of the inquiry in this Article is the religious pluralism of American society, which, as John Courtney Murray observed, is congenital: "As it arose in America, the problem of pluralism was unique in the modern world, chiefly because pluralism was the native condition of American society. It was not, as in Europe..."
and England, the result of a disruption or decay of a previously existent religious unity. The religious pluralism of contemporary American society inheres not only in the fact that among the great majority of Americans who consider themselves religious there is significant dissensus about many basic religious beliefs, but also in the fact that today many Americans do not consider themselves religious.

Against the background of the congenital religious pluralism of American society, it perhaps bears emphasis that nothing in this Article is meant to challenge the political-moral proposition, to some extent represented by the First Amendment provisions protecting religious liberty, that some religious matters are beyond the legitimate jurisdiction of government to regulate. (Precisely which religious matters are beyond government's legitimate jurisdiction is a matter of controversy.) The question addressed in this Article is whether, with respect to choices within the legitimate jurisdiction of government to make, we should accept an ideal of political choice according to which political choices may not be made that cannot be defended without relying on religious beliefs.

II. THE NEUTRALIST IDEAL OF POLITICAL CHOICE

I want to begin by considering an ideal of political choice — the "neutralist" ideal according to which a political choice may not be made that cannot be defended without relying on moral beliefs, whether religiously-based or not, that at least some opponents of the choice reject. (Variations on this ideal exist, but, as before, the variations are not important for present purposes.)

By a "moral" belief, I mean a belief about how it is good or fitting for human beings, whether some human beings or all human beings, to live their lives. (Of course, we're talking here about morality, not medicine. Our present concern is not biological well-being, but social.) In the language of the "right" rather than in that of the "good," I also mean a belief about how it is right for some or all human beings to live their lives. It would be a mistake to put any weight on the difference between discourse about "the good" and

10. See John C. Murray, We Hold These Truths 27 (1960).
11. See infra note 64.
discourse about "the right," because, for present purposes, any difference between "good-talk" and "right-talk" is irrelevant. Should we Americans accept the neutralist ideal of political choice? The ideal is "neutralist" in that it purports to exclude, as a sole basis for a political choice (that is, as a basis when no other basis is available) not just some controversial moral beliefs — for example, those with a religious content or those that have a religious basis — but all such beliefs. (By a "controversial" belief, I mean controversial in the context of American society, and not just marginally controversial, but centrally.) The neutralist ideal of political choice has been prominent in recent American political theory: Bruce Ackerman, Ronald Dworkin, Charles Larmore and Thomas Nagel have all, at one time or another, in one version or another, defended the neutralist ideal.

One defect of the neutralist ideal is so large as to destroy whatever appeal the ideal might otherwise have had: The ideal is impossibly restrictive. Beliefs about human good that are admissible under the neutralist ideal — beliefs that all citizens accept, or, at least, that they cannot "reasonably" reject — underdetermine the resolution of many of the political controversies that engage and divide us. The resolution of many such controversies requires recourse to moral beliefs that are inadmissible under the neutralist ideal: beliefs about

14. See John Finnis, Natural Law and Natural Rights 221-22 (1980).

Of course, some moral beliefs are religious beliefs, too: moral beliefs whose content is at least partly religious — e.g., "Thou shalt love the Lord thy God."

We should distinguish between the content of a moral belief being partly religious and a basis of a moral belief being religious. (I am grateful to Robert Audi for emphasizing this distinction to me.) Two persons, one of whom considers herself religious, the other of whom does not, can share a moral belief. If a nonreligious person shares a moral belief with a religious person, presumably the belief does not have a religious content. Nonetheless, if a reason why the religious person embraces the shared moral belief is that she embraces a religious belief that (in her view) supports the moral belief, then for her the moral belief has a religious basis even though for the nonreligious person it does not—indeed, even if for the religious person the moral belief also has an independent nonreligious basis.

If, as it seems, many shared moral beliefs (shared both by persons who consider themselves religious and by those who do not) are relatively indeterminate, a serious question arises about how much, or what, is really shared. In any event, the possibility that we Americans can resolve all or even many of the basic political controversies that engage and divide us solely on the basis of shared moral beliefs is very doubtful, given the indeterminacy of many shared moral beliefs.

15. See Bruce A. Ackerman, Social Justice in the Liberal State (1980); Ronald Dworkin, Liberalism, in Public and Private Morality (Stuart Hampshire ed., 1978); Larmore, supra note 8; Thomas Nagel, Moral Conflict and Political Legitimacy, 16 Phil. & Pub. Aff. 215 (1987). I have commented critically on Ackerman and Dworkin (and on a neutralist construal of John Rawls' work). See Perry, supra note 13, at 57-73. I have also commented critically on Ackerman and Nagel (and on a non-neutralist construal of Rawls). See Perry, supra note 1, at 8-28.
human good that many citizens (reasonably) reject. Kent Greenawalt has persuasively developed the point.\textsuperscript{16}

Another problem significantly diminishes the appeal the neutralist ideal might have had (for some) at first glance: The neutralist ideal of political choice, despite occasional pretensions to the contrary, is not itself neutral or impartial — as I explained in Love and Power.\textsuperscript{17} Steven Smith has captured the core point with this amusing tale:

\[\text{T}he \ common \ denominator \ argument \ is \ fraudulent. \ Suppose \ Dad \ and \ Daughter \ are \ discussing \ what \ to \ have \ for \ dinner. \ Daughter \ proposes: \ "Let's \ just \ have \ dessert." \ Dad \ suggests \ that \ it \ would \ be \ better \ to \ have \ a \ full \ meal, \ with \ salad, \ meat, \ fruit, \ cooked \ vegetables, \ and \ then \ dessert. \ Daughter \ responds: \ "Obviously, \ Dad, \ we \ disagree \ about \ a \ lot \ of \ things. \ But \ there \ is \ one \ thing \ we \ agree \ on; \ we \ both \ want \ dessert. \ Clearly \ the \ fair \ and \ democratic \ solution \ is \ to \ accept \ what \ we \ agree \ on. \ So \ let's \ just \ have \ dessert." \ Although \ he \ might \ admire \ Daughter's \ cleverness, \ Dad \ is \ not \ likely \ to \ be \ taken \ in \ by \ this \ common \ denominator \ ploy. \ The \ argument \ that \ secular \ public \ discourse \ provides \ a \ common \ denominator \ that \ all \ citizens \ share \ is \ comparably \ clever — and \ equally \ unpersuasive.\textsuperscript{18}\]

Given that the neutralist ideal of political choice is impossibly restrictive and is not itself neutral, why would anyone be tempted to accept it? Let's consider several reasons why some have been tempted — or, at least, why one might be tempted — to accept the neutralist ideal.

1. The "noncognitivist" reason: Questions about human good are not amenable to rational inquiry.

The neutralist ideal is an answer to a question about human good: "According to what ideal of political choice is it good for us to live our political lives?" Even if, for the sake of argument, we were to credit the noncognitivist reason, it would not support the neutralist ideal; rather, the noncognitivist reason tells us that the question to which the neutralist ideal is an answer is not amenable to rational inquiry.

Moreover, we should not credit the noncognitivist reason: Questions about human good are infinitely various, or virtually so; that no such question is amenable to rational inquiry is wildly implausible. Some such questions surely are.

2. The "pluralist" reason: To every question about human good that is amenable to rational inquiry, there are at least two answers

\[\text{16. See Kent Greenawalt, Religious Convictions and Political Choice (1988).} \]
\[\text{17. See Perry, supra note 1, at 10, 14-15, 147 n.9.} \]
\[\text{18. Steven D. Smith, Separation and the 'Secular': Reconstructing the Disestablishment Decision, 67 Tex. L. Rev. 955, 1010 (1989).} \]
that are (a) either equally reasonable, in the sense that the ways of life recommended by the answers are equally good or fitting ways for the human beings in question to live their lives, or (b) incommensurable, in the sense that the ways recommended by the answers are incommensurable.\textsuperscript{19}

This proposition does not seem to support the neutralist ideal of political choice, as my colleague Stephen Gardbaum has argued, with particular reference to incommensurability:

Incommensurability does not generally appear to require political neutrality. . . . [C]onflicts between competing values often arise that have no one rational outcome, and yet the state is not required to remain neutral among them. For example, the following pairs all represent political and economic values or goals about whose priority reasonable people can disagree: economic growth and conservation of natural resources, specialization and self-sufficiency, current and future consumption, expenditure on space exploration and welfare programs. Yet incommensurability does not compel state neutrality in these instances. To the contrary, the competition between these values and goals constitutes the very substance of politics.\textsuperscript{20}

If a political majority may legitimately “prioritize” between or among such incommensurable values, why may it not legitimately do so between the incommensurable ways of life recommended by competing answers to questions about human good?

Moreover, it is implausible that to every question about human good amenable to rational inquiry there are at least two answers either equally reasonable or incommensurable. We may safely assume that to some such questions there are at least two answers either equally reasonable or incommensurable, but that is a far cry from saying that every answer to those questions is, in relation to every other answer, either equally reasonable or incommensurable.

3. The “respect” reason: It necessarily denies to a person the respect due her as a fellow citizen — or as a “free and equal” person, or simply as a human being — for government to coerce her on the basis of beliefs about human good that she rejects (or “reasonably” rejects).

Of course, not every contested political choice is coercive.\textsuperscript{21} But the neutralist ideal may be proffered as an ideal not of political choice generally, but of coercive political choice. Nonetheless, the argument from respect is deeply problematic, as William Galston and others have explained:

[Charles] Larmore (and Ronald Dworkin before him) may well be right

\textsuperscript{19} See Joseph Raz, The Morality of Freedom 322 (1986) (“A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value.”).


\textsuperscript{21} See id. at 1366-67.
that the norm of equal respect for persons is close to the core of contemporary liberalism. But while the (general) concept of equal respect may be relatively noncontroversial, the (specific) conception surely is not. To treat an individual as person rather than object is to offer him an explanation. Fine; but what kind of explanation? Larmore seems to suggest that a properly respectful explanation must appeal to beliefs already held by one’s interlocutors; whence the need for neutral dialogue. This seems arbitrary and implausible. I would suggest, rather, that we show others respect when we offer them, as explanation, what we take to be our best reasons for acting as we do.

For example, when we arrest, try, and convict criminals, we show respect for their moral personality by offering the reasons embedded in the law. . . . The convicted criminal may reject each and every one of these premises. He or she may suffer from a sociopathic disconnection from all other human beings and from society at large. But we do not explain our actions to the criminal on the basis of his or her own beliefs. Indeed, to do so would be insulting and manipulative. We rather show respect by treating the criminal as we would anyone else, as someone capable of acting in accordance with a sound understanding of justice and of being motivated by a sense of justice.22

Of course, Galston would have to allow that it is never to show equal respect to a person for one to offer to another — for example, as for a Nazi to offer to a Jew — a reason to the effect that “you have an inferior nature,” even if the Nazi sincerely believes that to be his best reason for acting as he does.23

4. The “practical” reason: The practical costs of government coercing persons on the basis of beliefs about human good they reject

22. WILLIAM A. GALSTON, LIBERAL PURPOSES 109 (1991). As Gerald Dworkin has concluded, in criticism of Ronald Dworkin: “There is a gap between a premise which requires the state to show equal concern and respect for all its citizens and a conclusion which rules out as legitimate grounds for coercion the fact that a majority believes that conduct is immoral, wicked, or wrong. That gap has yet to be closed.” Gerald Dworkin, Equal Respect and the Enforcement of Morality, 7 Soc. Phil. & Pol’y 180, 193 (1990). See also FINNIS, supra note 14, at 221-22 (criticizing Ronald Dworkin).

23. I am grateful to Charles Larmore for this point.

Galston’s critique seems to me to survive, though his example of the criminal sociopath is no longer apt, when we understand that Larmore’s point is that (as Larmore has put it in correspondence) the “justification [for political choices of a certain sort; see supra note 8] must appeal, not simply to the beliefs that the other happens to have, but to the beliefs he has on the assumption (perhaps counterfactual) that he affirms the norm of equal respect.” The force of Galston’s position is undiminished: “[W]e show others respect when we offer them, as explanation, what we take to be our best reasons for acting as we do” — so long as our reasons do not themselves assert or imply the inferior humanity of those to whom the explanation is offered. GALSTON, supra note 22, at 109. Because the moral ideal of equal respect, which is central to Larmore’s theory, is controversial, perhaps it is misleading to label Larmore’s theory (and similar theories), which is exclusivist, “neutralist.” On the distinction between exclusivism and neutralism (which is the extreme version of exclusivism), see part III of this Article. Nothing of substance turns on this essentially terminological matter.
(or "reasonably" reject), costs in the form of human suffering, political divisiveness and instability, are always too high.

The "always" here is implausible: "Whether coercion is justified must be determined contextually, depending on such factors as the ideals in question, what is at stake, the consequences of acting or not acting in a given situation, and the amount of coercion involved."24

I want to emphasize, with respect to my rejection of the two preceding reasons, that in Love and Power I developed several reasons why, in the spirit of liberalism-as-tolerance, as distinct from liberalism-as-neutrality, we should be wary about pursuing coercive political strategies.26 Nothing in this Article is a call to relax that wariness.

I have given one important reason for rejecting the neutralist ideal of political choice: it is impossibly restrictive. I have also noted that the ideal is not itself neutral or impartial. Finally, I have explained why four reasons for accepting the ideal simply do not work.

None of this is to deny that government can, and sometimes should, be neutral between (or among) some competing positions—such as, competing positions about the nature of God. However, such neutrality is not neutral between all competing positions in the neighborhood—for example, the position supporting such neutrality and the position opposing it. Note, moreover, that no neutral justification of such neutrality may be available; it may not be possible to defend such neutrality without relying on controversial moral beliefs.

III. EXCLUSIVIST IDEALS OF POLITICAL CHOICE

The neutralist ideal of political choice is an exclusivist ideal. Indeed, it is the extreme version of an exclusivist ideal: It excludes, as a (sole) basis for a political choice, not just some controversial moral beliefs, but all such beliefs. To reject, at the one extreme, the neutralist ideal is not necessarily to accept, at the other extreme, the inclusivist ideal, according to which neither controversial beliefs about human good nor even supporting religious beliefs are excluded. Is there an appealing middle ground? Should we Americans reject both the neutralist ideal and the inclusivist ideal and instead accept

24. Gardbaum, supra note 20, at 1367-69. Gardbaum adds:
Within liberal societies, the amount of coercion generally involved in promoting such 'domestic' moral ideals as autonomy, equality, and human dignity is not always great, and often much less than that involved in importing 'foreign' ideals into a previously homogeneous moral culture. The model of the Bolshevik Party implanting and fostering the value of communism on Czarist Russia should not tyrannize our minds on this issue.

ld. at 1369.
25. See Perry, supra note 1, at 128-38.
an exclusivist ideal of political choice according to which some beliefs, whether controversial moral beliefs or supporting beliefs, are excluded?

Although I argued in Love and Power that we should reject the neutralist ideal of political choice, I defended an exclusivist ideal of the middle ground. In particular, I argued that some controversial beliefs should be excluded as a basis for a public political argument:26 any moral belief, or any supporting belief (whether religious or not), that fails what I called “the standard of public accessibility.”27

I now see that we Americans should not accept any exclusivist ideal, either of public political argument or of political choice— not even any “middle ground” ideal. Instead, we should accept the inclusivist ideal, according to which neither any controversial moral belief nor supporting belief—including (and this is what I want to emphasize here) any supporting religious belief—is excluded. This includes any supporting religious belief. There is no good reason to accept any middle ground exclusivist ideal. In particular, there is no good reason to exclude religious beliefs—religious beliefs that, in the view of those who embrace them, support controversial moral beliefs—as a basis for a political choice even when no other basis is available.

26. I was focused in Love and Power much more on public political argument than on political choice.

A defense of a disputed position abides the standard of public accessibility if it is neither authoritarian nor sectarian. A defense of a disputed position is authoritarian if and to the extent it relies on the authority of persons or institutions that have little if any authority beyond the confines of one’s own particular religious or other moral community. A defense of a disputed position is sectarian if and to the extent it relies on a claim of epistemological privilege that has little if any authority beyond the confines of one’s own particular religious or other moral community. By “a claim of epistemological privilege” I mean a claim to the effect that my religious or other moral community has a way of gaining access to religious or other moral truth that is superior to that of other human beings and other human communities. A defense of a disputed position seems to be sectarian—it seems to rely on a claim of epistemological privilege—if and to the extent the position is put forward as more than the reflective yield of the lived experience of an historically extended community of fallible, broken human beings struggling to discern what it means to live a truly, fully human life.

Id. For an earlier formulation, see Perry, supra note 1, at 106. For a discussion, see id. at 105-11.
1. Political choices that cannot be defended without relying on religious beliefs do not invariably deny to those who reject (or "reasonably" reject) the beliefs the respect due them as fellow citizens, as "free and equal" persons, or simply as human beings. As a basis for a political choice, controversial religious beliefs are neither more nor less problematic in that regard than are controversial nonreligious beliefs. As I argued earlier, controversial beliefs of neither kind (as a basis for a political choice when no other basis is available) can plausibly be understood necessarily to deny such respect.\textsuperscript{28}

This is not to deny that some sectarian rationales, whether religious or not, can deny to some persons the respect due them: for example, arguments that assert or imply that those persons are, because of their race, religion, or sex, not fully human. Nor is it to deny that, as Ken Karst has argued, some styles of religious politics (styles that embody religious intolerance, religious triumphalism, or the like) can deny to some of our fellow citizens the respect that is their due.\textsuperscript{29} But I do mean to deny that every style of religious politics necessarily does so. In particular, political choices that cannot be defended without relying on religious beliefs do not necessarily deny to any of our fellow citizens the respect due them.

2. Even as a sole basis for a political choice, religious beliefs are not, in our context, invariably divisive or, much less, destabilizing: Although some imaginable instances of choosing on the basis of religious beliefs might, in conjunction with other factors, precipitate political instability, as a general matter, "the risk of major instability generated by religious conflict is minimal. Conditions in modern democracies may be so far from the conditions that gave rise to the religious wars of the sixteenth century that we no longer need worry about religious divisiveness as a source of substantial social conflict."\textsuperscript{30} Our experience with our present practice (which, after all, is inclusivist)\textsuperscript{31} certainly seems confirmatory. (Or does someone want to argue that the sky really is falling — or is about to?) In the

\textsuperscript{28} See supra note 22 and accompanying text.


\textsuperscript{30} Lawrence B. Solum, Faith and Justice, 39 DePaul L. Rev. 1083, 1096 (1990). Solum is stating the argument, not making it. Indeed, Solum is wary of the argument. See id. at 1096-97. Solum cites, as an instance of the argument, Stephen L. Carter, The Religiously Devout Judge, 64 Notre Dame L. Rev. 932, 939 (1989). For another instance, see Malon Schwarzschild, Religion and Public Debate in a Liberal Society: Always Oil and Water, or Sometimes More Like Rum and Coca-Cola?, 30 San Diego L. Rev. 903, 910-14 (1993); see also Charles Larmore, Beyond Religion and Enlightenment, 30 San Diego L. Rev. 799, 801 (1993); cf. Murray, supra note 10, at 23-24 (counselling wariness about "project[ing] into the future of the Republic the nightmares, real or fancied, of the past").

\textsuperscript{31} See Levinson, supra note 9, at 2062-63, nn.8, 11. A recent collection contains several essays detailing our traditionally inclusivist practice: The Role of Religion in the Making of Public Policy, supra note 5.
United States and elsewhere in the First World, religion has been domesticated (at least for the most part). We are not the former Yugoslavia or India. An ideal of political choice forged in the crucible of a time or place very different from our own, or forged in our own time and place but to meet the exigencies of a time or place very different from our own, is scarcely an American ideal. Kent Greenawalt's admonition is relevant: "[W]e need to acknowledge that what principles of restraint, if any, are appropriate may depend on time and place, on a sense of present realities within a society, of its history and of its likely evolution."38

3. Religious beliefs do not have a different, much less inferior, epistemological status from that of other beliefs, a status that makes them less appropriate than other beliefs as a basis for a political choice. That is, if we have any religious beliefs, we do not come to them differently, nor do we justify them differently (if we try to justify them), than we do many of our nonreligious beliefs (in particular, our beliefs about ultimate, or "limit," questions). Larry Alexander has recently developed the point at length; it is enough, here, to incorporate Alexander's discussion by reference.

A variation on the argument under discussion here could be used to support a different exclusivist ideal, one that does not trade on the religious/secular distinction: "Some beliefs—both some religious beliefs and some secular beliefs—have a different epistemological status from that of other beliefs, a status that makes them less appropriate as grounds of political choice." Thomas Nagel once made an argument to that effect but, under assault from Joseph Raz, he has abandoned it. Further examples are the argument of Robert Audi, who allows for the possibility that some secular beliefs, and not just religious beliefs, are "esoteric," and the argument of

34. On "limit" questions, see Perry, supra note 1, at 71-72.
36. See Nagel, supra note 15.
37. See Raz, supra note 35, at 31-46.
38. See Perry, supra note 1, at 151 n.28.
39. See Audi, supra note 4, at 690: "[I]f [in addition to religious reason] there is secular reason which is esoteric in a sense implying that a normal rational person lacks access to it, then a stronger requirement is needed; one might thus speak of public reason, as Rawls and others do." (What is "a normal rational person?") In correspondence, Audi has written that he uses "'esoteric' in the classical sense implying intelligibility to
Kent Greenawalt, who insists that some religious and some nonreligious beliefs are "nonaccessible."40 My argument in Love and Power is yet another example.41 Alexander's powerful argument for "the unity of epistemology" is an adequate response, in my view, to any exclusivist position, whether or not the position trades on the religious/sectarian distinction that presupposes the "disunity" of epistemology — that presupposes, that is, that some beliefs, in particular some moral beliefs or some bases for moral beliefs, have a different epistemological status ("esoteric," "nonaccessible," etc.) that makes them inappropriate as bases of political choice. (Alexander's argument, although it "focus[es] on the relation between liberalism and religion[,] . . . extends beyond religion and encompasses all views of the Good that have implications for public policy."42)

(Of course, some religious persons (though not all) may insist that some religious beliefs do have a different and privileged epistemological status (e.g., "revealed by God"). Some who do so insist may want to argue that because of their privileged epistemological status, such beliefs are unsuited to be a basis for political choice in a society like ours.43 But the nonreligious persons who contend for an exclusivist ideal of political choice (e.g., Ackerman and Nagel) cannot acquiesce in the claim that religious beliefs have a privileged epistemological status. Therefore, they cannot join the argument that, because of their privileged epistemological status, such beliefs are unsuited as a basis for political choice.)

In addition to the absence of good reasons for accepting any middle-ground exclusivist ideal of political choice, there is this reason for rejecting any such ideal. By privileging some controversial moral beliefs, or some controversial bases for controversial moral beliefs, and de-privileging others, any exclusivist ideal of the middle ground inevitably creates two classes of citizenship: Those citizens all, or virtually all, of whose most basic such beliefs are privileged are "first

an initiated group." He adds that in the quoted passage, he "was taking account of the possibility that the secular may be esoteric, and not asserting that secular beliefs sometimes are: I do, as you say, allow for this, but wasn't gesturing toward any particular items." Letter from Robert Audi to Michael Perry (Aug. 14, 1992) (on file with author).


For a critical comment on Greenawalt's discussion of the nonaccessibility of religious belief and experience, see David Hollenbach, Contexts of the Political Role of Religion: Civil Society and Culture, 30 San Diego L. Rev. 877, 896-97 (1993).

41. See Perry, supra note 1.

42. Alexander, supra note 4; cf. Richard Neuhaus, Reason Public and Private: The Pannenberg Project, First Things, Mar., 1992, at 55, 57 ("So long as Christian teaching claims to be a privileged form of discourse that is exempt from the scrutiny of critical reason, it will understandably be denied a place in discussions that are authentically public.").
class” citizens; those citizens some of whose most basic such beliefs are de-privileged are relegated to “second class” citizenship.\textsuperscript{4}

To accept the inclusivist ideal of political choice, as I now believe we should, is not to deny that some religious beliefs represent bad theology, or bad epistemology, or both: theology or epistemology that misunderstands and therefore misrepresents how we fallible human beings come to our beliefs, including our religious beliefs and our moral beliefs.\textsuperscript{46} But it is deeply misguided to construct an (exclusivist) ideal of political choice purportedly for all of us Americans, or even for most of us, partly on the basis of theological views, or epistemological views, or both, that many Americans not only do not embrace, but reject. After all, no ideal of political choice is an ideal for all or most of us Americans that presupposes the superiority of theological or epistemological views many of us (reasonably) contest. (As Greenawalt has emphasized, “One must present reasons for the [proposed principle of restraint] that have appeal to persons of religious and ethical views different from one’s own. . . .”\textsuperscript{46}) No such ideal is part of any “overlapping consensus”: No such ideal represents a point of convergence among the moral and religious world views that divide us. No such ideal, therefore, is one that all or most of us can and should accept, or that none of us can “reasonably” reject.

In constructing an ideal of political choice for all or most of us Americans, and not merely for some of us, it simply will not do to privilege my (or our) controversial theological/epistemological views and to de-privilege theirs (e.g., David Smolin’s\textsuperscript{47}). It is one thing to reject certain beliefs as theologically unsound, or epistemologically unsound, or both, and, where it seems fitting to do so, to be willing to challenge them as such. It is another thing altogether to suggest that such beliefs may not serve as a basis for a political choice (may not, that is, when no other basis is available). Relatedly, it is one thing to

\textsuperscript{44} For an elaboration and an anguished and angry \textit{crie de coeur}, see David Smolin, \textit{Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry}, 76 Iowa L. Rev. 1067 (1991) (reviewing MICHAEL J. PERRY, \textit{Love and Power: The Role of Religion and Morality in American Politics} (1991)).

\textsuperscript{45} I quite agree with Dan Conkle’s argument in a recent essay that “when religious believers exercise their rights in the political process, some religious arguments have more to offer than others, and . . . they accordingly are entitled to more attention and public consideration.” Daniel O. Conkle, \textit{Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law}, 10 J. L. & RELIGION (forthcoming 1994).

\textsuperscript{46} \textit{GREENAWALT, supra} note 16, at 53.

\textsuperscript{47} See Smolin, \textit{supra} note 44.
say to a David Smolin, “Although your arguments, no less than mine, may serve as a (sole) basis for political choice, this is why I reject your arguments and think others should too.” It is another thing to say, “I don’t even have to try to meet your arguments on the merits, because, unlike mine, they may not serve as a basis for political choice.” As Smolin has aptly responded to such a claim: “If Perry’s ideals of dialogue are merely his personal religious ideals, why should they govern those who hold differing religious ideals?”

Let me emphasize again that in *Love and Power* I developed several reasons why, in the spirit of liberalism-as-tolerance, as distinct from liberalism-as-neutrality, we should be wary about pursuing coercive political strategies. That we should reject any exclusivist ideal of political choice (including any exclusivist ideal of the middle ground) does not mean that those of us of a mind to do so may not press for a state of affairs in which, for the most part, law and policy (especially coercive laws and policies) not only do not contradict the existing public consensus, but are grounded in such a consensus. Many of us — some who consider ourselves religious, others of who do not — believe that there is good reason to press for such a tolerant state of affairs: Absent such a consensus, the practical costs of some coercive laws and policies may be, in a society as morally and religiously pluralistic as ours, prohibitive. That we should reject any exclusivist ideal of political choice does not mean that those of us of a mind to do so may not concur in David Hollenbach’s argument, which I accept, that the proper role of religious discourse “in public” (especially in a democratic society as morally and religiously pluralistic as ours) is mainly a role to be played much more in public culture than in public argument specifically about political issues: to help build a public consensus about what kind of people “We the people” should aspire to be, — with what values, commitments,


To settle on a particular conception of public justification, it is therefore necessary to settle questions, at least to our own satisfaction, which are themselves properly political questions. The project of public justification therefore cannot be beyond or prior to politics itself. It is not a meta-political project, as some might have wishfully thought; it is, rather, itself a part of the realm of properly political argumentation.

Id.

49. In particular, where human rights are not imperiled.

50. Of course, if there is anything approaching a public consensus about some issue, it is extremely unlikely in a democratic society like ours that any law or policy can survive that opposes it.

51. See *Perry, supra* note 1, at 128-38.

52. The Constitution of the United States begins: “We the people of the United States...”
There is no tension between, on the one hand, pressing for a tolerant state of affairs (and concurring in Hollenbach's argument) and, on the other hand, saying that we should reject an ideal of political choice that excludes religious beliefs as a (sole) basis for political choice. Indeed, in the view of some of us who consider ourselves religious, it may not be possible to defend, or fully defend, those political choices conducive to, or even constitutive of, "a tolerant state of affairs" without relying on certain religious beliefs. In any event, it is one thing (and wrong) to say that a particular political choice should not be made because it cannot be defended without relying on religious beliefs that opponents of the choice reject (or "reasonably" reject). It is another thing altogether to say that a particular political choice — perhaps one that cannot be defended without relying on religious beliefs that opponents of the choice reject — should not be made because the reasons opposing the choice (which may even be religious reasons) are stronger than the reasons supporting it. Nothing in this Article calls into question an argument of the latter sort.

As I said, although I defended a middle-ground exclusivist ideal of political choice in Love and Power, I now think that we should reject even any middle-ground exclusivist ideal and instead accept the inclusivist ideal. But much of the constructive argument of Love and Power survives, albeit not as an argument for a middle-ground exclusivist ideal. It survives as an argument — incomplete, to be sure — for a particular understanding of how we fallible, broken human beings come to have many of the various and often competing religious beliefs and moral beliefs we do and, especially, of how we should bring those beliefs to bear in public political argument.

53. See Hollenbach supra, note 40, at 897.
55. On how we come to have some — not all, but some — of the beliefs we do, this statement by James Burtchaell is suggestive (though, obviously, much more needs to be said):

The Catholic tradition embraces a long effort to uncover the truth about human behavior and experience. Our judgments of good and evil focus on whether a certain course of action will make a human being grow and mature and flourish, or whether it will make a person withered, estranged and indifferent. In making our evaluations, we have little to draw on except our own and our forebears' experience, and whatever wisdom we can wring from our debate with others. . . .

What we are trying to unpuzzle are things like childbearing and immigration
course, there’s not much time — or, if time, occasion — for theologi-
cal or epistemological discourse in public political argument. But
that there is not much time does not mean there is no time. Public
political argument can include, after all, articles, books, op-ed pieces,
and so forth.

One ought not to think that religious discourse about the difficult
moral issues that engage and divide us is necessarily more problem-
atic — more interminable, say, or more dogmatic — than resolutely
secular discourse about those issues. David Tracy has lamented that
“[f]or however often the word is bandied about, dialogue remains a

and economic policy and infant mortality and drug use and family fidelity and
so much else about which we must frame moral judgments. With our fellow
communicants we share commitments and assumptions: that we are happier
giving than getting, that there is no greater love than to put down your life for
your neighbor, and that your neighbor always turns out to be the most unlikely

person.

James Burtchaell, The Source of Conscience, 13 NOTRE DAME MAG. 20, 20-21 (Winter
1984-85). (On our neighbor always turning out to be the most unlikely person, see Luke
10:29-37 (Parable of the Good Samaritan)). Burtchaell continues:

Nothing is specifically Christian about this method of making judgments about
human experience. That is why it is strange to call any of our moral convic-
tions “religious,” let alone sectarian, since they arise from a dialogue that
ranges through so many communities and draws from so many sources. And
when debate and dialogue and testimony do fructify into conviction, and con-
viction into consensus, nothing could be more absurd than to expect that con-
sensus to be confined within a person’s privacy or a church’s walls. Convictions
are what we live by. Do we have anything better to share with one another?

Burtchaell, supra at 21. (For a revised version of Burtchaell’s essay, and for several other
illuminating essays by Father Burtchaell, see JAMES BURTCHAELL, THE
GIVING AND
TAKING
OF
LIFE (1989));

But, the objection may be pressed, can a religious body argue its case in a
secular forum (i.e., one that is not already antecedently committed to the reli-
gion in question)? Either, it may be said, it will rely on Christian premises,
which ex hypothesi opponents will not accept; or it will employ purely secular
premises, in which case the ensuing law will not be Christian. In neither case
will any genuine debate have taken place between Christians and non-Chris-
tians. The dichotomy, however, is altogether too neat to be convincing. It pre-
supposes that there is and always must be a complete discontinuity between
Christian and secular reasoning. Certainly this can occur — if, for example,
the Christian is an extreme fundamentalist and the secular thinker regards in-
dividual preferences as the sole basis for morality. But in the sort of Western
society we have in mind, the moral intuitions of those who are not religiously
committed have been influenced by centuries of Christianity, and the mainline
Christian churches have for sometime been at pains to take account of develop-
ments in the human sciences and in the humanities which bear upon the inter-
pretation of Christian doctrine. In a period during which the narrowness of the
official churches has often driven genuinely Christian developments into other
channels, it is not in fact all that easy to determine which ideas are of purely
secular origin. But, these cultural reflections apart, Christians would presum-
bly want to argue (at least, many of them would) that the Christian revelation
does not require us to interpret the nature of man in ways for which there is
otherwise no warrant but rather affords a deeper understanding of man as he
essentially is. If that is so, there is room for a genuine exchange of ideas.

Id.

720
rare phenomenon in anyone's experience. Dialogue demands the intellectual, moral, and, at the limit, religious ability to struggle to hear another and to respond. To respond critically, and even suspiciously when necessary, but to respond only in dialogical relationship to a real, not a projected other."\(^5\) Given the religious illiteracy—and, alas, even prejudice—rampant among many secular academics,\(^6\) it perhaps bears emphasis that at its best religious discourse in public culture is not less dialogic (it is not less open, less deliberative, less productive) than, at its best, secular discourse in public culture. (The work of David Hollenbach, for example, is illustrative.\(^5\)) Nor, at its worst, is religious discourse more monologic (more closed, more dogmatic, more sterile) than, at its worst, secular

\(^5\) David Tracy, *Dialogue With the Other* 4 (1990). Steven Smith, commenting wryly that "'dialogue' seems to have become the all-purpose elixir of our time," has suggested that "[t]he hard question is not whether people should talk, but rather what they should say and what (among the various ideas communicated) they should believe." Steven D. Smith, *The Pursuit of Pragmatism*, 100 Yale L.J. 409, 434-35 (1990). As David Tracy's observation suggests, however, there is yet another "hard" question, which Smith's suggestion tends to obscure: Not whether but how people should talk; what qualities of character and mind should they bring, or try to bring, to the task.


\(^5\) See Hollenbach, *supra* note 40. Hollenbach writes:

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

*Id.* at 891.
discourse. An important feature of Hollenbach’s work is his argument, which I noted earlier, that the proper role of “public” religious discourse in a society as morally and religiously pluralistic as ours (helping to build a public consensus about the kind of people “We the people” should aspire to be) is a role to be played much more in public culture than in public argument specifically about political issues. He writes: “[T]he domains of government and policy-formation are not generally the appropriate ones in which to argue controverted theological and philosophical issues [nonetheless,] it is . . . neither possible nor desirable to construct an airtight barrier between politics and culture.”

It is important to remember, of course, that religious discourse in the public square can be quite sectarian and, therefore, divisive. (When it is, then, given America’s religious pluralism, it is also almost certainly ineffectual.) But it is important to remember, too — especially for many of us in the secular academy — that religious discourse in the American public square is not necessarily more sectarian than is much secular discourse. Indeed, it can be much less sectarian. After all, certain basic moral premises common to the Christian and Jewish traditions, in conjunction with the supporting religious premises, still constitute the fundamental moral horizon of most Americans (much more so than do Kantian (or neo-Kantian) premises, or Nietzschean premises, or Epicurean premises, and so forth).


60. Hollenbach, supra note 40, at 900. See also GREENAWALT, supra note 16, at 1034 (expressing skepticism about “the promise of religious perspectives being transformed in what is primarily political debate”).

61. See supra note 5 and accompanying text.


*I do not believe that we, as Europeans, can seriously understand concepts like morality and ethical life, person and individuality, of freedom and emancipation, without appropriating the substance of the Judeo-Christian understanding of history in terms of salvation. And these concepts are, perhaps, nearer to our hearts than the conceptual resources of Platonic thought, centering on order and revolving around the cathartic intuition of ideas. Others begin from other traditions to find the way to the plenitude of meaning involved in concepts such as these, which structures our self-understanding. But without the transmission through socialization and the transformation through philosophy of any one of the great world religions, this semantic potential could one day become inaccessible. If the remnant of the intersubjectively shared self-understanding that makes human(e) intercourse with one another possible is not to disintegrate, this potential must be mastered anew by every generation.*
One might challenge the inclusivist ideal of political choice as inconsistent with the Establishment Clause of the First Amendment,\(^4\) as presently interpreted by the Supreme Court.\(^5\) But that challenge — even if, for the sake of argument, we credit it\(^6\) — is largely beside the point. The fundamental political-theoretical question that engages us is not, What ideal of political choice should we accept, given the Court’s present interpretation of the Establishment Clause? Rather, the question is, What ideal of political choice should we accept? If there is an inconsistency between the ideal we should accept and the Court’s present interpretation of the Establishment Clause, so much the worse, as a matter of political theory, for the Court’s present interpretation of the clause. Indeed, if there is an inconsistency between the ideal we should accept and the clause rightly interpreted (whatever the right interpretation might be), so much the worse for the clause rightly interpreted. Of course, given the indeterminacy of the Establishment Clause, it is likely that a Supreme Court justice’s answer to the political-theoretical question of the ideal of political choice we should accept will influence his or her answer to the constitutional-legal question of the meaning of the clause.\(^7\)

IV. AN EXCLUSIVIST IDEAL FOR LEGISLATORS, AT LEAST — OR FOR JUDGES?

Should we Americans insist that legislators, at least, not make political choices that cannot be defended without relying on religious beliefs? It is difficult to see why we should, if we should not insist that citizens not make such choices. I agree with Jeremy Waldron’s position, which I need not rehearse here, that it is a mistake, in this context, to distinguish between citizens and legislators.\(^8\) At least, it is a mistake, in this context, to draw the distinction too sharply, or

\(^4\) The First Amendment forbids Congress — and the First Amendment in conjunction with the Fourteenth Amendment has been interpreted to forbid the states — to “make [any] law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” U.S. Const. amend. I.


\(^6\) I am not inclined to credit it. See Perry, supra note 1, at 112-16. But then, I do not profess to be an expert on establishment clause theory or jurisprudence.


\(^8\) See Waldron, supra note 6, at 826-31.
put too much weight on the distinction.  

Should we insist that religious beliefs are an inappropriate basis for judicial decision making (and, therefore, for judicial justification) when no other basis is available — and perhaps even when another basis is available?  

Theories of adjudication, perhaps especially theories of constitutional adjudication, are controversial. The serious question is this: Is there any good reason for saying that a judge, in the course of specifying — shaping — indeterminate legal materials, may rely on one (or more) of her own, controversial moral beliefs if the belief can be defended on a nonreligious basis but not if it can be defended only on a religious basis? It is easy to see why one might think that judges should not rely on their own, controversial moral beliefs. But it is difficult to see why, if one thinks that a

69. For an impressive argument that it does not make sense to distinguish between the grounds on which citizens may rely, in making political choices, and the grounds on which their elected representatives may rely, see Tushnet, supra note 5, at 199-201.  


71. Not that that is my view. To the contrary. See MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? (forthcoming 1994). In that book I explain:

The heart of the judge’s responsibility, of course, is to decide on the basis of “legal” premises, if there are any relevant legal premises: premises authoritative for her qua judge. Assuming that the relevant legal premises do not conclude the question, it seems fitting for a judge to decide on the basis of premises that, although not authoritative for her qua judge, are nonetheless the object of widespread consensus in American society — even, perhaps, part of the society’s “common sense” — unless the consensus/common sense is, in her view, either contrary to legal premises or mistaken; conversely, it seems problematic for her to decide on the basis of premises widely rejected in American society. According to Justice Brennan, “[E]ven high court judges are constrained in issuing rulings[,] . . . not just by precedent and the texts they are interpreting, but also, on any attractive political and jurisprudential theory, by a decent regard for public opinion . . . .”

Assuming, however, that legal premises and/or consensual/commonsensical premises, even if they rule out some answers to the “how best to achieve the value question”, do not yield a single answer, presumably she should decide on the basis of premises she accepts, premises authoritative for her qua the particular person she is — unless, of course, an axiomatic (for the political-legal culture) norm about judicial role requires her to forsake reliance on one or more premises she accepts (or unless one or more premises she accepts is widely rejected in American society). What sense would it make to suggest that when legal premises and consensual/commonsensical premises do not together yield an answer, a judge should decide on the basis of premises she rejects, premises not authoritative for her qua the particular person she is? (To say that an axiomatic norm about judicial role may require her to rely on one or more premises she rejects is just to say that one or more premises she rejects
judge may rely on her own, controversial moral beliefs if the beliefs can be defended on a nonreligious, but nonetheless controversial, basis, one should not also think that she may do so even if the beliefs can be defended only on a religious basis. Why, in the context of adjudication, should the controversial secular basis of a controversial moral belief be privileged and the controversial religious basis of a controversial moral belief be de-privileged? I suspect that the arguments one might be inclined to try at this point are the very arguments rehearsed, and found wanting, earlier in this essay.²¹

may be authoritative for her qua judge — that, in other words, one or more such premises may be legal premises.) As U. S. Circuit Judge James L. Buckley has written, in an essay titled “The Catholic Public Servant”: “When faced with ambiguities, or with problems that fall within the interstices that inevitably exist within and between laws, a judge is necessarily called upon to exercise a large measure of discretion. In doing so, he will inevitably bring to that task everything that he is — the books he has read; his experience as spouse, parent, and public official; his understanding of the nature of man and the responsibilities of citizenship; his sense of justice; even his sense of humor. A judge is not a machine, and the judicial function cannot be displaced by a formula or measured by an equation.” To say, as I did a moment ago, that a judge should not rely on premises widely rejected in American society is not to say that she should never rely on premises not widely accepted in American society; it is not to say that she should “never be the first person to bring a new value, a new political or ethical insight, into the law.” As Justice Brennan has said, “High court judges interpreting a bill of rights may at times lead public opinion.” Justice Brennan quickly added, however, that “in a democratic society they cannot do so often, or by very much.”

Id. at 98–99 (footnotes omitted) (alterations in original).

72. None of this is to suggest that the judge is a “moral philosopher”. See Waldron, supra note 6, at 833:

[A] point will come a point in judicial decision making when the judge must simply make a moral judgment of his own, in his own voice, the best way he knows how. He does not eo ipso become a moral philosopher, unless we extend the latter category to cover anyone who tries to think hard about moral problems. It makes more sense to adjust the categories from the other direction: moral and political philosophers are simply doing systematically, professionally, and at leisure what judges and other officials must do under a deadline every day. Neither activity — neither that of the philosopher nor that of the judge — differs, in essence, from the thinking and decision making of the ordinary person addressing matters of civic importance. For all three, there comes a time when he must think about and enter a value judgment in his own voice. Unless he does that, he will not be able to complete the task assigned to him, whether it is teaching, interpreting legal sources, or choosing for whom to vote. Once we acknowledge the unavoidable place of moral judgment in the activity of the judge, we must recognize that he is pro tanto in the same game as the ordinary citizen so anything appropriate for the citizen to take into account in exercising his political power is appropriate for the judge and for other officials to take into account, to the extent that they face moral choices in the exercise of theirs.

Id.
I hope I am not misunderstood at this point. To suggest that in the context of adjudication there is no good reason to privilege the controversial secular basis of a controversial moral belief over the controversial religious basis of a controversial moral belief is not to suggest that judges, either in deciding difficult cases or in justifying their decisions, should often or blithely rely on controversial moral beliefs or on controversial beliefs, religious or secular, that support controversial moral beliefs. Even when, in the “hard” case, there may be no apparent alternative for a judge to give a controversial moral belief as an element of her defense — her justification — of her decision, my suggestion is not that she also give the controversial belief (perhaps religious) that in her view supports the controversial moral belief, much less that she undertake a theological or philosophical defense of the supporting belief. To adapt a point I made earlier: That we should reject any exclusivist ideal of political choice, even for legislators and judges, does not mean that those of us of a mind to do so may not conclude that the proper role of religious or philosophical discourse “in public,” especially in a democratic society as morally and religiously pluralistic as ours, is mainly a role to be played much more in public culture than in public argument specifically about political or legal issues, including argument by legislators and judges acting in their official capacities. I do so conclude — and I concur, therefore, in David Hollenbach’s admonition: “I do not think it would be helpful for two judges, one a liberal Catholic and the other a conservative Protestant, to launch into epistemological and theological reasoning to explain why their responses to a piece of legislation regarding abortion [for example] are different. These theological and epistemological differences are better dealt with in the discussions that take place in the sphere I have called cultural, not that of the political sphere conceived narrowly as the judiciary or the legislature.”

V. CONCLUSION

Let me try, a final time, to forestall the misunderstanding that seems almost inevitable in discussions of religion and politics. To reject, as I have argued here we should, any exclusivist ideal of political choice is not to deny any of the following four premises: Indeed, as I have indicated at various points in this essay, I affirm each of the premises:

1. The proper role of religious discourse “in public” is a role to be

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73. See supra note 71.
74. Hollenbach, supra note 40, at 899-900. The analysis and conclusion of a recent article, which came to my attention after I had completed this Article, are substantially congruent with my own. See Idleman, supra note 70.

726
played much more in public culture than in public argument specifically about political issues.
2. Some religious claims represent bad theology and should therefore be rejected.
3. Our politics and law should aspire to be tolerant of moral and religious differences rather than "moralistic."
4. Some styles of religious participation in politics — those that fail the test of civility — represent bad citizenship.

It is one thing to construct, as Lawrence Solum has impressively done elsewhere in this Symposium, an exclusivist ideal of political choice. (Solum calls it "an ideal of public reason." 75) It is another thing altogether to make the case that we should accept such an ideal. It does not seem to me that the case has yet been made. A careful statement of credible reasons for any such ideal is much needed, in my view. I have tried to indicate in this Article why I find some of the most often given reasons (e.g., showing others the respect due them as free and equal persons) either ill-conceived or too thin to bear the weight put on them. One hopes that John Rawls' new book, Political Liberalism, 76 will significantly advance the discussion.

75. See Solum, supra note 7.