Freedom of Speech That Is Both Religious and Political

*Douglas Laycock**

Michael Perry's paper[1] is part of a long running debate that has occupied some of the most distinguished members of our discipline for up to fifteen years now, including Professor Perry himself,[2] Kent Greenawalt at Columbia,[3] Bruce Ackerman at Yale,[4] and the contributors to a symposium in the San Diego Law Review.[5] It is obvious that intelligent and important people think that these are important questions, but I must confess that I have never understood why that is. I wish that this enormous array of talent had spent less time on these questions and more time on other things.

No one has devoted more attention to these issues than Professor Perry, and it is only fair to mention one of the reasons he has returned to these issues so often. Professor Perry's repeated publication on these issues reflects a virtue that is far too rare among legal academics: he has listened to his critics, reconsidered his position, and actually changed his position. He has

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[1] Michael J. Perry, *Religion in Politics*, 29 U.C. DAVIS L. REV. 729 (1996) [hereinafter *Religion in Politics*].

[2] MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991) [hereinafter LOVE AND POWER]; MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY (1988); Michael J. Perry, *Toward an Ecumenical Politics*, 60 GEO. WASH. L. REV. 599 (1992).

[3] KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).

[4] BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

[5] *Symposium: The Role of Religion in Public Debate in a Liberal Society*, 30 SAN DIEGO L. REV. 643 (1993) (including articles by Kent Greenawalt, Robert Audi, Michael J. Perry, Lawrence B. Solum, Larry Alexander, Charles Larmore, Jeremy Waldron, John H. Garvey, David Hollenbach, S.J., and Maimon Schwarzschild).

not just tinkered with details; I understand him to have changed the core of his position. I very much admire this intellectual honesty, and he and I now agree much more than we disagree. But I would like to push him further in the direction he has been going.

Professor Perry now concludes that citizens are legally entitled to make both religious and secular arguments,[6] and that they are morally free to make both religious and secular arguments.[7] He says that there are important advantages to religious citizens making the argument that most persuades them, even if that is a religious argument.[8] I agree; the difference between us is that these conclusions seem obvious to me, while to him they seem to require elaborate justification. I should probably be more appreciative that he is refuting those who would seriously restrict religious arguments.

Professor Perry appears to have abandoned his earlier claim of a moral duty to refrain from certain kinds of religious arguments — those that claim infallibility and those that are inaccessible to persons outside the speaker's faith tradition.[9] His residual restrictions on religious argument are a proposed legal rule that any government decision must be supported by at least one plausible secular argument,[10] and what appears to be a criterion of persuasiveness, urging government officials not to be per-

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[6] *Religion in Politics*, *supra* note 1, at 733 (writing that "[e]very citizen, without regard to whether she is a legislator or other public official, is constitutionally free to present in public political debate whatever arguments about morality, including religious arguments, she wants to present").

[7] *Id.* at 741 (arguing that "as a matter not just of constitutionality but of political morality too, citizens and even legislators and other public officials may present, in public political debate, religious arguments about the morality of human conduct").

[8] *Id.* at 742 (arguing that "it is important that such religious arguments, no less than secular moral arguments, be presented in, so that they can be tested in, public political debate").

[9] *Compare* Michael J. Perry, *Religious Morality and Political Choice: Further Thoughts—and Second Thoughts—on Love and Power*, 30 SAN DIEGO L. REV. 703 (1993) (characterizing his earlier position as "an exclusivist ideal of the middle ground," and concluding that "we Americans should not accept any exclusivist ideal, either of public political argument or of political choice—not even any 'middle ground' ideal"), *with* LOVE AND POWER, *supra* note 2, at 100-12 (setting forth proposed limitations on religious political arguments).

[10] *Religion in Politics*, *supra* note 1, at 767 (writing that "the nonestablishment norm forbids government to rely on a religious argument about the requirements of human well-being in making a political choice about the morality of human conduct unless a plausible secular rationale supports the choice").

suaded by any religious argument unless they are persuaded that a good secular argument also supports the same conclusion.[11]

I believe that all this debate about limitations on the political process has been misguided. Our Constitution does not limit the arguments that a free people can make in political debate. The Constitution does not limit what the people can do to influence government; rather, it limits what government can do to the people. The Establishment Clause limits political outputs, the laws that government can enact — not political inputs, the arguments that citizens can make. I quite agree that moral constraints on argument are more limiting than legal constraints — in other words, that the Constitution protects the right to make immoral arguments — but I do not think that religious argument is a useful category for identifying immoral arguments.

I. POLITICAL INPUTS

A. Legal Questions

It is familiar ground that some speech is more central to the First Amendment than other speech.[12] Pornographic speech and commercial speech get only partial constitutional protection.[13] Political speech gets very strong constitutional protection; it is central to the First Amendment because it is essential to democratic self-governance.[14] We can infer this role for polit-

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[11] *Id.* at 768 (arguing that "the persuasiveness of any religious argument about the requirements of human well-being . . . should depend in part on there being at least one sound secular argument that reaches the same conclusion as the religious argument").

[12] *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 n.5 (1985) (plurality opinion) (classifying speech into categories that receive different levels of protection).

[13] *See, e.g.*, Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2375 (1995) (stating that commercial speech holds "'subordinate position in the scale of First Amendment values'") (quoting Board of Trustees v. Fox, 492 U.S. 469, 477 (1989)); Osborne v. Ohio, 495 U.S. 103, 108 (1990) (noting that "the value of permitting child pornography has been characterized as 'exceedingly modest, if not *de minimis*'") (quoting New York v. Ferber, 458 U.S. 747, 762 (1982)); Young v. American Mini-Theatres, 427 U.S. 50, 70 (1976) (plurality opinion) (stating that "society's interest in protecting [erotic materials with artistic value] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

[14] *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (noting that "[t]his Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values'") (quoting Carey v. Brown, 447

ical speech by construing the Free Speech Clause in light of the Republican Form Clause and in light of the constitutional provisions for elections and representative government.

Religious speech also gets very strong constitutional protection.[15] When the University of Virginia funded all student publications except religious publications, the Supreme Court found a free speech violation,[16] despite its general reluctance to order expenditure of government funds. This reluctance extends even to cases in which government subsidizes some but not all alternatives from a constitutionally protected choice or classification.[17] If the University had funded all student publications except commercial publications, we would have had a very different case.

The Court has repeatedly rejected the claim that the Establishment Clause somehow limits the constitutional protection of religious speech by private persons speaking in their private capacity.[18] The Court struck down a law that barred clergy from serving in the legislature, unanimously with respect to the re-

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U.S. 455, 467 (1980)); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (stating that "speech concerning public affairs is more than self-expression; it is the essence of self-government").

[15] Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2446 (1995). The Court stated:

> [P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be *Hamlet* without the prince.

Id. (citations omitted).

[16] Rosenberger v. Rector of the Univ. of Va., 115 S. Ct. 2510, 2516-20 (1995).

[17] *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 192-203 (1991) (holding that government could order federally-assisted family clinics not to mention abortion); Harris v. McRae, 448 U.S. 297, 311-26 (1980) (holding that government could fund childbirth and refuse to fund abortion); Geduldig v. Aiello, 417 U.S. 484, 492-97 (1974) (holding that state could insure against temporary disability and exclude temporary disability related to normal pregnancy); Brusca v. State Bd. of Educ., 405 U.S. 1050 (1972) (holding summarily that state can refuse to fund private education in religious environment even though it funds public education in secular environment). As *Rosenberger* illustrates, this reluctance to interfere with government funding decisions is a tendency, not a rule.

[18] *Pinette*, 115 S. Ct. at 2446-47; Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394-96 (1993); Board of Educ. v. Mergens, 496 U.S. 226, 247-53 (1990) (plurality opinion). For analysis of earlier cases, see Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 9-14 (1986).

sult,[19] and it has said in dictum that "of course, churches as much as secular bodies and private citizens have [the] right" to "take strong positions on public issues."[20] The Court requires laws to have some secular purpose,[21] but it has repeatedly rejected the argument that a law that coincides with the teaching of some religious group thereby establishes that religion.[22] The Court has never accepted in any context the view that religious arguments are excluded from or restricted in political debate.

Religious speech is central to the First Amendment because religion is central to the First Amendment. Religious speech is twice protected, once by the Free Speech Clause and once by the Free Exercise Clause.[23] We can infer from the religion clauses that disagreements about religion, like disagreements about politics, are of special constitutional significance. The constitutional solutions to political and religious disagreement are partly the same and partly different.[24] In the political context, we must resolve our disagreements sufficiently for government to act, so we vote. In the religious context, government need not act and our disagreement need not be resolved, so we do not vote and the Establishment Clause forbids elections. In both contexts, the Constitution recognizes

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[19] McDaniel v. Paty, 435 U.S. 618 (1978) (plurality and concurring opinions).

[20] Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970).

[21] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). For discussion, see *infra* text accompanying note 70.

[22] Bowen v. Kendrick, 487 U.S. 589, 604 n.8 (1988) (upholding Adolescent Family Life Act); Harris v. McRae, 448 U.S. 297, 319-20 (1980) (upholding restrictions on public funding of abortions); McGowan v. Maryland, 366 U.S. 420, 442 (1961) (upholding Sunday closing laws).

[23] See Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2449 (1995) (plurality opinion) (explaining that "religious expression receives *preferential* treatment under the Free Exercise Clause"); Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion) (noting that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect"); Largent v. Texas, 318 U.S. 418, 422 (1943) (holding that standardless permit system for distribution of publications, as applied to religious publications, "abridges the freedom of religion, of the press and of speech"). Justice Scalia wrote the plurality opinion in *Pinette* and joined a concurring opinion in *Mergens*. Justice O'Connor wrote the plurality opinion in *Mergens* and a concurring opinion in *Pinette*. Whatever differences of degree between Justices Scalia and O'Connor, they appear to agree that both clauses protect religious speech, a proposition that in any event seems clearly correct on first principles.

[24] Lee v. Weisman, 505 U.S. 577, 591 (1992) (noting that "[t]he First Amendment protects speech and religion by quite different mechanisms").

the importance of these disagreements to each group or individual with views, and it strongly protects individual belief, individual speech, and group association.

The status of religious speech on political issues is therefore overdetermined. Speech that is both religious and political is at the core of two clauses; it is at the highly protected core of the First Amendment for multiple reasons. I do not think that these protections are cumulative; either the religious or the political status of the speech is enough to trigger maximum First Amendment protection, and extra protection for religious political speech would be a form of content discrimination.[25] There may be cases of worship services and other ritual speech where the Free Exercise Clause provides somewhat different or greater protection than the Free Speech Clause. But in the context of political debate, the policy of neutrality among competing ideas, central to both the Speech Clause and the Religion Clauses, argues strongly for parity of religious and secular political speech.

Of course neutrality cuts both ways: lesser protection for religious political speech is as problematic as greater protection. This doubly maximally protected speech is an odd candidate for such a substantial debate about whether it is protected at all, whether it might even be constitutionally prohibited, whether it is immoral, or a violation of social norms, or otherwise somehow suspect.

A speaker in an American political debate, in all but the most extraordinary cases,[26] is entitled to make any substantive argument that she wants to make. That is the essence of the Free Speech Clause. To say that there is something especially problematic about one source of arguments, that you can make secular arguments but you cannot make religious arguments, is viewpoint discrimination, plain and simple. And of course the protection against viewpoint discrimination is the strongest protection known to the First Amendment, almost impossible to

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[25] *See* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 652-53 (1981) (stating that solicitation of funds does not acquire greater First Amendment protection when it is made part of religious rituals).

[26] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that state may punish only that advocacy that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

overcome, applicable even in non-public forums[27] and, at least for now, applicable to speech that is otherwise unprotected.[28]

The Supreme Court has unanimously held that excluding religious speech from a public forum is viewpoint discrimination, and not a more defensible subject matter exclusion, at least where the speaker addresses a topic that could be addressed from a secular perspective.[29] Religion is an important source of viewpoints in the process of democratic self-government. In the United States, about ninety-five percent of the population says it believes in God or a universal spirit,[30] and about two-thirds of all persons active in social movements say that their principal motivation is religious.[31] We simply do not have democratic self-government if we take seriously the notion that there is something suspect about arguments that motivate two-thirds of the people and that might appeal to ninety-five percent of them.

The strong form of this strange notion is Bruce Ackerman's claim that religious arguments are simply inadmissible in a liberal state.[32] This is a futile attempt at a coup d'etat, in which secularists would get to silence everybody on the religious side of the spectrum. Ackerman's secular understanding of the universe seems to me more likely than the alternatives, but when people

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[27] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

[28] R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (stating that "the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination"). The opinion in *R.A.V.* has been the subject of much persuasive criticism in this symposium; it may require modification in future cases. I cite it only as an illustration of the strength of the rule against viewpoint discrimination.

[29] Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392-94 (1993). *Accord* Rosenberger v. Rector of the Univ. of Va., 115 S. Ct. 2510, 2517-18 (1995). *Rosenberger* was not unanimous because the expenditure of public funds changed the issue for four Justices.

[30] GEORGE BARNA, VIRTUAL AMERICA 107 (1994) (reporting survey data from 1993-94); ANDREW M. GREELEY, RELIGIOUS CHANGE IN AMERICA 14 (1989) (reporting survey data from 1944, 1954, 1967, and 1981).

[31] John A. Coleman, *Under the Cross and the Flag: Reflections on Discipleship and Citizenship in America*, 174 AMERICA No. 16, May 11, 1996, at 6, 9.

[32] Perhaps the strongest statement of this position appears in Bruce Ackerman, Kent Greenawalt, and Michael McConnell, *The Religious Voice in the Public Square*, Oral Presentation at Association of American Law Schools (Jan. 1996) (recording available at Tarlton Law Library, University of Texas School of Law). *See also* ACKERMAN, *supra* note 4, at 280-81 (rejecting hypothetical and unrealistic claim of Diviner to dictate public policy in accord with his knowledge of God's will learned from black box or reading entrails or coin tossing).

on my side of that divide try to silence people on the other side, my dominant reaction is embarrassment.

The right to make religious arguments does not depend on what conclusions those arguments would support, but assumptions about the tendency of religious arguments seem to underlie much of this debate. The secularists seem to be too driven by particular issues and too prone to associate religious arguments with a small range of political positions they reject. At the conference at which I presented an oral version of these comments, the response was generally positive but with one caveat. I was repeatedly asked about a citizen or legislator who says that gay sex should be illegal because Leviticus says so,[33] and who refuses either to offer or listen to any other argument. Of course the argument never stops with Leviticus in a pluralistic society; supporters of restrictions on gay sex have made an enormous range of secular and religious arguments, from abstractions about the nature of human relationships[34] to data on promiscuity and a wide variety of largely unpublicized health risks.[35]

But suppose there is some religiously homogenous county where merely citing scripture is enough to win elections and public policy debates. In such a county, we can equally suppose arguments against war based solely on the commandment that "Thou shalt not kill,"[36] arguments against slavery on the ground that "there is neither bond nor free . . . for ye are all one in Christ Jesus,"[37] and arguments for welfare benefits on the ground that "Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me."[38] There might be individual citizens, or legislators, or religiously homogenous counties persuaded by these arguments even though they found other arguments implausible — even though

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[33] *Leviticus* 18:22 ("Thou shall not lie with mankind as one lies with womankind; it is abomination.").

[34] *See, e.g.*, John M. Finnis, *Law, Morality, and Sexual Orientation*, 69 NOTRE DAME L. REV. 1049 (1994). For a response, see Michael J. Perry, *The Morality of Homosexual Conduct: A Response to John Finnis*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 41 (1995).

[35] *See, e.g.*, MELISSA WELLS-PETRY, EXCLUSION: HOMOSEXUALS AND THE RIGHT TO SERVE 89-131 (1993).

[36] *Exodus* 20:13.

[37] *Galatians* 3:28.

[38] *Matthew* 25:40.

they otherwise thought that aggressive war would be in the national interest, that emancipating their slaves would wipe out their capital, and that aiding the poor would reward lazy and irresponsible behavior. Religious arguments may be loving or hateful, tolerant or intolerant. They cut in all directions, and often speak to fundamental values. Democracy would be impoverished without them.

Religious arguments from all points of the political compass are not a mere theoretical possibility; they are part of our history — and part of our present.[39] It is one of the strengths of Professor Perry's paper that he acknowledges that history, at least in passing.[40] Had Professor Ackerman's position prevailed throughout our history, the Constitution might still remain "a covenant with death and an agreement with hell"[41] — a slavery constitution. It is well known, but rarely acknowledged in the literature on religious arguments in politics, that the abolition movement had a religious base and relied heavily on religious arguments.[42] Indeed, Stephen A. Douglas attacked the abolitionist ministers in terms that track the contemporary academic attack on religious arguments in politics:

> I say sir, that the purity of the Christian church, the purity of our holy religion, and the preservation of our free institutions, require that Church and State shall be separated; that the preacher on the Sabbath day shall find his text in the Bible; shall preach "Jesus Christ and him crucified," shall preach from the Holy Scriptures, and not attempt to control the political organizations and political parties of the day.[43]

But it was precisely "Jesus Christ and him crucified" that the abolitionists ultimately invoked: "As He died to make men holy, let us die to make men free."[44]

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[39] *See, e.g.*, Coleman, *supra* note 31 (describing contemporary research on six religiously based social groups that span political spectrum from left to right).

[40] *Religion in Politics*, *supra* note 1, at 743, 749.

[41] BARTLETT'S FAMILIAR QUOTATIONS 437 (16th ed. 1992) (quoting William L. Garrison, Resolution adopted by Anti-Slavery Society (Jan. 27, 1843)).

[42] *See* SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 648-69 (1972); ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 78-79, 109-10 (2d ed. 1995); Edward M. Gaffney, Jr., *Politics Without Brackets on Religious Convictions: Michael Perry and Bruce Ackerman on Neutrality*, 64 TUL. L. REV. 1143, 1158-66 (1990).

[43] CONG. GLOBE, 33d Cong., 1st Sess. 656 (1854).

[44] *Battle Hymn of the Republic*, 9 ATLANTIC MONTHLY 145 (1862). The famous hymn by

Had Professor Ackerman's position prevailed, the civil rights movement also would not have happened, for it was organized and led out of the black churches.[45] When Reverend Martin Luther King and his followers were arrested for marching in Birmingham on Good Friday and Easter Sunday, 1963, in violation of a temporary injunction, Chief Justice Warren noted that "[f]or obvious reasons, it was important for the significance of the demonstrations that they be held on those particular dates."[46] No further explanation was required, and no one suggested that it was immoral, or a violation of social norms, to associate political demands with religious symbolism. Reverend King's *Letter from Birmingham Jail*, the most famous writing of the movement, was addressed to the white clergy, seeking the active support of the white church for the black civil rights movement.[47]

The political role of the black churches is a special case of a larger point: churches are one of the few social institutions in which persons of modest socioeconomic status learn political skills,[48] and this effect is particularly strong, and has been turned more often to political ends, in black churches.[49] Churches are disproportionate creators of social capital[50] — of the networks of relationships and mutual trust among people that are prerequisite to social cooperation.[51]

Julia Ward Howe appears without attribution on the first page of the February issue.

[45] *See* Gaffney, *supra* note 42, at 1166-75; *see generally* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63 *passim* (1988).

[46] Walker v. City of Birmingham, 388 U.S. 307, 325 (1967) (Warren, C.J., dissenting). The majority did not disagree, but claimed that there had been sufficient time to apply for a stay and still march on Good Friday. *Id.* at 318-19 (noting that "[t]here was an interim of two days between the issuance of the injunction and the Good Friday march").

[47] Martin Luther King, Jr., *Letter from Birmingham Jail, reprinted in* 26 U.C. DAVIS L. REV. 835 (1993).

[48] SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 18-19, 317-33, 384-88 (1995). Some churches are politically active and some are not, but all churches give opportunities for ordinary people to develop skills such as speaking to groups, chairing committees, and organizing volunteer efforts, and these opportunities are distributed in remarkably egalitarian ways in churches. The effect was far larger for Protestants than for Catholics. The findings are based on an initial sample of 15,053 respondents, with intensive follow-up interviews of more than 2,517 respondents. *Id.* at 535-37.

[49] *See id.* at 382 (Table 13.1).

[50] Coleman, *supra* note 31, at 8-9; Andrew Greeley, *The Strange Reappearance of Civic America: Relgion and Volunteering* (draft article available on the Internet at http://www.agreeley.com/civic/html) (1996).

[51] On the concept of social capital, see JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL

Abolition and civil rights are only two examples of major political movements with large religious elements. The Social Gospel movement,[52] the Prohibition movement,[53] most of our historic peace movements,[54] and the demand to permit freer immigration of refugees[55] all had strong religious elements. Religious arguments have always been part of American political debate. Many of the books and articles that would bar religious arguments from political debate do not even acknowledge this history, yet it is absolutely central to their claim that they somehow explain this history away.

Professor Perry would not limit the arguments that citizens can make, but he does say that there are limits on the kinds of reasons the government can rely on. He says that ideally, government should rely only on secular reasons and not on religious reasons.[56] He acknowledges that we probably cannot en-

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THEORY 300-21 (1990); Robert D. Putnam, *Tuning In, Tuning Out: The Strange Disappearance of Social Capital in America*, 28 PS: POLITICAL SCIENCE & POLITICS 664 (1995). Greeley, *supra* note 50, argues that Putnam exaggerated the decline of social capital because his measure of social capital did not include volunteering.

[52] *See generally* AHLSTROM, *supra* note 42, at 785-804 (summarizing history of social gospel movement); SUSAN CURTIS, A CONSUMING FAITH: THE SOCIAL GOSPEL AND MODERN AMERICAN CULTURE (1991) (reviewing history of social gospel, defined (at 3) "as the religious expression of progressivism" in early twentieth century); RALPH E. LUKER, THE SOCIAL GOSPEL IN BLACK AND WHITE: AMERICAN RACIAL REFORM, 1885-1912 (1991) (reviewing movement's attention to racial equality). The phrase "Social Gospel" was chiefly used by Protestants; for an account of parallel Catholic movements, see CHARLES E. CURRAN, AMERICAN CATHOLIC SOCIAL ETHICS: TWENTIETH-CENTURY APPROACHES 26-171 (1982) (describing social ethicist John A. Ryan, Catholic Worker movement, and German-American Catholic social reform organization Central-Verein).

[53] *See* PAUL A. CARTER, THE DECLINE AND REVIVAL OF THE SOCIAL GOSPEL: SOCIAL AND POLITICAL LIBERALISM IN AMERICAN PROTESTANT CHURCHES 1920-1940, at 31-45 (2d ed. 1971) (treating Prohibition movement as more humanitarian than moralistic, with its roots in Social Gospel); JAMES H. TIMBERLAKE, PROHIBITION AND THE PROGRESSIVE MOVEMENT 1900-1920, at 4-38 (1966) (reviewing religious basis of prohibition movement).

[54] *See* APRIL CARTER, PEACE MOVEMENTS: INTERNATIONAL PROTEST AND WORLD POLITICS SINCE 1945, at 92-93 (1992) (summarizing religious opposition to war in Vietnam); *id.* at 163-64 (describing religious support for the nuclear freeze); CURRAN, *supra* note 52, at 233-82 (describing the Catholic peace movement of the late 1960s); VALARIE H. ZIEGLER, THE ADVOCATES OF PEACE IN ANTEBELLUM AMERICA *passim* (1992) (reviewing teachings and disagreements of antebellum peace movements, with active involvement of churches and ministers and disagreements over interpretation of scripture).

[55] *See* Gaffney, *supra* note 42, at 1175-88.

[56] *Religion in Politics*, *supra* note 1, at 737 (writing that "*[a]s an ideal matter*, the nonestablishment norm is probably best understood . . . to forbid government to make any political choice, even one about the morality of human conduct, on the basis of a religious

force that limitation, that it is not a judicially administrable rule. But he proposes an operational rule that he does think is judicially administrable: for any challenged government act, there must be some plausible and sufficient secular reason.[57] If the court cannot find any plausible secular reason, then it has to strike the act down. But there is one revealing exception: any law can be based on the religious view that all humans are sacred.[58] I infer from context that the word "sacred" includes the view that all humans are of equal and very high value, or entitled to equal and great respect.[59]

Professor Perry seems to me most clearly right when he talks about this exception. He says that the religious argument that all humans are sacred has much in common with secular variations of the same argument, that no one should really feel threatened by government relying on this religious argument, and that there is really no harm in government doing so.[60]

The other thing he says about the exception is even more revealing. I do not know, but I suspect that this exception may be designed to fit a particular problem that Professor Perry faces personally. He says that there really is not any plausible secular argument for the proposition that all humans are sacred.[61] He

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argument").

[57] *Id.* (conceding that "as a practical matter, the nonestablishment norm requires only that government not make political choices . . . about the morality of human conduct . . . unless a plausible secular rationale supports the choice without help from a parallel religious argument").

[58] *Id.* at 761. Professor Perry writes:

> [G]overnment may, under the nonestablishment norm, and . . . legislators and others may, as a matter of political morality, rely on a religious argument that every human being is sacred *whether or not any intelligible or persuasive or even plausible secular argument supports the claim about the sacredness of every human being.*

Id.

[59] *See id.* at 758-59, 761 (citing secular declarations of equality and human dignity in support of claim that all humans are sacred).

[60] *Id.* at 761 (arguing that "[t]his qualification should trouble few, if any, religious nonbelievers. The proposition that every human being is sacred is shared not only among many different religious traditions but also between many religious believers and many who have no religious beliefs.").

[61] *Id.* at 760 (stating that "I have elsewhere called attention to the possibility that no intelligible secular argument supports the claim that every human being is sacred—that the only intelligible arguments in support of the claim are religious in character" (citing Michael J. Perry, *Is the Idea of Human Rights Ineliminably Religious?, in* LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES (Austin Sarat & Thomas Kearns eds., forthcoming

acknowledges that lots of people think there are secular arguments, but he says those arguments are just not plausible, at least to him. But, he says, we cannot eliminate this argument altogether just because there is no secular version of it, so we have to let him make the argument, and even persuade government to act on it, in its religious version.

I agree that we have to let him make the religious version of the argument if that is the version he finds persuasive. But I think his position on this issue is precisely the position of some serious religious believers on many issues. Maybe there is a secular argument for their position, but that argument does not resonate to them. It is not cast in the terms in which they think about these things. For them, the religious argument is the only one that persuades; sometimes, it may be the only argument they have the vocabulary to make. For those who believe that morality has no basis unless founded on God's law, any secular moral argument they make would seem to be only a tactic, not an argument that could actually be persuasive.

Consider as a more specific example the pro-choice argument made by David Richards of New York University. He has written that all arguments against abortion depend on religious premises, that no secular argument can withstand analysis, and therefore, that prohibitions on abortion are unconstitutional.[62] Of course this is not how most opponents of abortion assess the arguments,[63] but there may be, and probably somewhere there are, pro-life citizens with Professor Richards's view of the secular arguments about abortion. These hypothetical citizens are pro-life, but they find all secular arguments against abortion fallacious; they find only the religious arguments persuasive. They are in precisely the posture that Professor Perry is in with respect to the premise that all human beings are entitled to equal and great respect. I think that his exception about this very important argument, which seems to him essentially religious, ought to be generalized, and that everybody ought to be able to make the argument that seems best to her.

1996)).

[62] DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION 264 (1986).

[63] *See, e.g., Religion in Politics, supra* note 1, at 763-67 (quoting and analyzing secular core of Catholic bishops' argument against abortion).

Moreover, citizens persuaded only by religious arguments ought to be able to make their argument without worrying about the morality or legitimacy of doing so, without worrying that a conscientious legislator might read Professor Perry's article and decide that he is forbidden to rely on the argument the religious citizen wants to make, and without worrying that any resulting law might be struck down unless the Supreme Court is persuaded of the plausibility of an argument that these citizens personally find implausible.

I think the same considerations apply to Professor Perry's suggestion that government officials should not take positions on the basis of a religious argument unless they are persuaded to the same conclusion by a parallel secular argument. This makes considerable sense as a suggested criterion for persuasiveness; one can generally have more confidence in a conclusion supported by two or more independent arguments than in a conclusion supported by only one argument, whether or not one of the arguments is religious. Moreover, it is often desirable to restate religious arguments in terms that better communicate to persons outside the faith, and that this is a good reason for thinking about equivalent secular arguments. But this is true of any argument based on specialized premises not familiar to all or persuasive to all, whether the premises come from Christianity, or feminism, or liberal political theory, or neoclassical economics.[64] If Professor Perry's insistence on a parallel secular argument is intended as more than a suggested criterion of persuasiveness — if he intends a legal or moral constraint that disables officials from taking a position until they check their conclusions against secular arguments — I disagree. I would prefer that my legislators think about secular arguments, and I am free to vote on that basis, but there is no legal requirement that legislators think about anything. Constitutional constraints apply to the laws they enact, not to how they think.

If there is a right to abortion or to homosexual marriage or to any particular resolution of some of the other important controversies that seem to motivate much of this debate, such rights are not to be found in the First Amendment or the Estab-

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[64] *Cf. id.* at 749 (noting that more Americans are familiar with Christian and Jewish moral premises than with Kantian, Millian, or Nietzschean premises).

lishment Clause, but in rights to autonomy in intensely personal matters. The most plausible source of such rights is the Ninth Amendment, which actually talks about unenumerated rights; the Court has relied on a textually less plausible explanation in the Due Process Clause.[65] These claims of unenumerated personal autonomy rights are deeply controversial, but such rights either exist or they do not. The Establishment Clause is not their source; it does not enumerate these rights.

B. Moral Questions

Professor Perry is at least as concerned with morally permissible arguments as with legally permissible ones. It is certainly possible to imagine forms of religious argument that would be immoral. Attacking a religious group as evil or unworthy of citizenship or the source of national problems is likely to be considered immoral under utilitarian theories — doing serious harm to the group attacked and to the legitimacy of the democratic process — or under theories based in each person's right to equal respect. It may be that some narrow and divisive appeals to particularistic religious traditions are subject to these moral criticisms even if they refrain from direct attacks on persons of other faiths.

But I do not think it important to make fine moral distinctions in this area, because any problem that may exist is self-regulating. Narrow and divisive appeals to particularistic religious traditions do not win elections in a pluralistic society. Pat Buchanan did not help his cause at the 1992 Republican Convention,[66] and in 1996 his support began to fade as soon as he won enough votes to be taken seriously.[67] Indeed, he faded in

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[65] Roe v. Wade, 410 U.S. 113, 152-53 (1973).

[66] *See, e.g.*, David Firestone, *GOP Brushes Buchanan Aside*, NEWSDAY, Aug. 30, 1992, at 19. Firestone reported that:

> Pat Buchanan, who delivered one of the most memorably rancorous political speeches of modern times at the Republican National Convention 13 days ago, will not be taking his conservative spiel on the road, [apparently because] of the [Bush] campaign's attempt to distance itself from the right-wing stridency evident in Houston.

Id.

[67] *See, e.g.*, Richard Lacayo, *The Case Against Buchanan*, TIME, Mar. 4, 1996, at 24 (attacking Buchanan as bigoted after he won New Hampshire primary).

Republican primaries, where the voters most likely to oppose him were least likely to vote. Narrow religious appeals will disappear through the normal workings of the political process without regard to the morality of making such appeals. If the time ever comes when such appeals do not disappear through the normal workings of the political process, academics condemning them as immoral are unlikely to stem the tide.

It is also clear that the source of any moral issue with respect to such arguments is in their divisiveness, in their hatefulness, in their express or implied denial of equal citizenship to other citizens. Obviously there can be narrow, hateful, and divisive secular arguments as well. An argument's religious content is not what makes it immoral.

Now I can imagine a committed secularist (certainly not Michael Perry) saying that any religious argument is inherently divisive, because it implicitly excludes from the debate or from the polity all those who do not subscribe to the religion that underlies the argument. But this would be wrong both factually and conceptually.

Such a claim is not true factually, because appeals to the best in religious traditions can be powerfully moving and unifying for large numbers of believers, and such appeals can also resonate with analogous expressions of the same or similar values in other religions and in secular thought. The religious rhetoric of the civil rights movement appealed to consciences across the nation; equally important, it appealed to religious symbols and religious concepts held in common by most black and white southerners. A common belief that we are all made in God's image, a common belief in sin, and a common belief in forgiveness helped bridge the gulf between the races and heal the scars of Jim Crow.[68] This is an impressionistic claim, but I think

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[68] *See, e.g., Resolution on Racial Reconciliation on the 150th Anniversary of the Southern Baptist Convention*, SOUTHERN BAPTIST CONVENTION ANNUAL (1995) (on file with *U.C. Davis L. Rev.*). The Resolution denounces racism as a "deplorable sin;" affirms "that every human life is sacred, and is of equal and immeasurable worth, made in God's image, regardless of race or ethnicity;" acknowledges the role of racism in the formation and history of the Convention, asks "forgiveness from our African-American brothers and sisters;" and commits the church "to eradicate racism in all its forms from Southern Baptist life and ministry." A Presbyterian Church report, very early in relation to the civil rights movement, cited statistics on racial discrimination and lynchings, and called on members of the church to give "earnest attention to the present question of race relations in all its ramifications,

that the only serious debate could be over the magnitude of the effect. I do not believe that any serious observer could honestly conclude that the religious appeals of the civil rights movement were more divisive than unifying, and so far as I am aware, no one has made such a claim.

The claim that religious appeals are inherently divisive is also mistaken conceptually. Such a claim could seem plausible only to one who refuses to recognize anything of value in any religious tradition but his own (or in any religious tradition at all). The source of divisiveness here is in those who view the world in such a bigoted way, not in those who make religious arguments. Attacking a religious faith as containing nothing of value would be an example of the category of immoral arguments with which I introduced this section — attacking a religious group as evil or unworthy.

Even if I thought there were a moral problem with religious arguments in political campaigns, it would not make my list of the top ten moral issues facing our society, or even the top ten moral issues in political campaigns. Think about what passes for political argument, about the dishonest things that politicians say. My recollection is that Carter and Reagan each promised to cut taxes, increase spending (social spending for Carter, defense spending for Reagan), and balance the budget (by cutting out waste and fraud for both, and increasing revenue by cutting taxes for Reagan). This preposterous combination of promises worked at least twice, and both parties continue to talk of balancing the budget without touching social security. So my list of serious moral issues in political rhetoric would begin as follows:

1. What are the ethics of promising the voters impossible things?
2. What are the ethics of making campaign promises you do not intend to keep?
3. What are the ethics of calling your opponent an extremist?

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especially to the needs of Negroes in their own community." Minutes of the Seventy-Sixth General Assembly of the Presbyterian Church in the United States 99-100 (1936). The Presbyterian Church in the United States was the southern church created when the main Presbyterian organization split over slavery just before the Civil War.

4. What are the ethics of distorting your opponent's voting record or campaign statements?
5. What are the ethics of racial appeals?
6. What are the ethics of scaring the old folks?
7. What are the ethics of attack ads?
8. What are the ethics of making an unsubstantiated charge because you know the other candidate will have to spend two weeks refuting it and will never get entirely disentangled from it?
9. What are the ethics of push polls — asking huge samples of voters whether they would still support the other candidate if they learned of some hypothetical charge against him.[69] The "pollster" never actually says the charge is true, so it does not have to be true.
10. What are the ethics of refusing to address any issue that would require you to say that some significant voting bloc will have to bear some cost?

That is a quick list of ten substantial moral issues in political campaigns. I am not aware that they have generated any large literature in political or moral philosophy or in the law reviews. Maybe the philosophically inclined believe that politicians are incorrigible on these issues, so that moral codes would be futile, but that perhaps religious citizens actually care about morals, and might be persuaded to censor themselves if their arguments are labeled as immoral or inappropriate.

Or maybe those who claim that religious arguments are immoral are just trying to drive out a particular source of views that they often disagree with. Evangelical candidates for local office have been accused of running stealth campaigns, which is said to be an unfair campaign tactic, but a ban on religious arguments would virtually require religious candidates to run

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[69] For an account in which survey researchers raise the ethical issue, see Adam Clymer, *Phony Polls That Sling Mud Raise Questions Over Ethics*, N.Y. TIMES, May 20, 1996, at 1.

without mentioning their religious views — to run what would then be criticized as stealth campaigns. Does morality, or the Constitution, require that religious candidates not run at all?

Professor Perry ultimately concludes that religious arguments are morally permissible, but still I wonder why he believes that this issue requires such extended analysis. If I wanted to write about moral issues in political campaigns, this is not the one I would find most in need of study.

II. POLITICAL OUTPUTS

Professor Perry's paper is about the political process, but his proposed rule is ultimately a restriction on political outputs and not on political inputs. He says that laws are invalid unless supported by some plausible secular argument.

This bears some resemblance to the first prong in the *Lemon* test, but it appears to be different in at least two ways — more restrictive in principle, more permissive in practice. I understand *Lemon* to require that the legislature have some actual secular purpose; it may also have religious purposes, and the religious purposes might even be dominant, so long as there is some secular purpose.[70]

Professor Perry says that ideally the legislature should consider only secular arguments; he apparently rejects in principle the Court's view that the legislature can act in part for religious purposes. This is why his proposed rule is more restrictive in principle.

But Professor Perry would not make this proposed rule judicially enforceable. He would have the court ask only whether some plausible secular argument could support the law; the court apparently need not inquire whether this argument actually influenced the legislature or was part of its purpose. This is why his proposed rule is more permissive in practice: the legislature could act for purely religious reasons if the Attorney General could persuade the court of a plausible secular argument that would also support the law. This avoids one anomaly of the Court's formulation. If we take the Court at its word, a law that

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[70] *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

requires wholly secular conduct is unconstitutional if the legislature enacted the law for a wholly religious purpose.

I am not persuaded by either the Court's formulation or Professor Perry's, but both are relevant to a genuine and difficult problem that courts must sometimes address. At the core of the Establishment Clause should be the principle that government cannot engage in a religious observance or compel or persuade citizens to do so.[71] But "religious observance" is not a self-defining category. Lack of a secular purpose or secular argument for a law is some evidence that the law authorizes or compels a religious observance, but it is only some evidence. More obviously, the ability to think of some secular purpose is almost no evidence that the law does not command a religious observance. Attending church would be a religious observance no matter how much evidence accumulated of secular benefits to church attendance; providing an open forum for a broad range of speech is not a religious observance even if the legislature's only purpose was to facilitate religious speech. The latter example illustrates why Professor Perry is right to emphasize plausible secular purposes rather than actual motivation.

Equally important, both the Court's version and Professor Perry's version are backward looking; they evaluate legislative outputs on the basis of political inputs. That is, they evaluate a law by looking back into the political process to assess the arguments that were or could have been made for the law. This is partly unavoidable; a law's predicted future effects are inseparable from the arguments that can be made on its behalf. But insofar as possible, it is better to focus judicial review on what the law does, and not on why people wanted (or might have wanted) the law to be enacted. Focusing on the arguments for a law tends to restrict or penalize arguments in the political process — to do indirectly what cannot be done directly.

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[71] *But see* Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding municipal creche); Marsh v. Chambers, 463 U.S. 783 (1983) (upholding legislative prayer).

CONCLUSION

The state action distinction is drawn with special sharpness in the religion clauses. Religious speech by private citizens in their private capacity is strongly protected; the same religious speech by government officials in their official capacity is strongly prohibited. Where men and women govern themselves, constitutionally protected private speech is part of a process that ends in constitutionally restricted government action: there is speech by citizens, voting by citizens, speech by legislators, voting by legislators, enacted legislation, and enforcement of that legislation against citizens, who may continue the circle by speaking about their case and the underlying issue. It is not always clear where the protected political process ends and restricted government action begins. Occasional conundrums are inevitable: the people acting collectively *are* the sovereign from whom the people acting individually are protected.

I am sure that political arguments are on the constitutionally protected side of the line. Professor Perry's defense of freedom of speech that is both religious and political is welcome, even if he finds the issue harder than I do.

Statutes are on the constitutionally restricted side of the line, and judicial review should focus on political outputs instead of inputs. Professor Perry's proposed rule that every law must be supportable by some plausible secular argument emerged from his consideration of permissible arguments. Thus, his proposed limit on political outputs seems to be for him a prophylactic rule constraining political inputs.

I would come at the problem from the other direction, and directly examine political outputs in terms of whether they require or encourage a religious observance. This shift of perspective does not make the issue simple, but permits consideration of a wider range of evidence, and it reduces the risk that freedom of speech will be indirectly restricted by reviewing laws on the basis of the arguments offered for them in political debate.

My approach requires a more fully elaborated conception of what constitutes a religious observance, and that must await another forum and further thought. I have tried to say just enough to indicate why I am not persuaded by either the Court's formulation or Professor Perry's.