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The Role of Religious Values in Judicial Decision Making

SCOTT C. IDLEMAN*

[U]nless people believe in the law, unless they attach a universal and ultimate meaning to it, unless they see it and judge it in terms of a transcendent truth, nothing will happen. The law will not work—it will be dead.¹

INTRODUCTION

It is virtually axiomatic today that judges should not advert to religious values when deciding cases,² unless those cases explicitly involve religion.³ In part because of historical and constitutional concerns and in

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². See, e.g., KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 239 (1988); Stephen L. Carter, The Religiously Devout Judge, 64 NOTRE DAME L. REV. 932, 932 (1989); Thormburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 778 (1986) (Stevens, J., concurring) (asserting, in the context of abortion, that the argument that life begins at conception is a religious or theological argument and that the Court's jurisdiction is limited to evaluating secular interests); In re Quinlan, 355 A.2d 647, 658 (N.J. 1976) (noting that "it is not usual for matters of religious dogma or concepts to enter a civil litigation (except as they may bear upon constitutional right [sic], or sometimes, familial matters") (citation omitted), cert. denied, 429 U.S. 922 (1976); City of Milwaukee v. Wilson, No. 77-670 (Wis. Cl App. Jan. 19, 1979) (LEXIS, States library, Wisc file), aff'd, 291 N.W.2d 452 (Wis. 1980).
³. Other cases explicitly involving religion include disputes within or between religious entities, child custody cases (where the parents' religious beliefs bear on the issue of custody), cases involving alleged discrimination on the basis of religion or by an allegedly religious institution, taxation cases examining whether the entity seeking tax-exemption or some other tax preference is statutorily "religious," and, of course, cases arising under the religion clauses of the First Amendment to the Constitution (or under analogous clauses within state constitutions).
part because of assumptions about the nature of religious knowledge itself, religion is frequently perceived as an inappropriate source of values in the policy-making or law-making process, including adjudication. This Note refutes that position and explains why certain religious values can and even should enter into the judicial decision-making process.

Part I begins with a discussion of what constitutes a “religious” value and then evaluates five explanations of why religious values might be perceived as illegitimate sources in the law-making process. Part II, in turn, sets forth a number of reasons—from the four perspectives of history, political philosophy, social utility, and the reality of judicial decision making—why religion can or should be included in a judge’s resolution of cases. Finally, Part III delineates certain prudential and constitutional limits on the use of religious values in judicial decision making.

Because this Note develops its thesis largely in the abstract, a number of qualifications should be noted from the outset. First, when discussing judicial reliance on religious values, this Note has in mind not only the religious values or beliefs of the presiding judge, but also the religious values of the parties at hand or of society generally, including the teachings of formal religious organizations. Second, the term “religious values” (examined more closely in Part I) should be construed broadly to include not only values as such, but also religious teachings, claims, and underlying beliefs. Third, when speaking of “judicial decision making,” this Note primarily addresses the judicial resolution of questions of law, although the judicial use of religious values may have implications for other functions such as fact-finding or the formation of remedies. Finally, this Note does not necessarily envision an explicit role for religious values in the vast majority of legal controversies; rather, the focus is on ethically difficult cases, or other so-called “hard cases,” where judicial

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4. This Note will not directly discuss the role of religious values in the decision making of legislative or executive officers. For a discussion of religious values in legislative decision making, see GREENAWALT, supra note 2. It is probably the case, however, that the use of religious values by these other lawmakers also meets with general disapproval, at least among certain commentators. See, e.g., Bowers v. Hardwick, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting) (“That certain religious groups condemn [homosexual sodomy] gives the State no license to impose the judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine.”); Edward B. Foley, Tillich and Camus, Talking Politics, 92 COLUM. L. REV. 954 (1992) (reviewing MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991)).

5. For one approach to categorically separating “hard cases” from “easy cases,” see David Lyons, Justification and Judicial Responsibility, 72 CAL. L. REV. 178, 179-83 (1984). Of course, the convenient bifurcation of litigation into easy and hard cases is not without its critics. See, e.g., Lois G. Forer, The
reference to religious values, among others, may be particularly appropriate, helpful, and even necessary. Hard cases might present issues such as when human life begins or ends, what constitutes a human life, how humans should treat the environment or other species, or how scarce resources should be distributed within the human community. Like many problems confronting the courts, all of these issues require ultimate moral determinations about the nature of human beings or about the nature of their relationship to one another, to the state, and to the global community.

I. EXAMINING THE NATURE OF RELIGIOUS VALUES AND THEIR APPARENT EXCLUSION FROM THE AMERICAN LAW-MAKING PROCESS

A. What Makes a Value or Claim "Religious"?

However theoretical this Note's thesis may be, it can hardly be developed without some level of shared understanding concerning the ideas involved and the various alternative consequences at stake. Generally speaking, the broader one's definition of "religious," or the more liberal one's conception of religiousness, the more significant the notion of excluding religious values from judicial decision making becomes. At the outset, therefore, it is necessary to ask why any particular
value or claim should be considered “religious” at all and to attempt to define where the edges of that concept might lie.  

Most people would probably agree that when formally recognized religious organizations make theologically-based claims about public policy, then these claims or their underlying values should be considered religious in nature.  

A determination of religiousness cannot ultimately rest with the identity of the speaker, however, since religious organizations or individuals clearly make claims and engage in speech which would not be considered religious by any measure and since, more


8. Examples might include NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL, PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY (1986), or NATIONAL COUNCIL OF CHURCHES OF CHRIST, THE PLUTONIUM ECONOMY: A STATEMENT OF CONCERN (1975). It does not necessarily follow that such claims or values must be considered religious, especially if one takes seriously this Note’s position that deeming something religious or nonreligious should not simply be a public opinion-based or tradition-based descriptive undertaking. As a practical matter, however, one’s definition of religion or religious would have to be extremely limited, highly unorthodox, and/or probably unworkable if it considered the above claims or values to be nonreligious.

9. From a subjective vantage point, of course, many persons or institutions may believe that every aspect of their existence is to some degree religious, such that it would not be possible for them to make nonreligious claims or engage in nonreligious speech. See, e.g., Dean B. Suagee, American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth’s Caretakers, 10 Am. INDIAN L. REV. 1 (1982) (“Tribal religions tend to see all life in religious terms, rather than divided into domains clearly religious or nonreligious.”). This Note tends toward a more objective perspective, in part
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significantly, this approach simply begs the question. That which is "religious," moreover, cannot be defined solely by resort to a laundry list of characteristics such as theistic belief, the use of ritual, the use of sacred texts, the concept of prayer or meditation, or the expectation of revelation. A laundry list approach may function quite well at labeling those beliefs or values which resemble the one or more religious traditions from which the list was constructed, but inherent in this approach are both a substantial risk of bias (or "religious chauvinism") and, once again, a strong tendency simply to beg the question.

Although no approach is without its flaws (and thus its critics), it is nevertheless possible to construct definitional schemes which are better or worse than others according to various extrinsic criteria, such as flexibility, inclusiveness, or some measure of operative utility (predictive, taxonomic, or heuristic value). One arguably better approach, based heavily on the criteria of inclusiveness and heuristic value, would be to conceive of religiousness in terms of the degree of subjective ultimacy arising from the meaning or purpose of one's assertion—that is, in terms of the actual significance of certain types of claims to the life of the claimant. The late theologian Paul Tillich, for example, described religious faith or one's relationship to God as the source of one's

because law making typically requires some minimal level of objectivity (and since this Note is precisely about judicial law making) and in part because the subjective vantage point may be largely irrelevant to most persons confronted with the question of whether or not judges can advert to religious values when deciding cases.

10. Under an identity-of-the-speaker approach, a value would be identifiably "religious" if it is uttered by a person or institution which is "religious." But this begs the question, since one must then explain what makes any particular person or institution "religious."

11. To be sure, various religious traditions may possess all or only a few of these characteristics, and various nonreligious traditions may possess some as well. Buddhism and Taoism, for example, are considered nontheistic religions. See WING-TSIT CHAN ET AL., THE GREAT ASIAN RELIGIONS: AN ANTHOLOGY 71, 150 (1969). Native African religion and most Native American religions, in contrast, are theistic but involve no scriptures or holy books and rely largely on oral tradition. See JOHN S. MBITI, INTRODUCTION TO AFRICAN RELIGION 15 (1975); RICHARD C. BUSH ET AL., THE RELIGIOUS WORLD: COMMUNITIES OF FAITH 13 (Robert F. Weir ed., 1982). And ritual is certainly part of many nonreligious institutions including freemasonry, academia, the military, collegiate fraternities and sororities, and numerous others. In short, a checklist approach to separating the religious from the nonreligious is marginally useful at best and, in addition to running a risk of being Christian- or Western-centric, can be highly misleading as well.

12. THOMAS LUCKMANN, THE INVISIBLE RELIGION 41-42 (1967) ("Under the impression of a particular historical form of religion a misleadingly general definition of religion emerged. The definition prejudges the phenomenon in a manner which is best described as "narrowly 'ethnocentric'.").

13. Note, Definition of Religion, supra note 7, at 1069-70 & n.84.

14. Under this approach, a value or belief would be identifiably "religious" if it resembles a value or belief embraced by a tradition which has already been deemed religious—again requiring that one further explain what makes the baseline tradition (or its values or beliefs) "religious."
"ultimate concern," such that "[t]he object of theology is what concerns us ultimately." According to Tillich:

The religious concern is ultimate; it excludes all other concerns from ultimate significance; it makes them preliminary. The ultimate concern is unconditional, independent of any conditions of character, desire, or circumstance. The unconditional concern is total: no part of ourselves or of our world is excluded from it; there is no "place" to flee from it.

In turn, world views which solicit, or which in fact become, the ultimate concern of their adherents—such as those making normatively fundamental claims about the human species—can then be viewed as religious, or at least as making religious claims. Such claims, addressing the so-called

15. 1 Paul Tillich, Systematic Theology 12 (1951) [hereinafter Tillich, Systematic Theology]; see also George F Thomas, Philosophy and Religious Belief 44-47, 207-10 (1970) (summarizing and discussing Tillich’s concept of ultimate concern); Paul Tillich, Dynamics of Faith 1-4 (1957) [hereinafter Tillich, Dynamics of Faith]; Paul Tillich, Theology of Culture 7-8 (Robert C. Kimball ed., 1959) ("Religion, in the largest and most basic sense of the word, is ultimate concern."); cf. Luckmann, supra note 12, at 69-73; Anthony O’Hear, Experience, Explanation and Faith: An Introduction to the Philosophy of Religion 2-3 (1984) ("Although it is probably fruitless to search for any definition of religion in terms of necessary and sufficient conditions relating to either beliefs or practice, all religions can in one way or another be seen as providing a framework of meaningfulness for the lives and thought of their adherents and as making personal demands on them."). For a general summary and discussion of Tillich’s theology, see James L. Adams, Paul Tillich’s Philosophy of Culture, Science, and Religion 17-61 (Schocken Books 1970) (1965).

16. 1 Tillich, Systematic Theology, supra note 15, at 11-12 (footnote omitted). Apparently, Tillich intended the notion of "ultimate concern" to embrace both the subject’s state of mind and the object to which that state of mind is unconditionally devoted or oriented. See Tillich, Dynamics of Faith, supra note 15, at 11 ("The ultimate of the act of faith and the ultimate that is meant in the act of faith are one and the same.").

17. Religion: North American Style 6-7 (Patrick H. McNamara ed., 2d ed. 1984) ("[V]iews involving some kind of reflection upon ‘ultimate’ human purposes can be regarded as religious in this broad, overarching sense."); Collier, supra note 7, at 999 n.122. Third Circuit Court of Appeals Judge Arlin Adams, one of the more thoughtful judicial commentators on the issue of defining religion, has noted:

Traditional religions consider and attempt to come to terms with what could best be described as "ultimate" questions—questions having to do with, among other things, life and death, right and wrong, and good and evil. Not every tenet of an established theology need focus upon such elemental matters, of course; still, it is difficult to conceive of a religion that does not address these larger concerns. For, above all else, religions are characterized by their adherence to and promotion of certain "underlying theories of man’s nature or his place in the Universe."


Under a traditional scheme of classifying approaches to defining religion (or distinguishing the religious from the nonreligious), this Note’s “ultimate concern” approach is something of a hybrid. On the one hand, it can be considered a "functional" approach, since it examines the actual function of a claim or value within the life of the adherent. On the other hand, because it takes into account the nature
“big questions,” would include assertions about the meaning and purpose of human existence or ultimate statements about the nature of human beings. Secular humanism, for instance, may not be a religion as such, but when it makes claims about the meaning of human existence,

of the claim or value—by examining whether or not the claim or value addresses ultimate questions of human existence—it may also be considered a “substantive” approach, looking to the actual substance or content of the claim or value in question. For a discussion of the functional and substantive approaches, see Smith v. Board of Sch. Comm’rs, 655 F. Supp. 939, 967 (S.D. Ala. 1987), rev’d, 827 F.2d 684 (11th Cir. 1987); LUCKMANN, supra note 12, at 41-42.


Being religious means asking passionately the question of the meaning of our existence and being willing to receive answers, even if the answers hurt. Such an idea of religion makes religion universally human, but it certainly differs from what is usually called religion. It does not describe religion as the belief in the existence of gods or one God, and as a set of activities and institutions for the sake of relating oneself to these beings in thought, devotion and obedience. No one can deny that the religions which have appeared in history are religions in this sense. Nevertheless, religion in its innermost sense is more than religion in this narrower sense. It is the state of being ultimately concerned about one’s own being and being universally.

Id. at 1. Because such assertions or questions also fall under a number of other categories, including natural law and ethics, some persons might be tempted simply to reject or ignore the possibility that they may be religious. To say, however, that a claim is not religious simply because it is “merely” metaphysical, ethical, or the product of natural law reasoning is to skirt the issue entirely. The Roman Catholic Church also makes natural law/ethical claims, and yet one would hesitate to take those out of the realm of “religious” simply because they fall under other categories. See RELIGION: NORTH AMERICAN STYLE, supra note 17, at 7.


then under this approach it would be making religious claims. And while such an inclusive approach may not be appropriate in all legal contexts—First Amendment jurisprudence possibly being one such context—it finds ample theological and religious philosophical support; it would seem, at least comparatively, to most reduce the inherent risk of Western-centricism or "religious chauvinism", and, to the extent that it is relevant, this approach has already been recognized and employed by a number of courts, typically in the free exercise context. Because such an inclusive definition of religious values may


21. See, e.g., Ingber, supra note 7, at 285-86. But see infra notes 90-95 and accompanying text (questioning whether "religion" under the First Amendment should be broadly or narrowly construed, especially as between the two religion clauses).

22. Precisely because there is no widely accepted approach to defining religion (or to distinguishing the religious from the nonreligious), the most that one can hope for is that a plurality of relevant commentators accepts one's particular approach. Of course, the "ultimate concern" approach has hardly gone uncriticized, and one of the easiest criticisms is the assertion that not all persons have ultimate concerns or that persons may have a number of ultimate concerns at once. See, e.g., Freeman, supra note 7, at 1536-37; Greenawalt, supra note 7, at 808. This criticism arguably results from unduly underemphasizing the notion of ultimacy (although it is only fair to point out that these authors were speaking in the limited context of the First Amendment). It may be true that some persons are consciously unable to rank their putative ultimate concerns, but when push comes to shove—when those concerns are in tension, for example—one can be certain that there will emerge some even more ultimate concern (whether or not from within that pool) which will dominate or mediate among these competing concerns. Even if that meta-factor turns out to be nothing more than self-gratification, this hardly indicates that no ultimate concern exists; to the contrary, it simply means that one's religion is a cult of self. And while one might recoil at the prospect of granting solipsism protection under the First Amendment, that legal constraint hardly renders solipsism nonreligious in a larger sense.

23. Note, Definition of Religion, supra note 7, at 1074-75. "[W]hile parochial to the extent that any definition formulated on the basis of human experience must be, the ultimate concern approach does as much as possible to avoid the dangers of religious chauvinism." Id. at 1075. Not surprisingly, Tillich was extremely interested in the possibility of dialogue and mutual understanding among different religions. See, e.g., PAUL TILLICH, CHRISTIANITY AND THE ENCOUNTER OF THE WORLD RELIGIONS (1963).

24. The Supreme Court, relying on Tillich's writings, clearly recognized this characterization of religion in the conscientious objector exemption case of United States v. Seeger, 380 U.S. 163 (1965) (extending the conscientious objection exemption of the federal draft statute to include individuals objecting on the basis of personal ethical creeds not affiliated with traditional religion). Rejecting a theistic model of religious belief, the Court held that "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption" is sufficient to satisfy the statutory free exercise claim. Id. at 176; see also Welsh v. United States, 398 U.S. 333 (1970) (elaborating on Seeger's approach to determining the scope of what qualifies as "religious" under the statute for the purposes of conscientious objection); United States v. Ward, 973 F.2d 730, 732 (9th Cir. 1992) (quoting Welsh, 398 U.S. at 340, and asserting in the free exercise context that "'[r]eligious beliefs' are those that stem from a person's 'moral, ethical, or religious beliefs about what is right and wrong' and are 'held with the strength of traditional religious convictions'"; International Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 440 (2d Cir. 1981) (employing, in part, an ultimate concern approach in the free exercise context); Malnak v. Yogi, 592 F.2d 197, 208-09 (3d Cir. 1979) (employing, in part, an ultimate concern approach in the
deeply trouble some readers, however, and because it is offered here

establishment context); United States v. Levy, 419 F.2d 360, 362 (8th Cir. 1969) (employing, in part, an ultimate concern approach in the statutory conscientious objection context). But see Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) (asserting, in dicta, that "philosophical and personal" beliefs—for instance, those held by Henry David Thoreau—would not qualify as religious beliefs under the First Amendment). In the tax preference context as well, the concept of "religion" or "religious" has often been construed liberally, albeit unsystematically. See Bruce R. Hopkins, The Law of Tax-Exempt Organizations §9.2 (6th ed. 1992); 9 Mertens' The Law of Federal Income Taxation §§ 34.33, 34.36 (1942 & Supp. 1992).

Outside of these and certain other contexts, the courts have generally not adopted such an inclusive approach to defining "religion" or "religious." The purpose of citing these examples, however, is not to argue that "religion" under the First Amendment or the Internal Revenue Code should be interpreted so inclusively. It is merely to highlight that such an inclusive approach is not so unconventional as to lie beyond judicial recognition and, as illustrated in the above cases, that in certain contexts such as conscientious objection or tax exemption, a broad definition of religion may be socially desirable.

25. Some readers may find this approach to be overinclusive, particularly since it appears to recast as religion what is normally construed simply as philosophy, particularly moral philosophy. See supra note 18. Of course the outstanding question, then, is whether the conventional line between the religious and the nonreligious is in fact sound. If instead of choosing a starting point which isolates certain forms of thinking as religious, one starts from the equally defensible premise that religious thinking is pervasive, then the task is no longer one of identifying those lines of thought which are religious, but rather one of identifying and explaining why any given claim about the origin, nature, and purpose of human beings is not religious in nature. One's starting point, in other words, makes all the difference, and this Note would argue that a rigorous, more systematic inquiry into the role of religious values in judicial decision making may ultimately require a more liberal starting point.

Lest too many readers remain troubled, one final analogy might prove helpful. In some respects (and somewhat ironically), the word "religion" is much like the word "politics" (or, alternatively, the word "religious" is much like the word "political") when one attempts to actually define each word's scope and to appreciate the implications of such an undertaking. To call the Supreme Court a political branch or agency, for example, may be quite troubling to some listeners, especially if, by "political," the listener has in mind "Republicans versus Democrats, partisan maneuvering, self-serving interest group pressures, and the realm of will as opposed to the realm of law." Martin Shapiro, Michael J. Perry's Morality, Politics, and Law: Morality and the Politics of Judging, 63 Tul. L. Rev. 1555, 1557 (1989).

Yet, to anyone trained in the western tradition, a moment's reflection will show that this vision of politics as maneuvering for partisan advantage is a very incomplete and misleading version of what the word "politics" has always meant. [namely] the pursuit of the good through participation in the life of the community and more particularly through participation in the process through which the community made its decisions about what collective actions it should take in pursuit of that goal.

Id. Likewise, to call secular humanism or communism a religious world view may also be troubling, especially if, by "religious," the listener has in mind Catholic Mass or Jewish Seder, prayer and meditation, or reliance on divinely inspired texts. Yet to anyone familiar with philosophical and anthropological approaches to religion, a vision of religion based on Western ideas of congregation, theism, and ritual is a very incomplete (although not necessarily misleading) version of what the word "religion" has meant and can mean to different persons in different places at different times. As Professor Harvey Cox of the Harvard Divinity School has noted, in relation to the First Amendment:

Sensing, perhaps, that the power to define what is or is not a legitimate "religious" activity seems denied them by the Constitution, the courts, when they cannot avoid a decision, turn to some vague "man-in-the-street" idea of what "religion" should be: It involves prayer and has something to do with a deity, etc. But a man-in-the-street approach would surely have ruled out early Christianity, which seemed both subversive and atheistic to the religious Romans of the day.
merely as an example of how expansively the concept of religiousness can or should be conceived, this Note will generally confine its analysis to religious claims which most or all persons would recognize as such—once again, a theologically based position by a traditional religious organization. Nevertheless, it is important to acknowledge that the line between the religious and the nonreligious—if it exists at all—is imprecise at best, and that the implications of a policy which generally seeks to exclude religious values from law making are potentially far broader than they may appear at first blush.

B The Exclusion of Religion from the American Law-Making Process

As noted in the Introduction, religion and religious values (at least as traditionally defined) are generally viewed as illegitimate sources from which to draw in the judicial decision-making process. One obvious concern is that a judge’s use of religious values might violate the Establishment Clause of the First Amendment, a matter which is taken up extensively in Parts II and III. Other concerns, though, arise from various characteristics of religion or religious knowledge which some believe make religion an inherently inappropriate component in the public policy or law-making process. Accordingly, the remainder of this Part will discuss and evaluate four such possible characteristics, as well as one final concern specifically arising from the nature of the judicial decision-making process itself.


26. In contrast to a dichotomous model, it may ultimately be most worthwhile to conceive of religiousness and nonreligiousness as two ends of a continuum, within which one phenomenon can only be said to be more or less religious relative to another.

27. On this point, at least, most judges and philosophers of religion would probably agree. See United States v. Kuch, 288 F Supp. 439, 443 (D.D.C. 1968) (“The dividing line between what is, and what is not, a religion is difficult to draw.”); RELIGION: NORTH AMERICAN STYLE, supra note 17, at 3 (“Try to define religion and you invite an argument. Scholars have historically resembled the blind men describing the elephant in the old fable, pointing to different features of religious belief and practice in offering definitions of religion.”).

28. See supra note 2.

29. The religion clauses of the First Amendment to the Constitution provide: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” U.S. CONST. amend. I.

30. Another immediate concern about the interaction of government and religion, and one not directly discussed in this Part, is the tyranny that might result from the government’s religious motivation. The fear is that allowing religious conviction into the dialogue, we stand at the brink of a long and slippery slope. Near the bottom lies the so-called ‘Christian Amendment’ to the
1. The Issue of Accessibility

A principal argument against the use of religious values in law making is that they may not be "accessible" to all citizens, such that their use would "deny the essential spirit of democracy." Advocates of this argument would hold that public law making demands reliance on reasons which are accessible to all members of the public, and that inaccessible reasons—such as those which are religious in origin or reasoning—should thus not serve as the basis of law. One such advocate describes the position as follows:

I have in mind those who claim some special, privileged access to the principles of political morality (or morality in general). Such a position appears to be endorsed by many religious "fundamentalists," who place great stock in revelation or the inspired interpretation of sacred texts. It is not, however, limited to contemporary fundamentalists, but is shared, for example, by those who accept Plato's vision of the ideal commonwealth, which was to be governed absolutely by a caste of "philosopher kings" who alone have access to the otherwise inaccessible principles of virtue. On this sort of view, moral guidance is revealed to a select few, and political argument is not public.

Needless to say, this position rests on a number of premises concerning the nature of religion, the nature of knowledge, and the nature of the law-making process. It assumes, for example, that religiously based knowledge held by some persons is ipso facto inaccessible to others, perhaps since

Constitution. and [at] the bottom of the slope lies something like the Islamic Republic of Iran Carter, supra note 2, at 940. This concern, in addition to being questionable in itself, see id. at 940-41, should properly be viewed as a matter of church-state relations under the Establishment Clause, which is discussed in Parts II.A and III.B.

31. The idea (and subsequent liberal requirement) of accessibility seems to incorporate at least two separate but related concepts: comprehensibility and commonality. Comprehensibility involves the degree to which particular values or their origin can be intuited or intellectually received, while commonality involves the degree to which those values or their origin are actually embraced or shared by members of the political community. The distinction between these two concepts can be illustrated by comparing a quote from Professor Lyons, see infra text accompanying note 34 (emphasizing comprehensibility), with a quote from Professor Perry, see infra text accompanying note 40 (emphasizing commonality). This Note primarily focuses on the issue of comprehensibility, but the notion of commonality is nevertheless (indeed, inevitably) woven throughout the discussion.


34. LYONS, supra note 32, at 189 (footnote omitted); see also BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 10 (1980) ("The germ of the idea is that nobody has the right to vindicate political authority by asserting a privileged insight into the moral universe which is denied the rest of us.").
religious understanding may involve such activities as faith in the transcendent, prayer to or communion with the transcendent, or revelation. Likewise, a religiously based public policy argument may not satisfy the criterion of accessibility "to the extent that it intrinsically appeals to and includes those who share common religious presuppositions while simultaneously excluding those who do not subscribe to certain religious tenets."36

This perspective, however, not only risks mischaracterizing the nature of religious belief (and thus any values or claims generated by such belief) but also fails to be equally critical of other supposedly nonreligious types of knowledge which inform the law-making process. The accessibility approach, in other words, is both overbroad in its uncritical disqualification of religion and "underbroad," if you will, in its uncritical failure to disqualify nonreligion. It would simply be incorrect, first of all, to begin with the premise that most or all religiously based knowledge is inaccessible. Such a perspective, in fact, "is very much a caricature of how religion operates, particularly in the United States, with its strong tradition of religious dissent—a tradition that permeates even those denominations that supposedly are most authoritarian."37 To be sure, it is not exactly clear which aspects or elements of a religious belief system are genuinely inaccessible. An initial commitment of faith or belief, for example, may be seen by a nonadherent as an unattractive undertaking, but the commitment itself as well as the various reasons why one might undertake such a commitment are not "inaccessible" as such.38 Likewise, a subsequent adherence to religious doctrines or norms (such as those derived from scripture) may also be an undesirable choice from the nonadherent's viewpoint, but the adherence itself is certainly

37. Carter, supra note 2, at 941. Professor Carter is apparently suggesting that a strong tradition of dissent indicates that it is unsound to draw a dichotomy between the accessible versus the inaccessible based on whether one is inside versus outside a particular religious faith, since factions arise within the same religion. Arguably, such a tradition of dissent is less relevant to the issue of accessibility and more relevant to the issue of closed-mindedness, discussed infra at part I.B.2., since the presence of competing positions within a body indicates that at least the body itself is not closed-minded (although each faction within the body may very well hold to its position in a closed-minded fashion).
understandable in light of the commitment of faith. And the content of those doctrines or texts is also accessible to the extent that others may read and understand their meaning and implications. Stated differently,

to say that an argument satisfies the accessibility standard is not to suggest that everyone who hears the argument will embrace it.

That a conviction is not shared does not mean that reliance on it in political argument is necessarily inconsistent with the accessibility standard. It’s difficult to imagine how political argument of any kind, even political argument steadfastly “secular” in character, could satisfy a standard that strict.

True, religious claims which allegedly derive from revelation or from unique communion with some transcendent realm may not be accessible if they remain entirely unstated or if their particular origin is expressly asserted to lie beyond the grasp of reasonable perception. But to the extent that such claims are the only truly inaccessible forms of religious knowledge, then a per se, blanket exclusion of all religious knowledge would be grossly overbroad and can only be explained on some other basis.

The inaccessibility position may also be grossly underbroad to the extent it fails to characterize, and thus disqualify, other sources informing the law-making process which could be considered equally inaccessible. It may be true that a fundamentalist Christian’s reliance on inspired textual interpretation or a Platonist’s vision of the ideal commonwealth are


41. One such basis might be the potential impracticality or impossibility of actually distinguishing accessible religious knowledge from inaccessible religious knowledge. Incidentally, there may be a logical flaw to a nonadherent’s assertion that a religious adherent genuinely has access to knowledge to which the nonadherent does not. If the nonadherent (especially an atheist or extreme skeptic) truly believes that the adherent’s religion is false, then the nonadherent must also believe that the adherent’s claim to privileged or revealed knowledge is also false. Consequently, the adherent’s knowledge must not be privileged or revealed (that is, it must be of human origin), in which case the knowledge is not inaccessible at all (at least in the sense of being divinely revealed), but instead merely the adherent’s own “intuition” or “conscience,” in essence no different from the atheist-nonadherent’s. This point would also seem to be relevant to the preceding question of whether or not an initial commitment of faith is accessible. Even if the religious adherent claims, for example, that his commitment of faith was not a rational choice per se, but rather a divinely inspired event, then the atheistic or extremely skeptical nonadherent still cannot call this event “inaccessible” (at least in the sense of being divinely inspired) unless he too truly believes that it was a divinely ordained event, in which case the event would not be entirely inaccessible after all. To the extent, therefore, that the criterion of accessibility is evaluated subjectively, then the less the nonadherent (or other observer) actually believes the claims of the adherent, the weaker that nonadherent’s accessibility argument will be.
inaccessible forms of insight, but why draw the line at the Christian or the Platonist? Is it not true that all persons ultimately rely on forms of insight which are inaccessible to others? Even those who claim to make nonreligious moral judgments must rely on one or more "personal bases for decision"—that is, personal perceptions, intuitions, feelings, commitments, and deferences to the judgment of others "that cannot be justified, in the force they are given, in terms of publicly accessible reasons."

In fact, the model of political discourse—the so-called "liberal dialogue"—which requires accessibility in the first place is itself an inaccessible ideal.

If taken to its logical end, therefore, the accessibility requirement would purge from the law-making process not only certain religious knowledge but also most moral discourse—including talk of natural or inalienable rights—and would consequently reduce the process to a sterile dialogue about a small body of data on which all citizens can agree.

Because such a result is clearly undesirable, the accessibility requirement cannot be justified either generally as a sound principle for public discourse or specifically as a basis to exclude religion from the law-making process. Likewise, the accompanying notion that religious knowledge and nonreligious knowledge can be readily distinguished by their nature is also unsound. Relegating religious knowledge to the "nonrational" or "subjective" realm of an epistemological system that

42. GREENAWALT, supra note 2, at 156.
43. Carter, supra note 2, at 941-42 (footnote omitted).
44. One commentator has correctly noted that:
Contemporary philosophical systems based on feminism, wealth maximization, neutral conversation, liberal equality, or libertarianism are natural law philosophies. They start with assumptions about human nature and what is good for people, and they claim to employ reason to judge the relative justice or injustice of legal practices like slavery, the free market, patriarchy, and socialism.

Natural law reasoning, like all reasoning, has to proceed from axioms or presuppositions that are not themselves derived from logic.

45. See Smith, supra note 33, at 1011 (noting that a genuinely complete application of the public accessibility requirement would ultimately disqualify "utilitarianism, economic analysis, Kantian ethics, and every other form of political and moral philosophy," a result that "would paralyze democracy, not purify it").
delegitimizes knowledge which is not seen as objective, rational, or empirically verifiable has been the primary means by which liberalism has controlled religion since the Enlightenment. Such an epistemological system, however, has been substantially rejected by philosophers and therefore hardly provides a solid basis on which to separate religious insight from most other sources of insight. In short, "once a judge's moral understanding is permitted to play a role, the liberal argument cannot distinguish religiously based knowledge from other moral knowledge, or at least, cannot do so without arguments that require a bit too much cognitive dissonance." Moreover, even if one accepts the premises that religious values are genuinely inaccessible and that inaccessible arguments should generally be disfavored in the law-making process, at least one commentator would still hold that under certain circumstances a judge may rely on religious values, in particular on her own religious convictions.

Both because of the indeterminacy of community opinion and because their task is sometimes to decide by themselves what is right, judges will occasionally have to decide what is a correct answer to an issue of moral and political philosophy. Let us suppose, for example, that the judge is interpreting an environmental statute and the statutory language is unilluminating for the problem at hand. Resolution of the issue seems finally to turn on how much respect is owed by humans to the natural world, with no clear guidance from the statute itself or legislative history. I see no escape from the proposition that the judge,


The claim that there are rational principles, independent of a metaphysic or a theology, capable of resolving conflicts between groups with competing interests has shown itself to be empty. There are in fact competing and contradictory understandings of rationality and justice, resting on fiduciary formulations which are now rarely examined and whose importance and indeed existence is frequently denied.

Id. at 72 (emphasis in original) (quoting DUNCAN B. FORRESTER, BELIEFS, VALUES, AND POLICIES: CONVICTION POLITICS IN A SECULAR AGE 5 (1989)).

48. Carter, supra note 2, at 944. Professor Carter's observation about cognitive dissonance is not merely rhetorical; indeed, the more rigorously one examines the proffered rationales for excluding religious values from the public arena (e.g., inaccessibility and closed-mindedness), the more one senses that they have a certain sophistic, post facto quality to them. One might even venture to say that they, along with other related claims, comprise a sort of "Ptolemaic secularism," devoted to the exclusion of religion at whatever cost, including a willingness to turn a blind eye to illogic and inconsistency.
like the legislator, may in such settings find it necessary to rely on his religiously informed answers to what is right.

Under this alternative model, reliance on religious convictions would be appropriate precisely when legal reasoning or existing legal sources are unable to provide the judge with adequate guidance. This model, in other words, considers reliance on religious convictions to be a means of last resort in the resolution of hard cases, and is therefore more limited than the position advocated by this Note—namely, that religious values (including the judge's own convictions) may permissibly enter the resolution of ethically difficult cases at any stage.

In summary, the accessibility requirement and the accompanying dichotomy between religious and nonreligious knowledge or belief are arguably irrelevant if not altogether unsound for the purposes of how judicial decision making is informed. A position against the judicial use of religious values, therefore, must rest on other grounds.

2. The Issue of Open-Mindedness

A second reason why religion or religious values may be excluded from the law-making process is that religious adherents are often seen as rigid or closed-minded in their stances on particular issues, contrary to the


50. GREENAWALT, supra note 2, at 240-41. Professor Greenawalt's model is but one of many alternative approaches to dealing with religious values given the liberal notion of accessibility. Professor Perry of Northwestern University, for example, would permit religious discourse to enter the public forum so long as the proponent of that discourse is willing "to elaborate [his] position in a manner intelligible or comprehensible to those who speak a different religious or moral language" and "to defend [his] position in a manner neither sectarian nor authoritarian." See PERRY, supra note 4, at 105-06.

51. At the same time, this Note acknowledges certain prudential and constitutional limits on the use of religious values by judges. See infra part III.A-B. Additionally, this Note does not advocate that a judge should either immediately or solely rely on religious values, but rather that religious values, like other sources of insight, can or should be part of the judge's overall decision-making process. Cf. Carter, supra note 2, at 943 (emphasis in original) (remarking that "we ought to be uncomfortable with the idea that the religiously devout judge will proceed at once to her religious values—but only for the same reasons that we ought to be uncomfortable with the idea that any judge will proceed at once to her own values. Even the model of the morally sensitive judge does not propose an entire abandonment of the norms of judging."). And of course, fundamental standards such as relevance and judicial competence may also place limits on the role which religious values may play in any particular controversy. See infra part III.C.
liberal democratic requirement that participants in the public forum be amenable to reason and be willing to strike compromises in the name of the larger public good. The concern, in other words, is that religious convictions are more rigid than personal bases of judgment, effectively foreclosing the possibility of effective discourse and changes of mind in response to publicly accessible reasons. The idea roughly is that someone who begins with a strong personal sense on a moral question can be persuaded out of it with good arguments but that the person with a sense of a religious answer is beyond persuasion.

As with the issue of accessibility, however, this perspective fails because it is both overbroad in its total disqualification of religion and underbroad in its failure to disqualify certain nonreligious forms of input which may also involve closed-mindedness. First, “whatever might be said about the religiously devout, there is no reason—or at least no a priori reason—to assume that they are more closed-minded than others of strong moral beliefs.”

It may be that, in gross, religious convictions leave less room for further reasoning than personal bases of judgment, but if the worry is openmindedness and sensitivity to publicly accessible reasons, drawing a sharp distinction between religious convictions and personal bases [of judgment] would be an extremely crude tool.

Second, even if there exists a meaningful correlation between religious belief and closed-mindedness, it is no less true that many nonreligious people also manifest closed-mindedness when they take their agendas into the law-making arena. To assert otherwise, in fact, not only devalues the genuine tenacity with which many nonreligious persons rightly hold their moral or political beliefs, but possibly mischaracterizes the American law-making process, a process which substantially depends on the existence of a diverse and strongly opinionated citizenry. Indeed, the adversarial judicial law-making process—even more perhaps than the legislative law-making process—exists largely because individuals or

52. See id. at 941-42.
53. GREENAWALT, supra note 2, at 158-59.
54. Carter, supra note 2, at 942.
55. GREENAWALT, supra note 2, at 159 (emphasis in original).
56. Id., see also Carter, supra note 2, at 942. But cf. Robert Audi, Religion and the Ethics of Political Participation, 100 ETHICS 386, 395 (1990) (reviewing GREENAWALT, supra note 2) (distinguishing between the holding of beliefs and the attitude with which one holds beliefs, and asserting that the attitude with which religious beliefs are held is different in kind from the attitude with which nonreligious beliefs are held).
groups with strongly held beliefs are unable or unwilling to resolve their disputes nonlitigiously.

The requirement of open-mindedness, then, like the requirement of accessibility, cannot provide a sound basis for excluding religion or religious values from the law-making arena, including the judicial law-making process. Perhaps some religious input could be excluded under this requirement, but so also would a sizeable quantity of nonreligious input have to be equally excluded. And in the end, the entire notion of excluding strongly held beliefs should be seriously questioned, as a matter of both political theory and practical politics.

3. The Legitimacy of Religious Belief Generally

A third reason why religious values may often be singled out for exclusion is that the underlying religious beliefs are seen by modern intellectuals as simply illegitimate in an epistemological sense, a perspective related to, but certainly deeper than, the issues of accessibility and the manner in which those beliefs are held.

Today, there is a serious division between religion (especially conservative religion) and intellectual life. Indeed, the term “fundamentalist” is generally taken to be a synonym for “anti-intellectual,” and even so-called “liberal” denominations are not taken seriously to the extent that they cling to beliefs in genuine divinity. Faithfulness to the ideal of the secular society predominates among American intellectuals, and aggressive secularism pervades American intellectual life. Public life goes on without religion, although large numbers of Americans remain religiously faithful in private.

57. Within the context of the Establishment Clause, for example, one commentator has suggested that religions could be viewed and treated differently depending on whether they are “inerrant” or “dialogic” in their approach to their beliefs and positions. See Daniel O. Conkle, Religious Purpose, Inerrancy, and the Establishment Clause, 67 IND. L.J. 1 (1991).

58. E.g., GREENAWALT, supra note 2, at 6 (“A good many professors and other intellectuals display a hostility or skeptical indifference to religion that amounts to a thinly disguised contempt for belief in any reality beyond that discoverable by scientific inquiry and ordinary human experience.”); Richard H. Hiers, Normative Analysis in Judicial Determination of Public Policy, 3 J.L. & RELIGION 77, 77 n.2 (1985) (“Generally, legal philosophers, like many other western intellectuals since the Enlightenment, tend to view religion as superstition, and faith as a poor substitute for reason and logic.”); see, e.g., Suzanna Sherry, Outlaw Blues, 87 MICH. L. REV. 1418, 1427 (1989) (asserting, in apparent seriousness, that “such things as divine revelation and biblical literalism are irrational superstitious nonsense”).

59. Gedicks, supra note 46, at 126 (footnotes omitted); see also Mark Tushnet, Comments on Gedicks and Ball, 4 NOTRE DAME J.L. ETHICS & PUB. POL’Y 457, 458 (1990) (“Secularists of a certain sort denounce the impact of religion on public policy because, in their view, all religions are basically irrational throwbacks to a pre-Enlightenment era and are therefore fundamentally inconsistent with the
Whether or not this view of religion as illegitimate is actually a causal factor in the exclusion of religious input from the law-making process is certainly debatable, but one can find evidence of an elitist hostility toward religious participation in public life—perhaps even in the jurisprudence of the Supreme Court—which may otherwise be difficult to explain. And even if religious values are not excluded on the grounds that religion is intellectually illegitimate, their exclusion may nevertheless send that message to religious and nonreligious persons alike.

To some people, of course, there may be nothing objectionable with a governmental message that one citizen's world view is intellectually illegitimate or inferior to another's. To the extent, however, that one adheres to liberal political ideals such as tolerance and government neutrality, then the notion that the state may send such messages, whether explicitly or implicitly, should seem absolutely impermissible. Even more problematic, the state would presumably be able to take such positions only if it could convincingly establish that one world view is in fact superior to another in some meaningful way—hardly a simple task in a supposedly post-modern age of ontological relativism.

4. The Policy Implications of Religious Values

Still another reason why religious values might be seen as an inappropriate component of law making may have less to do with the nature of religious knowledge or adherence as such, and more to do with the policy implications which are often associated with those values. In particular, the discomfort which may accompany religious involvement in the public policy process might stem largely from the fact that religious groups or organizations not infrequently advocate conservative, liberty-restrictive policy positions. As a consequence, the exclusion of religious values might ultimately be more a political or ideological matter than an epistemological or constitutional one.

It is not clear what there is about religious morality that renders it unacceptably subjective and private that is not also true of secular morality. It may be that, because the source of

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61. Id. at 1584-85, 1612-15. See generally Baer, supra note 47; David W. Louisell, Does the Constitution Require a Purely Secular Society?, 26 CATH. U. L. REV. 20 (1976) (arguing that the Supreme Court "tilts" the Constitution against religion in favor of a purely secular society).
62. Gedicks & Hendrix, supra note 60, at 1598.
63. Cf. id.
Although this thesis may seem questionable on its face, it acquires credibility when one juxtaposes different public policy issues or stances and observes that a double standard appears to exist regarding the perception of religious participation in public life. Under this model, religious participation in public life is apparently acceptable, even encouraged, on certain issues or when religion supports certain viewpoints—for example, when religious groups oppose nuclear proliferation or favor more social welfare programs—but it is forbidden on certain other issues or when religion supports certain other viewpoints—for example, when religious groups oppose legalized abortion or legalized euthanasia. As an illustration, one need only compare the praise given to religious groups and leaders for participating in the civil rights movement of the 1960s to the criticism and often harsh treatment given to religious groups and leaders for participating in the anti-abortion movement of the 1980s and 1990s. One can clearly make qualitative distinctions between the two issues juxtaposed in this illustration, but such

Id. at 1597-98 (footnote omitted); see also Hiers, supra note 58, at 77 n.2 (speculating that legal philosophers' and other western intellectuals' poor perceptions of religion may "have been shaped by familiarity with cases in which proponents of religion have appeared as enemies of human well-being—in opposition, for instance, to the teaching of evolution or of literature, and to blood transfusion or other apparently beneficial forms of medical intervention").

64. See, e.g., Henry J. Hyde, Keeping God in the Closet: Some Thoughts on the Exorcism of Religious Values from Public Life, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 33, 40-42 (1984). To illustrate the apparent double standard at work, Representative Hyde provides the following example taken from the 1984 Presidential election campaign:

Had the Archbishop of New York quizzed a conservative Catholic President about his commitment to nuclear arms control, would there have been impassioned hand-wringing at the New York Times editorial board about "mixing politics and religion"? Yet this is precisely what happened when the Archbishop of New York questioned a liberal Democratic candidate for Vice President about her approach to the public policy of abortion. Why is it that Archbishop O'Connor threatens the separation of church and state when he tries to clarify Catholic teaching about abortion, and the Rev. Jesse Jackson does not when he organizes a partisan political campaign through the agency of dozens of churches?

Id. at 41-42; see also John H. Garvey, A Comment on Religious Convictions and Lawmaking, 84 MICH. L. REV. 1288 (1986):

[Certain religious claims are allowed and others are disqualified] not because they are religious per se but because of their content. The difference between calling homosexuality a sin and calling gene-splicing a sin is not that the former claim is religious and the latter secular. It is that the former claim collides with a good that liberal democracy values more highly.

Id. at 1292.

distinctions will probably not erase the double standard apparently at work in the contemporary treatment of religious participation in public life.

In summary, then, the exclusionary treatment of religion and religious values from the public policy or law-making arena may actually be an ideologically selective phenomenon, depending largely on the subject matter or viewpoint of the speaker’s message rather than the accessibility of that message or the speaker’s relative open-mindedness.66

5 The Issue of Judicial Objectivity or Impartiality

There is one final principal argument against judicial reliance on religious values, especially where a judge relies on her own religious convictions. Such reliance may be seen as illegitimate to the extent that judging should be an “objective” activity, one which should not rest on “subjective” sources such as religious knowledge. In other words, a judge’s reliance on her own religious convictions (and perhaps on those of others) might be incompatible “with the ideal of fairness that lies at the heart of the notion of reasoned justice under law—the ideal, which retains its vitality even in a post-Realist age, that judicial decision making should be ‘objective’ or ‘impartial’.”67

66. This may not be entirely accurate to the extent that different religious claims are treated differently not only on the basis of their content, but also on the basis of what kind of religious organization or person is asserting them. For example, a claim made by a theologically liberal religious organization (e.g., a mainline Protestant Christian denomination) may be treated differently from a similar claim made by a theologically-conservative religious organization (e.g., a fundamentalist Protestant Christian denomination), perhaps on the basis of perceived open-mindedness. To completely separate the issues of accessibility, open-mindedness, intellectual legitimacy, and policy implications, therefore, may be misleading, since these factors may be substantially interrelated.


If we want judges to act as moral decision makers even when they cannot employ society’s morality as their standard of moral reference, and if judges’ personal moral views are determined by their religious convictions, we cannot sensibly ask them to exclude from their calculations what many of them may view as the most relevant source of moral guidance.

Id. at 1546-47. The notion of “impartiality” is certainly a characteristic expected of judges, and is cited numerous times in the American Bar Association’s Model Code of Judicial Conduct. See Model Code of Judicial Conduct (1990); see also Jeffrey M. Shaman et al., Judicial Conduct and Ethics § 5.01 (1990) (stating that “[t]here is perhaps no more basic precept pertaining to the judiciary than the one which holds that judges should be sufficiently detached and free from predisposition in their decision-making.”). The term “impartiality” is not defined, however, and the Model Code does not suggest that judicial reference or reliance on religious values when resolving cases would constitute a breach of impartiality.
Judges, however, must often rely on so-called nonlegal factors, including their own sense of morality (whether or not immediately religious in origin), when deciding cases where statutory language and precedent are ultimately unhelpful. And as a practical matter, any way a judge decides a case—for example, one involving the scope of a litigant’s sexual privacy—she must necessarily embrace certain explicit and implicit political, social, and moral philosophical positions at the expense of others, with her choice of outcome inevitably reflecting her own philosophical worldview. Thus, for example, merely because the Supreme Court in Bowers v. Hardwick68 claimed, in the name of judicial legitimacy, to be adhering to seemingly neutral factors such as precedent, tradition, and the “language or design of the Constitution,”69 it inevitably rested its decision on certain views about human beings, human society, and the state.70 And can one say whether the judicial decision making in Bowers was objective or subjective? Impartial or partial? These are difficult questions, of course, in large part because a dichotomy between subjective and objective judicial decision making is not necessarily helpful. Judges should certainly strive to be comprehensive and to avoid parochialism when deciding cases, but to ask them to ignore their own conceptions of reality and ethics is itself a form of partiality—albeit away from the judge’s own philosophical framework—and is hardly realistic in light of contemporary understandings of the judicial mind.71

As an aside, Professor Fallon’s “post-Realist” conception of judicial objectivity, which is probably rather orthodox today, should be contrasted with the pre-legal realist, legal positivistic model of law making, which itself provides another, quite different argument against the judicial use of religious values. Under that model, not only were judges supposed to be objective and merely apply (not make) the law, but the law which the legislators created was to be “scientifically” constructed, liberated from the quite unscientific influences of morality and religion. Cf., e.g., Henry S. Maine, Ancient Law 15 (Beacon Press 1970) (10th ed. 1884) (emphasis in original) (asserting, in a delightful blend of Social Darwinism and legal positivism, that “the severance of law from morality, and of religion from law, belong[ ] very distinctly to the later stages of mental progress”).

68. 478 U.S. 186 (1986) (upholding Georgia’s criminal anti-sodomy statute as applied to homosexual sodomy).
69. Id. at 190-94.
71. See, e.g., Shaman et al., supra note 67, § 5.04, at 105 (“Despite earlier fictions to the contrary, it is now understood that judges are not without opinions when they hear and decide cases. Judges do have values, which cannot be magically shed when they take the bench.”); cf. Charles E. Clark, The Limits of Judicial Objectivity, 12 AM. U. L. REV. 1 (1963). It may be especially impractical, moreover, to ask a judge to ignore her own sense of reality and morality when that sense is a direct product of religious faith. See infra notes 108-09 and accompanying text.

This is not to say that a judge’s reference to her own religious convictions should never be classified as impartiality or bias. There may be particular settings—the criminal sentencing context, for example—where such references might be inappropriate as a matter of due process. See, e.g., United
II. ARGUMENTS FOR THE USE OF RELIGIOUS VALUES IN JUDICIAL DECISION MAKING

Because this Note's thesis runs counter to the conventional understanding, many of the arguments in this Part and in Part 1 are negative in form—that is, they proceed largely by refuting conventional arguments. The ultimate aim of this Part, however, is to move beyond refutation and explain why, and in what ways, judges legitimately can or should employ religious values when deciding hard cases. With this end in mind, the propriety of the judicial use of religious values will be examined from four perspectives: historical-constitutional, political-philosophical, utilitarian, and empirical.

A. The Historical-Constitutional Perspective

It is beyond question that religious values have informed American jurisprudence from the time of the nation’s birth.72 “[R]eligion and jurisprudence are so related,” in fact, “that to understand American legal history, one must understand American religion.”73 It is not until recent

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generations that “the public philosophy of America [has] shifted radically from a religious to a secular theory of law”74. Of course, a recognition that religious values have historically informed the decision making of judges does not alone justify contemporary judicial reliance on them. It would be equally unjustifiable, however, to ignore the historical role of religion and to assert, explicitly or implicitly, that American law is not a product of such reliance.75 And in light of religion’s traditional place in judicial decision making, it might also be analytically erroneous to place the burden of justification on those who assert a role for religious values. From a historical perspective, in fact, perhaps the burden should be on those who seek to exclude religion or religious values—on the grounds, for example, that those values are somehow qualitatively and meaningfully different from nonreligious values (which, as illustrated earlier, is no simple task).76

Closely related to the historical perspective is the perspective derived from the principles and language of the federal Constitution, which contains a number of clauses relevant to the interaction of law and religion.77 The most obvious constitutional objection to the judicial use of religious values is that such use might violate the Establishment Clause of the First Amendment.78 Since judges—either through common law or

74. Berman, Law and Religion, supra note 72, at 408.
75. Cf., e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (2d ed. 1985). Professor Friedman’s widely used book is cited here not for what it says, but rather for what it fails to say, about the role of religion in American legal history. If, for example, one were interested in reading about the relationship between law and religion generally, or between law and Christianity specifically, then one would need to look elsewhere, since those words do not even appear as entries in the index. Indeed, a perusal through the entire volume generally leaves one with the impression that American law was, and is, almost completely unrelated to religious thought. Such omissions are truly unfortunate and may result simply from the fact that “[m]any secular-minded historians often forget that their own preference for nonreligious thinking cannot simply be projected backward into the past.” STROUT, supra note 72, at xiii.
77. In addition to the Establishment and Free Exercise Clauses of the First Amendment, the Constitution also prohibits the use of a religious test or oath as a requirement to holding public office. See U.S. CONST. art. VI, cl. 3. This Note’s focus on the federal Constitution should not foreclose a similar examination of state constitutional provisions which affect the interaction of government and religion. For partial overviews of this area of law, see generally G. Alan Tarr, Church and State in the States, 64 WASH. L. REV. 73 (1989), and Linda S. Wendtland, Note, Beyond the Establishment Clause: Enforcing Separation of Church and State through State Constitutional Provisions, 71 VA. L. REV. 625 (1985).
78. See George E. Garvey, Book Review, 33 CATH. U. L. REV. 801, 805 (1984) (reviewing MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982)). “A decision based on a judge’s conclusion that a particular Roman Catholic, Protestant or other moral view is superior to that of competing philosophies would likely shock the nation. The ‘wall of separation’ would be viewed as breached in a most egregious manner.” Id. Professor Garvey further notes, though, that “[i]t should
statutory construction—effectively make law,\textsuperscript{79} and since judges are officers of the government, then their use of religious values when rendering decisions could very well violate the Establishment Clause.\textsuperscript{80} Such use, for example, might be seen as impermissibly favoring religion over irreligion or favoring one religion over others,\textsuperscript{81} primarily advancing or endorsing religion generally, or excessively entangling the government with religion\textsuperscript{82}—any or all of which could be considered an

be no less shocking, however, for the courts to refuse to consider the moral teachings of religious traditions when making moral value judgments. The constitutionalization of a secular moral philosophy, to the exclusion of traditional religious moral views, would be tantamount to establishing a secular federal religion.” \textit{Id.}

\textsuperscript{79} \textsc{Lyons, supra} note 32, at 88 (“If courts render authoritative interpretations of the law, but they have discretion to decide its meaning when it is unclear, then they do not simply apply the law. They also help to make it. They do not simply legislate: they also ‘legislate’”); \textsc{Forer, supra} note 5, at 287-88 (“Despite comprehensive legislative codes—the Uniform Commercial Code, the Model Penal Code, class action procedural rules and similar carefully drafted statutes and rules—lacunae that call for interstitial legislation and interpretation are inevitable. Even the wisest drafters cannot anticipate all problems.”).

\textsuperscript{80} This is not to say that where judges do not “make law,” their use of religious values might not violate the Establishment Clause, since they most certainly remain state actors. \textit{See, e.g.,} North Carolina Civil Liberties Union Legal Found. v. Constandy, 947 F.2d 1145 (4th Cir. 1991) (holding that a judge’s opening prayer violated the Establishment Clause), \textit{cert. denied}, 112 S. Ct. 3027 (1992). The case, for establishment, though, seems strongest (or at least most paradigmatic) when the governmental activity in question is law making.

\textsuperscript{81} \textit{E.g.,} \textsc{Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (asserting that the Establishment Clause requires, among other things, that “[n]either a state nor the Federal Government can prefer one religion over another”); \textsc{Larson v. Valente, 456 U.S. 228 (1982).}

\textsuperscript{82} \textit{See \textsc{Lemon v. Kurtzman, 403 U.S. 602 (1971).} In \textsc{Lemon}, the Court set forth the following three-prong analysis to evaluate the constitutionality of governmental actions challenged under the Establishment Clause: “First, the statute [or governmental action] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute [or governmental action] must not foster ‘an excessive government entanglement with religion.’” \textit{Id.} at 612-13 (citations omitted). In more recent cases, the Court has expanded on the first and second prongs using an “endorsement” analysis proposed by Justice O’Connor. For example, regarding the second prong (which examines the effect of a governmental action), the clause may be violated if “[g]overnment . . . [appears] to take a position on questions of religious belief or . . . [makes] adherence to a religion relevant in any way to a person’s standing in the political community.” \textsc{County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 594 (1989) (holding unconstitutional an unaccompanied Christian nativity scene on a county courthouse’s main staircase, while holding constitutional a Jewish Chanukah menorah situated next to a Christmas tree and a sign saluting liberty). For further discussion regarding all three prongs of \textsc{Lemon}, see \textit{infra} part III.B.

It is not clear how viable the endorsement approach will prove to be in future litigation, especially outside the context of religious symbolism cases. More significantly, the status of \textsc{Lemon}-based Establishment Clause doctrine in general is currently considered uncertain. First, as many scholars and judges have pointed out, it is problematic in both theory and application. \textit{See, e.g.,} Carl H. Esbeck, The Lemon Test: Should It Be Retained, Reformulated or Rejected?, \textsc{4 Notre Dame J.L. Ethics & Pub. Pol’y} 513 (1990); William P. Marshall, Unprecedented Analysis and Original Intent, \textsc{27 WM. & MARY L. Rev.} 925, 928 (1986) (noting that the existing jurisprudence of the religion clauses “admittedly is inconsistent and at times incomprehensible”); \textsc{Smith, supra} note 33, at 956; \textsc{The Supreme Court, 1991 Term—Leading Cases, 106 Harv. L. Rev. 163, 260 nn.5-6 (1992). Second, it is particularly unstable
"establishment" under the clause.

As a textual and historical matter, however, invoking the Establishment Clause to prohibit judicial reliance on religious values has little to recommend it; indeed, the words and background of the Constitution would seem to argue against such an approach. As a matter of straightforward textual construction and original intent (to the extent the latter can be divined), the Establishment Clause was designed to deal only with actions of the federal legislature, and therefore its application to the judiciary, whether federal or state, or to state governmental actions in general, should be viewed primarily as the product of recent, extra-constitutional judicial interpretation. Second, the historical relationship at present due to changes on the Court (namely, the replacement of former Justices Brennan and Marshall with Justices Souter and Thomas, respectively) and because of a strong dissenting faction within the Court. In County of Allegheny, for example, Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, dissented at length, sharply criticizing the endorsement approach and acknowledging that "[p]ersuasive criticism of Lemon has emerged." See County of Allegheny, 492 U.S. at 655-79 (Kennedy, J., dissenting). To be sure, this doctrinal instability remains even after Lee v. Weisman, 112 S. Ct. 2649 (1992) (holding unconstitutional a rabbi's deliverance of a theistic prayer at a middle school graduation), a case which many believed would result in a partial or total rejection of the Lemon analysis. See Robert L. Cord, Church, State, and the Rehnquist Court, Nat'l Rev., Aug. 17, 1992, at 35, 36-37 (suggesting that "[e]ven though the graduation-ceremony invocation was declared unconstitutional in Lee v. Weisman, it is premature to conclude that the Rehnquist Court will necessarily follow the Warren and Burger Courts' Establishment Clause jurisprudence"). Effectively ignoring Lemon, the five-member Weisman majority (per Justice Kennedy) instead employed a psychological coercion analysis, more or less proposed by Kennedy in his County of Allegheny dissent.

83. This Note's Establishment Clause analysis is essentially limited to questions of text, history, and contemporary doctrine, and does not explicitly attempt to develop its thesis according to the vast realm of "constitutional values." Examples of this latter sort of analysis might include Daniel O. Conklee, Toward a General Theory of the Establishment Clause, 82 Nw. U.L. Rev. 1113 (1988), or John H. Mansfield, The Religion Clauses of the First Amendment and the Philosophy of the Constitution, 72 Cal. L. Rev. 847 (1984). Of course, constitutional values may embrace many of the perspectives which are discussed in this Note, including tradition, political theory, social utility, and various practical or prudential concerns.

84. ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 12 (1982) (concluding that the intention of the ratifiers was "to deny Congress the power to establish a national religion"). This interpretation is certainly one reasonable construction of the language of the First Amendment: "Congress shall make no law respecting an establishment of religion") U.S. Const. amend. I (emphasis added).

85. See Everson v. Board of Educ., 330 U.S. 1 (1947) (extending the Establishment Clause to all governmental actions at the federal and state levels). As Professor Gunther notes, "Everson assumed without significant discussion that the establishment clause was incorporated into the 14th Amendment and was therefore applicable to the states. The Court did not address the contention that the language of the 14th Amendment may present a textual barrier to incorporation of the establishment clause." GERALD GUNTHER, CONSTITUTIONAL LAW 1508 (12th ed. 1991); see also Mary Ann Glendon & Raul F Yanes, Structural Free Exercise, 90 Mich. L. Rev. 477, 481-86 (1991); Note, Rethinking the Incorporation of the Establishment Clause: A Federalist View, 105 Harv. L. Rev. 1700 (1992). Even if the clause itself did not solely name "Congress," incorporation to the states is still problematic since
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between religious values and law making, discussed above, was certainly in force at the time the Constitution was created; indeed, a separation of religious values from the legal and political processes would not even have been comprehensible to the drafters of that document.86

The authors of the Constitution, including those who were very skeptical of the truth of traditional theistic religion, did not doubt that the validity of the legal system itself depended on the validity of religious faith, and more particularly of the Protestant Christian faith that predominated the new American Republic.87

To be sure, much of the Constitution itself—notably the Establishment

the Fourteenth Amendment Due Process Clause provides only that no “State [shall] deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. The issue of establishment, however, is not necessarily an issue of “life, liberty, or property”, indeed, the major counterargument—namely, that “liberty of conscience” is implicated—is potentially undermined by the existence of the Free Exercise Clause of the First Amendment. See GUNTHER, supra, at 1508 & n.2. And the Fourteenth Amendment Privileges and Immunities Clause, U.S. CONST. amend. XIV, § 1—providing that “[n]o State shall ________ enforce any law which shall abridge the privileges or immunities of citizens of the United States”—is even less relevant than the Due Process Clause as a matter of the Supreme Court’s own interpretation. See CORD, supra note 84, at 84-101; LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 165-85 (1986).

86. Smith, supra note 33:

If the possibility of separating church and state presented eighteenth century Americans with a genuine option, the separation of politics and religion, or of government and religion, did not. Religious premises, assumptions, and values provided the general framework within which most Americans thought about and discussed important philosophical, moral, and political issues. For that reason, Americans of the time could not seriously contemplate a thoroughly secular political culture from which religious beliefs, motives, purposes, rhetoric, and practices would be filtered out.

Id. at 966; see also HENRY F. MAY, THE ENLIGHTENMENT IN AMERICA (1976):

[We may be able to understand [late eighteenth century] political thought better if we start where they nearly always did, with religion. Men of the late eighteenth century, whether they were Calvinists or Armenians, deists or atheists, seldom thought about any branch of human affairs without referring consciously to some general beliefs about the nature of the universe and man’s place in it, and about human nature itself.

Id. at xiii-xiv; see also NORMAN COUSINS, “IN GOD WE TRUST” THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS (1958); ELLIS SANDOZ, A GOVERNMENT OF LAWS: POLITICAL THEORY, RELIGION, AND THE AMERICAN FOUNDING (1990); M.E. Bradford, Religion and the Framers: The Biographical Evidence, 4 BENCHMARK 349 (1990); Richard Vetterli & Gary C. Bryner, Religion, Public Virtue, and the Founding of the American Republic, in TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 91, 100 (Neil L. York ed., 1988) (“The Founders as a whole were deeply religious men. Religion played a vital role in most of their lives; it influenced their beliefs and activities, their ideals and hopes.”).

87. Berman, Law and Religion, supra note 72, at 406. Founding era statesmen such as Washington, Adams, and even Jefferson (whose legacy includes the rather hackneyed “wall of separation” metaphor) all envisioned the new nation as being overseen by God, and as being comprised of citizens whose morality was essentially religious in origin. EDWIN S. GAUSTAD, A RELIGIOUS HISTORY OF AMERICA 123-27 (new rev. ed. 1990); Franklin I. Gamwell, Religion and Reason in American Politics, 2 J.L. & RELIGION 325, 332 (1984).
Clause—was substantially informed by religious values and beliefs about the nature of human beings and the state,\textsuperscript{88} and thus to interpret the clause as completely prohibiting the use of religious values in law making is counterintuitive if not somewhat bizarre.\textsuperscript{89}

Of course, a historical perspective on the Constitution should not necessarily dictate our current understanding of that document, and therefore the contemporary constitutional perspective must be examined as well. At what points and for what reasons judicial reliance on religious


Indeed, the principle of nonestablishment, of separating church from state, was as much expounded by the churches (the "evangelical separatists") as by the less religious political leaders (the "Enlightenment separatists") of the founding era. See \textit{John Witte, The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay, 40 Emory L.J. 489, 491-97 (1991). According to Professor Witte:}

The primary purpose of the evangelical separatists was religious, not political. They sought to free religion and the church from the intrusions of politics and the state. Only when freed from the fetters of the law, they believed, could religion properly exert its leavening influence on society. Only when relieved of the restrictions of the state could the church properly exercise its ministry and mission in the community.

\textit{Id.} at 494; \textit{see also Arlin M. Adams & Charles J. Emmerich, A Nation Dedicated to Religious Liberty} 51-65 (1990). Some scholars, in fact, have even questioned whether there was \textit{any} truly nonreligious line of thought underlying the founding era conception of the proper religion-government relationship. See \textit{Steven D. Smith, The Rise and Fall of Religious Freedom in Constitutional Discourse, 140 U. Pa. L. Rev. 149, 159-63 (1991). It is equally true today that church-state separation is as much motivated by religious as by nonreligious interests, as the continuing role of the religiously affiliated, politically active Americans United for Separation of Church and State (AU) makes evident. Given this reality, it is only fair to inquire whether a judge who receives and reviews briefs by AU (among other separationist religious groups) is being influenced by religious values or considerations, and in turn whether such influence should itself be considered a form of establishment.}


If the First Amendment is understood (as the Court now seems to understand it) as a prohibition of any governmental recognition of fundamental convictions of a religious origin, then it means something it surely never was intended to mean: the cutting off of American society from its spiritual and cultural roots in the Judaic-Christian tradition.

\textit{Id.} at 124. Indeed, while it would be basically naive to reject the notion of a living constitution, it is troubling to think that the modern interpretation of a clause should be so variant from the original understanding that, had the framers or ratifiers known of this interpretation, the clause might never have been proposed or ratified in the first place. \textit{Cf. Laura Zwicker, Note, The Politics of Toleration: The Establishment Clause and the Act of Toleration Examined, 66 Ind. L.J. 773, 793-94 (1991) ("It is unlikely that the New England states would have supported the establishment clause if it had meant . . . that states could no longer provide public support for religion or maintain an established church.").
values would constitute "an establishment of religion" according to contemporary doctrine will be addressed below in Part III.B, since that doctrine clearly imposes limits on the role which religious values can play in the judicial decision-making process.

Before moving on to the political-philosophical perspective, one final dimension of the contemporary constitutional perspective should be noted. The Court's expansion of the Establishment Clause has come almost exclusively from its broad approach to the question of what constitutes an "establishment." Accordingly, there should be concern over why the Court has not been equally or proportionately expansive in its approach to the question of what constitutes "religion" for the purposes of the clause. As demonstrated in Part I.A, for example, an expansive approach to defining "religion" is clearly possible, and in fact the Court has interpreted the term expansively in other contexts such as free exercise and taxation. This interpretative dissymmetry is troubling, both as a textual matter and as a matter of judicial accountability, and perhaps the Court is simply trying to prevent the serious societal and political consequences which would result were "religion" to be read broadly in the establishment context. Under such a reading, the government could almost

90. Tribe, supra note 7, § 14-6, at 1187.
91. See supra note 24 regarding the conscientious objection and taxation cases. See also Torcasso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (explicitly recognizing "Secular Humanism" as a religion in the United States); Grove v. Mead Sch. Dist. No. 354, 354 F.2d 1528, 1536 (9th Cir. 1965), cert. denied, 474 U.S. 826 (1985); Rhode Island Fed'n of Teachers v. Norberg, 630 F.2d 850, 854 (1st Cir. 1980) (asserting that secular humanism may be a religion); Crowley v. Smithsonian Inst., 636 F.2d 738, 742-43 (D.C. Cir. 1980) (assuming secular humanism to be a religion for the purpose of analysis).
92. After all, "religion" is mentioned only once in the First Amendment, and therefore to read it one way for the Establishment Clause and another way for the Free Exercise Clause is clearly problematic as a matter of textual interpretation. See Tribe, supra note 7, § 14-6, at 1186; Everson v. Board of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting).
93. "Judicial accountability" is the notion that the courts, as a matter of their own legitimacy, have some degree of responsibility to adequately justify, or at least explain, their decisions to those persons or bodies to whom the courts are accountable—the citizenry, the other branches of government, and so on. See Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791 (1992):

The underlying substance of [the Court's] legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all.
Id. at 2814. If the Supreme Court were to construe "religion" the same way for both religion clauses, then this consistency alone would arguably provide some degree of accountability, though the construction itself may or may not be justified. Likewise, were the Court to construe "religion" differently for each clause, as the Court seems to do, then it should assume the extra burden of explaining such a disparity, in addition to justifying each construction independently. To the extent, therefore, that the Court has adopted disparate interpretations between the clauses, and to the extent that the Court has failed to adequately explain this disparity, there arises a problem of judicial accountability.
never be genuinely neutral with regard to religion (since it must always rely on some vision of ultimate human purpose), and the disestablishment crusade which might follow—for example, the removal of secular humanism from the public education system—would be devastating.\(^4\) In short, the Court would ultimately have to acknowledge the possibility that, at some level, "[e]very law system is an enactment of and an establishment of religion."\(^5\)

**B. The Political-Philosophical Perspective**

In addition to historical and constitutional support, the judicial use of religious values finds justification in various principles of contemporary political philosophy, particularly in notions of participatory government and communitarian theory.

1 Religious Values and the Model of Inclusive Pluralism

Any discussion of American political theory should begin with a recognition of this nation's vast diversity, whether racial, religious,  

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\(^4\) See, e.g., Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1537 (9th Cir. 1985) ("To borrow the ultimate concern test from the free exercise context and use it with present establishment clause doctrines would be to invite attack on all programs that further the ultimate concerns of individuals or entangle the government with such concerns."); cert. denied, 474 U.S. 826 (1985); Anita Bowses, Delimiting Religion in the Constitution: A Classification Problem, 11 VAL. U. L. REV. 163, 197-204 (1977); Ingber, supra note 7, at 270-71; James McBride, Paul Tillich and the Supreme Court: Tillich's "Ultimate Concern" as a Standard in Judicial Interpretation, 30 J. CHURCH & ST. 245, 247, 270-71 (1988); David G. Leitch, Note, The Myth of Religious Neutrality by Separation in Education, 71 VA. L. REV. 127 (1985); Note, Definition of Religion, supra note 7, at 1083-84. Professor Tribe, who now questions the propriety of interpreting "religion" differently for each clause, at one time argued that a dual (or "variable") definitional approach was preferable for reasons similar to those given by the court in Grove. See Tribe, supra note 23, § 14-6, at 826-33. In the first edition of his treatise, for example, Professor Tribe asserted that:

[I]n the age of the affirmative and increasingly pervasive state, a less expansive notion of religion [than that employed in the Free Exercise Clause] was required for establishment clause purposes lest all "human" programs of government be deemed constitutionally suspect. Such a twofold definition of religion—expansive for the free exercise clause, less so for the establishment clause—may be necessary to avoid confronting the state with increasingly difficult choices that the theory of permissible accommodation could not indefinitely resolve.

**Id.** at 827-28. In the second edition of his treatise, however, Professor Tribe substantially abandoned his advocacy of this dual-definitional approach, conceding that it "constitutes a dubious solution" to the apparent problem of a tension or conflict between the two clauses, "a problem that, on closer inspection, may not exist at all." Tribe, supra note 7, § 14-6, at 1186.

\(^5\) ROUSAS J. RUSHDOONY, CHRISTIANITY AND THE STATE 82 (1986). For further discussion concerning the proposition that government actions are inevitably religious, see Ingber, supra note 7, at 270 n.236.
cognitive, or cultural. Nowhere is this aspect of American society more evident, in fact, than in the varied religious beliefs of its members.\textsuperscript{96} Not surprisingly, the American political law-making system both reflects and strives to foster this diversity through the liberal philosophical ideal of tolerant pluralism, where the endorsement of any one individual's or group's views at the expense of others' is seen as anti-pluralistic, intolerant, and thus unacceptable.\textsuperscript{97} "Liberal government," in other words, "is understood to be neutral government,"\textsuperscript{98} and as such it practices a policy of exclusive pluralism: the exclusion of any particular conception of societal good so that each individual or group may be free to follow his own such conception.\textsuperscript{99} This may be achieved by voluntary exclusion—where individuals or groups voluntarily refrain from injecting their own beliefs into the law-making process—or it may be achieved by involuntary exclusion—where those beliefs, if injected, are simply ignored in that process.\textsuperscript{100} And under this version of liberal political philosophy,

\textsuperscript{96} In the United States today, there are more than 1500 different "primary religious organizations" (i.e., churches, sects, cults, temples, societies, and missions). J. Gordon Melton, The Encyclopedia of American Religions at xix (3d ed. 1989).

\textsuperscript{97} Francis Canavan, Pluralism and the Limits of Neutrality, in Whose Values? The Battle for Morality in Pluralistic America 154 (Carl Horn ed., 1985) [hereinafter Whose Values?].

\textsuperscript{98} Id.

\textsuperscript{99} For an articulation of this liberal ideal in the general context of the Constitution, see Robin West, Progressive and Conservative Constitutionalism, 88 Mich. L. Rev. 641 (1990):

For classical liberals, it is the individual, not the community, who is the Authority on the nature of the good, not only with respect to religious beliefs and political ideas (separately insulated from community control by the first amendment), but also with respect to ways of life. Consequently, legislation that interferes with such individual authority is strongly disfavored, and properly subject to constitutional check.

\textit{Id.} at 663. For an articulation of this liberal ideal in the specific context of the religion clauses, see Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine and practice. It may not be hostile to any religion or to the advocacy of non-religion. The First Amendment mandates government neutrality between different religions, and between religion and nonreligion.").

Governmental neutrality—and the resultant model of exclusive pluralism—may rest on at least two alternative premises: (1) "that it is impossible to rank competing views of the good life and thus impossible to say that one is better than another," or (2) that "even if one way of life can be said to be better than others, the state must be neutral among them because no actual consensus exists concerning which way of life is best." Stephen A. Gardbaum, Why the Liberal State Can Promote Moral Ideas After All, 104 Harv. L. Rev. 1350, 1356-57 (1991). For an assessment of these premises, see id. at 1358-70.

\textsuperscript{100} One way in which religion has been removed (voluntarily and involuntarily) from the public sphere has been through its "privatization"—that is, by its conception as a purely private matter. See Gerard V. Bradley, Dogmatomachy—A "Privatization" Theory of the Religion Clause Cases, 30 St. Louis U. L.J. 275 (1986); Gedicks & Hendrix, supra note 60, at 1584-85, 1599; Myers, supra note 47. In the First Amendment context, for example, the Supreme Court recently asserted that "[t]he design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere" Lee v. Weisman, 112 S. Ct. 2649, 2656 (1992); see also Lemon v. Kurtzman, 403 U.S. 602, 625 (1971). This privatization of religious
one can further appreciate how and why the exclusion of religious claims from the law-making process might appear justifiable, especially when those claims may involve inaccessible reasoning, close-minded adherence, and, most significantly, liberty-restrictive policy implications.101

As a matter of political philosophy and fundamental fairness, however, to what degree does this model of neutral government truly reflect or foster the ideal of "tolerant pluralism"? Although governmental neutrality through exclusive pluralism is one answer to the problem of diversity, it is not the only answer, and arguably it is not the best. For a chief aspect of exclusive pluralism is, oddly enough, its own intolerance towards certain world views and models of political participation which differ from itself, and in this sense it is as value-imposing as the endorsement of any particular conception of social good. Ironically, exclusive pluralism thus becomes the very monster it purports to fight, and in place of any specific conception of social good it potentially "leads to the establishment of the beliefs of the most secularized, materialistic, and hedonistic elements of the population as normative."102

Not only do exclusive pluralism and so-called government neutrality fail to eradicate intolerance, they also fail to fully appreciate the meaning of pluralism. When one focuses solely on the outcomes of law making (and especially when one has particular outcomes in mind), then of course the belief, however, not only risks misperceiving the nature of religious belief or faith but may also be severely alienating to those who are strongly religious. Gedicks & Hendrix, supra note 60, at 1599; Stephen D. Smith, The Restoration of Tolerance, 78 CAL. L. REV. 305, 317 & n.49 (1990).

101. See, e.g., James Hitchcock, Disentangling the Secular Humanist Debate, in WHOSE VALUES?, supra note 97, at 21, 34-35 (noting that "orthodox religious believers are often accused of being absolutists who try to impose their morality on everyone else, or not properly respecting American pluralism"); see supra part I.B.4.

102. Canavan, supra note 97, at 160. In this vein, Lutheran-turned-Catholic theologian Richard John Neuhaus has remarked that "[p]luralism is a jealous god. When pluralism is established as dogma, there is no room for other dogmas. The assertion of other points of reference in moral discourse becomes, by definition, a violation of pluralism." RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 148 (1984).

Like exclusive pluralism, secularism would also seem vulnerable to this kind of Nietzschean fate. Those who advocate secularism—which seems, not surprisingly, to be historically and philosophically related to the liberal ethos of exclusive pluralism—precariously straddle the fence between being indifferent toward, and being hostile toward, religion. As one commentator has observed:

The secularism that arises in a culture out of protest against the excesses and extravagancies of religious zeal and passion can itself become afflicted with this form of invalidism. Secularism itself may thus become a form of uncontrolled zeal that carries its own poisonous venom [sic] into the life of the community. Thus, what initially arose as a sane, disciplined resistance to the folly of religious zeal dissolves into a counter-movement of zealots, bent on destroying all religion, but in the process, becoming itself a religion of demonic proportions.

exclusion of certain worldviews or public policy stances seems justifiable. Yet to focus only on outcomes is to ignore perhaps the most important aspect of a truly vital pluralism—namely, the opportunity for all citizens of all philosophical persuasions to participate in the law-making process, to have their viewpoints considered by lawmakers, and, if ultimately successful, to have their values reflected in the laws under which they must live. As one pair of commentators notes:

The stability of any liberal democracy depends on a perception of the people that their law treats everyone more or less equally and does not affirmatively dictate different results based upon the status of those that it governs. If the religious people who constitute the majority of Americans come to believe, as many already do, that the law-making process does not respect their religious beliefs (at least to the extent that it respects secular beliefs), then they themselves will neither respect the process nor the laws that it generates.

The model of exclusive pluralism can also be criticized on two other grounds. First, the exclusion of religion from the law-making process not only generates its own form of intolerance and denies religious citizens the opportunity to meaningfully shape public policy, it also sends the message to these citizens that their beliefs—their sources of ultimate concern, if you will—do not merit serious consideration. The knowledge that the political system rejects an individual’s personal religious experiences as being wholly subjective and irrelevant makes her

103. The exclusive approach likewise fails to appreciate the fact that significant social change often requires (not simply invites) the injection of competing ideologies or worldviews into the law-making process, and lawmakers therefore cannot afford to be “neutral” when individuals or groups make legitimate claims about political or social justice: The implication [of an exclusive approach] is that pluralism is a system in which diverse groups voluntarily refrain from pushing their own views too hard, lest they tread on the toes of their neighbors. In reality, pluralism is precisely the opposite. It is of the essence of a pluralistic society that, since there is no commonly accepted standard for what is true or false, every group must push as hard as it can for its own positions. Limits are imposed on this only by other groups pushing equally hard in the other direction. No effective social movement of the past quarter century—the civil rights movement, feminism, environmentalism—has been successful by being voluntarily deferential to other groups. Hitchcock, supra note 101, at 35; cf. The Federalist No. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961).

104. Gedicks & Hendrix, supra note 60, at 1599-1600. Moreover, a neutrality, outcome-focused model of pluralism not only deprives certain citizens from participating in the law-making process but also largely deprives the process (and thus society) of any real substance. “[T]he liberalism of neutrality,” in other words, “impoverishes the very community that it promises to enrich.” Smith, supra note 100, at 329.

105. Gedicks & Hendrix, supra note 60, at 1598-99.
feel separated, illegitimate, and inferior." Second and more significant, the supposed solution to the problem of diversity which exclusive pluralism purports to bring about is not really a solution at all. As a practical matter, "secularism has not solved the problem posed by religion in public life so much as it has buried it. By placing religion on the far side of the boundary marking the limit of the real world, secularism prevents public life from taking religion seriously." And in the end, the notion that government can truly be neutral toward competing conceptions of social good may simply be unrealistic. As one commentator has remarked: "Liberalism-as-tolerance is an admirable ideal," but "[l]iberalism-as-neutrality is a phantom, a will o' the wisp." One obvious alternative to government neutrality and exclusive pluralism, and an approach which would more readily permit judges and other lawmakers to advert to religious values, is the model of inclusive pluralism. Such a model would hold that any and all values and conceptions of social good are welcome in the law-making arena, and that judges and other lawmakers should accept or reject them on their merit and relevance, not on their source or the manner in which they are held. This "jurisprudence of inclusion"—although certain to yield outcomes which will not please all citizens—is ultimately more justifiable than exclusive pluralism to the extent that law making, by acknowledging the beliefs and values of the citizenry, could be embraced as a politically legitimate enterprise and to the extent that religion could be respected as a valid source of moral insight. Judges and other lawmakers may, of

106. Id. at 1599; see also Carter, supra note 2, at 940.
107. Gedicks, supra note 46, at 139 (emphasis in original).
108. Michael J. Perry, A Brief Comment, 63 TUL. L. REV. 1673, 1676-77 (1989) ("[T]here is no such thing as a political justification that does not privilege—that does not presuppose the authority or superiority of—a conception (or range of conceptions) of human good relative to another such conception (or range of conceptions)."; see also Joseph M. Boyle, Jr., A Catholic Perspective on Morality and the Law, 1 J.L. & RELIGION 227, 233-34 (1983) ("There is no neutral ground on which legislators, judges or citizens can stand and rationally arbitrate the conflicts between moral perspectives. Any such ground will in fact be some moral perspective and the illusion that it is neutral will have the effect of disregarding the moral views of some citizens."); Francis Canavan, The Pluralist Game, 44 L. & CONTEMP. PROBS., Spring 1981, at 23, 36 (noting that "some view concerning sexual relationships gets enforced by the power of law. What is impossible is to take no view at all and call it neutrality.").
110. See Gedicks & Hendrix, supra note 60:
So long as they are put forth in terms and on premises that permit a debate about their general wisdom and usefulness, religiously based arguments that are relevant to resolution of a public policy issue should not be disqualified from participating in the discussion solely because of their religious origin or character. 
Id. at 1616 (footnote omitted).
course, ultimately choose not to advert to religious values when resolving difficult issues, but to deny them the opportunity to choose at all is neither neutral nor fair government.

2. Religious Values and Community-Based Law Making

A second relevant strain of political thought, and one which has increasingly gained an audience among legal and other scholars, is commonly referred to as communitarianism. Under a particular communitarian perspective, the judicial use of religious values might be justified — perhaps even required — as a means to permit citizens to collectively shape or maintain the “tone of the society” or to “maintain a decent society” Although this approach to law making


112. Communitarianism, like “feminism” and perhaps like “religion” itself, is difficult to define, in part because several different camps—from neo-republicanism to critical legal studies—have invoked communitarian ideas, and in part because communitarianism would seem to be more of a broad, after-the-fact label than a singular, discernable philosophical position. See Gardbaum, supra note 111. Of some help is a “platform” generated by a “communitarian teach-in” in the fall of 1991 in Washington, D.C., which is in effect a manifesto of communitarian values. See The Responsive Communitarian Platform: Rights & Responsibilities, 2 Responsive Community: Rt. & Resp., Winter 1991-92, at 4. As used in this Note, the idea of communitarianism would encompass the right of citizens to collectively shape, to varying degrees through every legal institution, the nature of their social, political, and economic environment. Accordingly, to the extent that the judiciary is unable to respond to the religiously inspired values of citizens who in large part comprise the civil community, then the notion of community is itself offended.

113. This phrase derives from Alexander M. Bickel, On Pornography: Dissenting and Concurring Opinions, 22 Pub. Interest, Winter 1971, at 25, 25-26, and possibly from Louis Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 391, 395 (1963), and has been employed by the Supreme Court in its treatment of obscenity. E.g., Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59 (1973). This Note’s invocation of Professor Bickel should not suggest that Bickel had in mind the judicial use of religious values as a means of maintaining the societal tone; indeed, the invocation is somewhat ironic, since he apparently did not think highly of religion in the public square. See NEUHAUS, supra note 102, at 81; Michael E. Smith, The Special Place of Religion in the Constitution, 1983 Slip. Ct. Rev. 83, 112.

114. Chief Justice Warren introduced this phrase while dissenting in Jacobellis v. Ohio, 378 U.S. 184 (1964) (holding that a film, possessed and exhibited by the criminal defendant, was not legally obscene under the First Amendment), although he may have derived it from Henkin, supra note 113, at 394. In relevant part, Warren stated:

In this and other cases in this area of the law, which are coming to us in ever-increasing numbers, we are faced with the resolution of rights basic both to individuals and to society as a whole. Specifically, we are called upon to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments.
may be readily criticized as paternalistic, or as simply a means of effecting a tyranny of the majority, it is hard to deny that communities ought to be able to influence the nature of law, at least to a point.115

Of course, the right of a community to influence judicial decision making—or, in turn, the propriety of a judge advertising to a community’s values—may be more complicated than the role of community values in legislative decision making, especially where the judiciary is not designed to be, or does not purport to be, necessarily subject to democratic or majoritarian influence.116 Nevertheless, judicial decision making cannot and should never be absolutely severed from societal context, perhaps especially in hard cases. Indeed, to prohibit a judge from hearing the voices of religious citizens as she decides what are in essence religious questions is to sever a relevant community from the collective dialogue of law making and thus to render that law making both less informed and potentially less legitimate to the community.117 Such a complete severance, in fact, may not only give rise to, and in some cases may maximize, the so-called “counter-majoritarian difficulty,”118 but also leaves judges in the difficult, dangerous, and potentially untenable position of resolving cases on largely personal or nonsocietal grounds.

C. The Utilitarian Perspective

In addition to being historically and philosophically justifiable, the inclusion of religion in the law-making process is also justifiable as a

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115. Of course, where or what this “point” ought to be is one of the central, enduring debates in political and constitutional theory. Some theorists have argued that the judiciary may properly intervene in otherwise majoritarian-democratic law making in cases where the political processes have been, or perhaps have become, inaccessible to or unrepresentative of certain subsets of society. See, e.g., JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). Other theorists argue that as far as rights are concerned, the political process is largely irrelevant, and the judiciary either may or must intervene whenever law making impinges on a certain body of fundamental rights or fundamental values. For a critical discussion of this approach, see John H. Ely, The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values, 92 HARV. L. REV. 5 (1978).


117. See also infra text accompanying notes 120-23.

118. See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962). "The root difficulty" with the power of judicial review, observed Bickel, is that it "is a counter-majoritarian force in our system. When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it." Id. at 16-17.
matter of social value or utility. The use of religious values in judicial law making can yield benefits both to the substance and legitimacy of judicial decisions and to the society which must live in the context of judge-made law.

First, religion may endow the law with a unique sense of legitimacy, at least from the perspective of the governed. To be sure, a feeling that law is in some way rooted in religion, and can appeal to a divine or semi-divine sanction for its validity, clearly accounts to a considerable degree for that aura of authority which law is able to command and more particularly for the belief in the moral duty to obey the law.

Accordingly, when the law is divorced from religion—when meaningful religious participation in the law-making process is absent—the legal system may be seen by many as illegitimate.

The radical separation of law and religion in twentieth century American thought, in the sphere of jurisprudence and legal philosophy, creates a serious danger that law will not be respected. If law is to be measured only by standards of experience, or workability, and not by standards of truth or rightness, then it will be difficult to enforce it against those who think it does not serve their interests.

In fact, if the law-making process becomes too secularized and creates too serious a sense of disenfranchisement among religious citizens, then social order itself—a supposed goal of the law—may be undermined. In

119. As used in this Part, the terms "utility" and "utilitarian" are meant simply to convey the notion of usefulness or functional value and should not necessarily be construed as expressions of the political-economic philosophy of Jeremy Bentham or John Stuart Mill. Of course, invoking that latter meaning of utilitarianism to support judicial reliance on religious values might be possible, and, for those so inclined, this Part could be seen as a partial list of benefits which could then be factored into an essentially utilitarian cost-benefit analysis. Cf. John Stuart Mill, Utility of Religion, in Nature and Utility of Religion (George Nakhmian ed., Bobbs-Merrill Co. 1958) (1858).

120. DENNIS LLOYD, THE IDEA OF LAW 47 (1964); see also BERMAN, supra note 1, at 24-25 ("[E]ven in those societies which make a sharp distinction between law and religion, the two need each other—law to give religion its social dimension and religion to give law its spirit and direction as well as the sanctity it needs to command respect.").

There are persuasive arguments, of course, that the legitimacy of law does not or should not derive from its embodiment of the moral-religious values of the community. See STANLEY I. BENN & RICHARD S. PETERS, THE PRINCIPLES OF POLITICAL THOUGHT 67-82 (1959). Accordingly, to the extent that one rejects the notion that the law's legitimacy derives, in part or in whole, from its inclusion of the community's moral-religious values, then certainly this first factor would hardly be persuasive.

121. Berman, Law and Religion, supra note 72, at 409; see also NEUHAUS, supra note 102, at 259 ("[T]here is nothing in store but a continuing and deepening crisis of legitimacy if courts persist in systematically ruling out of order the moral traditions in which Western law has developed and which bear, for the overwhelming majority of the American people, a living sense of right and wrong.").

122. Gedicks, supra note 46, at 139 (arguing that the exclusion of religion from public life,
short, the interaction of law and religion may not simply be prudent but may be necessary, for the sake of both law and religion.123

Second, religion can provide the law (and society) with a conceptual framework in which complex philosophical ideas such as freedom or social justice can more deeply be understood.124 Pre-Civil War abolitionism, the early twentieth century social gospel movement, and the civil rights movement, for example, can all be traced to a religiously informed understanding about the meaning of justice and to “a commitment to ideas that could not be lived out freely in any of the existing frameworks of shared meaning.”125 And religion’s ability to enhance the law’s appreciation of important public policy questions may result not only from the ideas, values, and world views embraced by various religious traditions but also from the “rich, polyvalent symbolic power” which is inherent in, and often unique to, religious language and discourse.126

Third, because many religions are grounded in long, often thoughtful traditions, and because religion is often oriented toward forces or ends

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essential by ignoring religious persons and their views, “can remain stable only so long as those who are ignored acquiesce to their social situation”); see also FREDERICK M. GEDICKS & ROGER HENDRIX, CHOOSING THE DREAM: THE FUTURE OF RELIGION IN AMERICAN PUBLIC LIFE (1991).

123. Berman, supra note 1, at 25 (arguing that “where [law and religion] are divorced from each other, law tends to degenerate into legalism and religion into religiosity”).


The greatest contribution of religion to our constitutional order might be the one that figured so largely in the original arguments for limited government: Religion may put political and legal disputes in better perspective by reminding us that, in the end, our souls can neither be saved nor lost by mere governments.

Id. at 138.

125. Lovin, supra note 124, at 18-19. This is not to deny that religious thinking can be, and in the past has been, a source of ideas and practices which are antithetical to contemporary notions of human dignity or social justice:

[The] correlation of the culture’s religious history with the ultimate dignity of man is by no means unambiguous. Instances to the contrary can readily be cited, such as the attempts to give biblical justifications of human slavery among certain Southern churchmen; or the overt enslavement of human beings as factory workers among pious Northern industrialists prior to the rise of trade unions in the United States. But the discrepancies, along with their own distinctive disclosures of depravity, stand repudiated by the more sensitive and prophetic legacy of this religious history, which, one may say, has been the more enduring, if not always the more pervasive, form of its witness.

Meland, supra note 102, at 20.

which transcend society (particularly society's immediate temporal framework), religion can serve both as a counterweight to new or temporary shifts in societal attitudes or desires as well as a relatively objective measure against which such shifts can be evaluated.\textsuperscript{127} Ironically, it may be precisely because of this dissentient dimension of religion that some persons find religious participation in public life to be of low utility, particularly in a dynamic, progressive society such as the United States. One need only look to recent history, however, to realize that religious organizations ultimately fail society not when they are antagonistic to political and social developments but when they acquiesce to them in the name of deference and institutional civility.

\[\text{I}t \text{ must be remembered that religion is almost always accorded recognition and even the blessing of the state as long as religion supports the national interests and public policies of the state, as in the Third Reich or the most atheistic socialist countries today. Religion may be tolerated and even patronized in the totalitarian state as long as religion assumes a subservient role. It is only when the prophetic role of religion is exercised calls into question the declared interests and policies of the state, that the right of communities of faith to be involved in society is most likely to be challenged and even denounced by the state, whether communist or democratic.}\textsuperscript{128}

Fourth, because of its broad sense of history and continuity and its focus on the transcendent, religion also has the potential to be forward-

\textsuperscript{127} See Murray S. Stedman, Jr., Religion and Politics in America 18-19 (1964) (asserting that religious bodies—by virtue of their acute sense of moral awareness, history, and continuity—are in a unique position to evaluate and pass judgment on significant public and political issues); Hyde, supra note 64, at 44; George Weigel, Catholicism and the American Proposition, First Things, May 1992, at 38, 39-40 (arguing that, among other things, the "self-consciously transcultural and transhistorical" nature of modern Catholic social teaching make it a particularly apt resource for the ongoing debate about the future of American society); Peter L. Berger, The First Freedom, Commentary, Dec. 1988, at 64:

\[\text{The most important secular purpose any church can serve is to remind people that there is a meaning to human existence that transcends all worldly agendas, that all human institutions (including the nation-state) are only relatively important, and that all worldly authority—even that of the Supreme Court of the United States—is disclosed as comically irrelevant in the perspective of transcendence.}\textsuperscript{128}

\[\text{Id. at 65.}\]

\textsuperscript{128} James E. Wood, Jr., The Prophetic Role of Religion in Society, 30 J. Church & St. 219, 225 (1988). For a partial account of the dynamics, for better and for worse, of the Christian churches during the rise of the Third Reich, see Franklin H. Littell, From Barmen (1934) to Stuttgart (1945): The Path of the Confessing Church in Germany, in Readings on Church and State 281 (James E. Wood, Jr. ed., 1989). Littell notes that those religious leaders who systematically refused to pledge their support to Hitler and the state were, ironically, severely attacked for "meddling in politics." Id. at 285.
looking and to provide the law with moral and political vision. While both law and religion are very much rooted in tradition and significantly oriented towards what has already been, and must be—equally oriented towards the changing needs of society and towards what is yet to come. This may be particularly true today, where judges and other lawmakers continue to confront new and increasingly complex questions about ultimate human value and purpose. Accordingly, religious vision can "provide an account of the whole in which to test the larger meaning and purpose of the decisions we make at any particular historical moment." Religion, in other words, "challenges law not only on the level of duty but also, and primarily, on the level of aspiration."

Finally, even if religious values as such are not directly employed in a judge's decision making, a judge's ability to evaluate relevant history and precedent case law from a theological perspective may itself be a source of valuable and unique insight. Indeed, because American law and society are so much the product of Judeo-Christian ethical and philosophical thought, it should seem quite unconscionable that judges

129. See THOMAS, supra note 15:

It can be shown that religion in its highest form has raised morality to a higher level. For example, the "dynamic religion" of Western ethical monotheism has inspired men with the vision of a world community and has awakened a desire to overcome the forces that separate different classes, races, and nations and set them in opposition to each other. Based upon the belief that all men have been created by God and should love one another as brothers, this vision has made men aware that they have obligations not only to those of their own society but also to all mankind. Thus, while what [Henri] Bergson called "static religion" has usually been content to provide a divine source and sanction for the conservative social morality of a "closed society," "dynamic religion" has been one of the most powerful forces behind the creative morality that leads towards an "open society" of all mankind.

130. See BERMAN, supra note 1, at 34.


132. BERMAN, supra note 1, at 135.

133. See generally Fort, supra note 73 (advocating a theologically-informed approach to jurisprudence); MILNER S. BALL, THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS (1981). In large part, Professor Ball's thesis is that "the biblical tradition is the most fruitful medium for understanding, judging, and celebrating the secular world, including law [and] that a theological standpoint will provide a view of law in context and in relation to other human enterprises." Id. at 2; see also Mulford Q. Sibley, Religion and Law: Some Thoughts on Their Intersections, 2 J.L. & RELIGION 41 (1984); Samuel E. Stumpf, Theology and Jurisprudence, 40 CHRISTIAN SCHOLAR 169 (1957).
(and lawyers) might engage in the great task of law making without some sense or understanding of the law's religious roots and meaning. 134

D The Empirical Perspective

One final perspective on the role of religious values in the judicial decision-making process is empirical in nature, and examines the issue in light of what is actually happening in that process. This Note argues that religious values are already informing judicial decision making, and that their use is and will continue to be inevitable. Accordingly, the better course might be simply to acknowledge and accept the judicial use of religious values, thereby leading to a higher degree of accountability and, hopefully, an improvement in the manner in which they are used. The concern, in other words, should not be over whether or not religious values are being used, but rather how well or properly judges are in fact using them.

Although the position that judges are inevitably using religious values may be controversial, it is arguably more realistic than the counterpremise that they are not. Initially, if one accepts the earlier assertion that claims which address the so-called big questions of human existence are inherently religious in nature, 135 then it necessarily follows that judges must think religiously when they decide cases that involve such questions. In resolving substantive due process cases arising under the Fourteenth Amendment, for example, the Supreme Court has addressed such fundamental questions as the status of a human fetus (and the status of the act of abortion), 136 the status of a human being in a persistent vegetative

134. A judge's capacity to appreciate the religious background (among other backgrounds) of law could be especially necessary where that judge is attempting to interpret a rule or principle in light of original intent or historical context. See Terence Ball, Constitutional Interpretation and Conceptual Change, in LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 129, 131 (Gregory Leyh ed., 1992) (noting that "[t]o correctly characterize an author's text requires that one be able to identify the world picture that informs the language within which his or her intentions are (or were) framed in the first place").

135. See supra notes 15-18 and accompanying text.

136. Roe v. Wade, 410 U.S. 113 (1973) (holding that there is a constitutional right to undergo an abortion, limitable by states only in the third and possibly second trimesters). The Court's claim that it did not need to "resolve the difficult question of when life begins," id. at 159, hardly renders its decision making less philosophical or religious. In a world where scientific data will not resolve the issue of defining the moral boundaries of human life, an assertion that one does not or cannot know those boundaries is arguably as much a philosophical or religious claim as an assertion that human life begins at any particular temporal-spatial point.

For two recent and quite interesting statements of the position that religious values should inform the legal dialogue over abortion, see Ruth Colker, Feminism, Theology, and Abortion: Toward Love,
state, (and the status of the act of removing life-sustaining treatment),\textsuperscript{137} and the status of the act of homosexual sodomy.\textsuperscript{138} One may choose to call these issues any number of things: legal questions, moral questions, social questions, or questions of the greatest philosophical moment. But by addressing such issues, the Justices must have included in their analyses religious values, since all of them invariably require determinations about the nature and telos of the human being, including what constitutes full human value for the purposes of birth, life, and death.

Even if one were to confine the term "religious" solely to claims which emerge from persons or institutions which practice or advocate traditional religion, then one must still conclude that many judges, albeit fewer, are thinking religiously or adverting to religious values when deciding cases. First, the mere fact that judges are operating in a legal system which has deep theological roots will lead them to render decisions which necessarily implicate religious values, even if those religious values were incorporated into the law at a much earlier date and the legal system has since become, or is perceived to be, secular in nature.\textsuperscript{139} Second, when a judge relies, as she often must, on the moral tone or values of the ambient society,\textsuperscript{140} once again she will likely be relying ultimately on religious values, since society's moral values often stem from or reflect


\textsuperscript{137} Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990) (suggesting that there is a limited constitutional right to refuse life-sustaining or life-saving medical treatment).

\textsuperscript{138} Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that there is no constitutional right to engage in homosexual sodomy). For an analysis of Bowers, see supra text accompanying notes 68-70 and infra notes 164-69 and accompanying text.


Temporal society, of necessity a creature of laws, is shaped by the religious influences that shape the individual members of society. Therefore the presence of Christians within society, and the general dissemination of Christian ideas among the populous [sic], even among those not possessed of Christian faith, has had dramatic impact on the evolution of western jurisprudence.

Id. at 50.

\textsuperscript{140} GREENAWALT, \textit{supra} note 2, at 240; see also Kairys, \textit{supra} note 2:

If legal reasoning does not provide the source for results, what does? The results come from those same political, social, moral, and religious value judgments from which the law purports to be independent. The ultimate basis for a decision is a social and political judgment incorporating a variety of factors, including the context of the case, the parties, and the substance of the issues.

Id. at 247. In fact, judicial decision making may entail an even more sophisticated level of meta-ethical analysis, since "[j]udicial decision, especially on matters of high constitutional import, often involves a choice between moral values, and not merely the application of some single outstanding moral principle ... " H.L.A. HART, \textit{The Concept of Law} 200 (1961).
Third, where the judge herself is religious in a traditional or formal sense, then the likelihood of reliance on religious values is also substantial, even if the judge claims or believes that she is not relying on her own convictions. As one commentator has noted:

The liberal insistence that judges and other government officials place religious conviction entirely to one side plainly misconceives the nature of faith. Religious faith is not something that can be shrugged off like an unattractive article of clothing. The very idea of devotion suggests a way of ordering all life and all knowledge, including, although not exclusively, moral knowledge.

Indeed, it may be that judges are selected for office precisely because of their ability to make acceptable judgments informed by their moral, political, and religious preferences, even if these preferences are not explicitly revealed in judges' actual decisions.

As a practical matter, speculation about judicial psychology may be unnecessary, since one can find numerous examples of cases in which judges actually refer to religious values in their reasoning. Explicit judicial recourse to religious values can be found, for example, in cases involving the Fifth Amendment right to remain silent and not have that silence used against oneself, the question of whether sexual intercourse is an inherent right of marriage, the constitutionality of

141. See Berman, supra note 1, at 135, 174 n.1; Timothy L. Fort, Law and Religion 113-14 (1997); Lyons, supra note 32, at 10 (noting that "[a] theological conception of the foundation for moral judgments is still widely accepted" and "is shared not only by many who believe in the existence of a God but also by many who deny or doubt that a God exists").

142. One commentator has bluntly summed up the matter as follows:

We must deal with the fact that, regardless of what the norm of official behavior is, public officials will take their own religious convictions into account in performing their official duties. They may not always do so, but it is absurd to suppose that they have never done so with some frequency, that they do not now do so with some frequency, and that they will not always do so with some frequency.

143. Carter, supra note 2, at 940.


145. People v. Bobo, 212 N.W.2d 190, 194 (Mich. 1973) (acknowledging that "[t]his humane rule has higher sanction than mere judicial precedent") and then referring to the trial of Jesus before the Sanhedrin, as recorded in Matthew 26:57-68) (quoting State v. Hogan, 252 S.W. 387 (Mo. 1923)).

a statute prohibiting sodomy,\textsuperscript{147} the validity of a statute prohibiting public nudity,\textsuperscript{148} the right of one spouse to act as conservator of the other spouse,\textsuperscript{149} the conversion of property,\textsuperscript{150} child visitation rights,\textsuperscript{151} child custody rights,\textsuperscript{152} criminal sentencing for child sexual abuse,\textsuperscript{153} criminal sentencing for murder,\textsuperscript{154} the propriety of state

\textsuperscript{147} Bowers v. Hardwick, 478 U.S. 186, 196-97 (Burger, C.J., concurring) (asserting that condemnation of sodomy "is firmly rooted in Judeo-Christian [sic] moral and ethical standards"); Commonwealth v. Wasson, No. 90-SC-558-TG, 1992 Ky. LEXIS 140, at *56-57 & n.1 (Ky. Sept. 24, 1992) (Lambert, J., dissenting) (citing Leviticus and Romans as well as Chief Justice Burger's reference in Bowers to the Judeo-Christian tradition). Lest the reader think that religious values are consistently used to uphold or justify anti-sodomy statutes, it should be noted that the trial court in Wasson received testimony against the statute from a Presbyterian minister, see id. at *6, and the Supreme Court of Kentucky received amicus briefs against the statute from numerous religious organizations. See id. at *8 & n.1.


\textsuperscript{149} In re Siveke, 441 N.Y.S.2d 631, 634 (N.Y. Sup. Ct. 1981) ("[T]he proposition that the relationship of husband and wife is special and unique finds support in scripture as well, wherein we are told, 'Therefore a man leaves his father and mother and cleaves to his wife, and they become one flesh.' (Book of Genesis, Chapter 2, Verse 24)."

\textsuperscript{150} Wells Fargo Bank Int'l v. Binabdulaziz, 478 N.Y.S.2d 580, 581 (N.Y. Sup. Ct. 1984) ("The answer lies in recalling that historical canon long recognized in the Judeo-Christian tradition of our system of justice that he who finds and keeps property he knows belongs to another must restore the property involved (Leviticus 6:4)").

\textsuperscript{151} Chicome v. Chicome, 479 N.W.2d 891, 897 (S.D. 1992) (Henderson, J., concurring in part and dissenting in part) (asserting that the "Bible decrees" homosexuality, the sexual orientation of the mother seeking visitation rights). The manner in which religious values are used in this case—as a way to evaluate the morality of the mother's conduct or lifestyle—is not the manner in which religious values are often used in child custody and visitation cases, in which a parent's own religious beliefs are factored into the decision. See infra note 187.

\textsuperscript{152} In re Shotwell, No. CA 6189, 1983 WL 5642, at *2 (Ohio Ct. App. Dec. 6, 1983) (asserting that "[l]egitimate efforts at establishing guidelines for resolution of custodial conflicts need[ ] to be focus[ed] upon basic Judeo-Christam [sic] principles of family"). As in Chicome, the manner in which religious values are used in this case—as a way to provide a moral context in which to resolve the custodial dispute—is again not the usual function of religious values in child custody cases.

\textsuperscript{153} People v. Jagnjic, 447 N.Y.S.2d 439 (N.Y. App. Div. 1982) (Lupiano, J., dissenting): The condemnation of crimes against the young is deeply ingrained in the ethical and moral history of western civilization. Indeed, the [B]ible is replete with references to this universal condemnation as, for example, the following scriptural passage concerning children—"Whosoever shall offend one of these little ones it were better that a millstone were hanged about his neck, and that he were drowned in the depth of the sea" (Matthew 18:6). History, philosophy and religion teach us that human nature is not perfect and that justice demands a balance in her scales.

\textsuperscript{154} People v. Yocus, 436 N.Y.S.2d 1002 (N.Y. App. Div. 1981) (O'Connor, J., dissenting): Our entire Judeo-Christian concept of civilization is founded on the basic tenet that we are all possessed of a free will and that we can, within limits, pick and choose our goals and our way of life. Society must, at all costs, be protected and preserved and its predators and transgressors must be swiftly made to realize the error and the evil of their
termination of parental rights,\textsuperscript{155} and a lawyer's ethical and professional responsibility to his client.\textsuperscript{156} The purpose of citing these cases is not necessarily to endorse their use of religious values; it is merely to illustrate that, despite the law's supposed indifference to religion, the use of religious values remains an indelible aspect of the judicial law making process.\textsuperscript{157} From an empirical perspective, then, emerges a picture of judging in which religious values are already informing judicial decision making, despite the seemingly secular nature of the process. In turn, this suggests that the removal of religion from the legal arena has not created a shift from law making partially informed by religion to law making totally informed by secular sources; rather, the transformation has been largely cosmetic, one in which religion has simply been removed from sight.\textsuperscript{158}

\textit{ways. But the penalty imposed should never be so devastating as to stifle repentance or destroy all hope of redemption.}

\textit{Id.} at 1004.

\textsuperscript{155} \textit{In re S.L. and L.L.,} 419 N.W.2d 689, 697-98 (S.D. 1988) (Henderson, J., dissenting) (asserting that "children are entrusted to parents as part of God's great plan" and that "the Law should be ever so cautious in interfering with that edict" and citing numerous passages from the Old and New Testaments); \textit{In re J.Z.,} 423 N.W.2d 813, 817 (S.D. 1988) (Henderson, J., dissenting).


\begin{quote}
Civilization's most sacred, learned, dedicated and staunchest advocate of all times, centuries ago, admonished:

"No one can serve two masters; for either he will hate the one and love the other, or he will hold to the one and despise the other."

The advocate was the Christ Jesus; the admonition was to his disciples and the multitude during His Sermon on the Mount; the admonition is cited in the most dynamic, accurate and prestigious of all law books, The Holy Bible, at Matthews the 6th Chapter and the 24th Verse.
\end{quote}

\textit{Id.} at 569.

\textsuperscript{157} That a majority of these citations, \textit{supra} notes 145-56, are to concurring or dissenting opinions, and not to majority opinions, is precisely what one would expect to find. In separate opinions, individual judges are freer to express what they are actually thinking, and thus one would expect to find religious values coming out of the closet, so to speak, when judges are writing separately.

\textsuperscript{158} Take, for example, the recent case of \textit{North Carolina Civil Liberties Union v. Constangy,} 947 F.2d 1145 (4th Cir. 1991), \textit{cert. denied,} 112 S. Ct. 3027 (1992). In \textit{Constangy,} the Fourth Circuit invalidated under the Establishment Clause a state judge's practice of beginning each court session with a prayer of his own creation. There is little doubt that under current Establishment Clause doctrine the prayer should have been invalidated, and from that perspective the outcome is not problematic. However, what exactly is the outcome? True, other attendants of his courtroom will no longer have to listen to his personal prayer, and perhaps this is desirable (especially where certain attendants, such as criminal defendants, are not voluntarily before the judge). But as far as Judge Constangy's decision making—presumably the greatest potential source of actual establishment—it will surely continue to be informed by his own religious beliefs and values. And the real outcome, therefore, is simply the cosmetic removal of religion from sight, a politically palatable but almost entirely hollow form of disestablishment.
And the real shift, therefore, has been from a law making explicitly informed by religion to a law making covertly informed by religion—a result which warrants not only reexamination, but possibly rejection as well.60

III. LIMITS ON THE USE OF RELIGIOUS VALUES IN JUDICIAL DECISION MAKING

This Note clearly envisions and advocates a role for religious values in judicial decision making. There should be limits on that role, however, some of which are similar to the limits placed on other sources of input and some of which may be unique to the nature of religious values.

A. Distinguishing Proper from Improper Uses of Religious Values

As a practical matter, the use of religious values should be limited by the same prudential standards which limit a judge’s use of other sources of insight, such as history or tradition, the social sciences, or the physical sciences. Because history or historical analysis, for example, can be easily manipulated by judges, one must draw a line between the proper and improper use of history. Likewise, because religious values can be

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159. Cf Meland, supra note 102, at 24-25. Professor Meland argues that, despite the secular state’s desire to disassociate its decisions and policies from religious considerations, influences, or representations, the mores of the faith, or the ethos of its tradition and history, are not necessarily excluded from the exercise of government. Although these mores may not rise to the surface as overt arguments or principles in the deliberations of a political assembly, they are very apt to be present and pervasive in the presuppositions, sentiments, and objectives that motivate and direct such deliberations.

Id.

160. One reason, and perhaps the only plausible reason, why covertness about the use of religious values in law making should be desired is that it makes law making seem more palatable or politically legitimate to groups who are offended by the explicit recognition or endorsement of religion by government. Such groups might include the nonreligious, the non-mainstream religious, or the mainstream religious who favor strict separation of government and religion. To be sure, this kind of concern is probably what undergirds a nonendorsement or nonalienation approach to the Establishment Clause. Yet, to invoke that clause as a means of prohibiting governmental recognition of religion is simply to beg the question (or is at most an exercise in sterile formalism), since the government engages in all sorts of activities which offend various individuals or groups. The government apparently finds it unnecessary, for example, to be covert when dealing in other areas such as foreign policy or economics even though some persons are quite offended by the government’s recognition of one or more positions effectively at the exclusion of others. For a further discussion of this point, see Smith, supra note 88, at 211.

161. See, e.g., John P Stevens, A Judge’s Use of History, 1989 Wis. L. Rev. 223, 230-35 (discussing the use of Western and constitutional history in the crèche case of Lynch v. Donnelly, 465 U.S. 668
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determined, filtered, and employed by judges in many different ways, one must also draw a line between their proper and improper use.

To "properly" use religious values, then, judges should undertake at least the following three inquiries. Any religious claim, first of all, must be evaluated in its original and historical contexts. How did the religious claim come about, what kind of theological premises gave rise to it, and how has it evolved since its original formulation? Has active euthanasia, for example, always been proscribed by religious denominations, and, if so, has the reasoning changed over time? Second, any religious claim must be evaluated in its contemporary context. How and why do its contemporary adherents construe the religious claim in question? Are there differing constructions or rationales behind the claim? Third, judges must take account of religious claims which contradict the claim in question, especially if those competing claims arise from within the same religious tradition. In summary, a judge's evaluation of a religious value or assertion should conform to a thorough and balanced analysis, not unlike a judge's evaluation of any other source of insight.

(1984)); Douglas Laycock, Text, Intent, and the Religion Clauses, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 683, 683 (1989). See generally CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969); Donald P. Boyle, Jr., Note, Philosophy, History, and Judging, 30 WM. & MARY L. REV. 181 (1988). One would like to believe, for example, that a judge's historical analysis would be accurate, both in terms of what it includes and what it omits, or that a judge's use of social or physical scientific data or theories would be improper if it failed to advert to available competing data sets and theories. These are ideal standards, of course, and it would not be difficult to show that they are seldom met by judges—the Supreme Court's Everson decision, discussed supra note 85, provides a rich illustration.

162. One may rightly ask what value it would be to a judge if there were competing viewpoints within the same religious tradition, or if various religious traditions were in tension with each other on a particular issue. As a practical matter, other sources which inform judicial decision making (e.g., economics or history) frequently offer judges conflicting data or conclusions, and thus the simple answer is that religious values in conflict with each other are of the same value as other internally-conflicting sources. A more thoughtful response might be that where religious values or traditions are seriously in tension with each other, then one may question whether the judiciary should address the issue at all—that is, whether the courtroom is really the appropriate forum. Precisely because there may appear to be no clear resolution to a dispute, perhaps such matters are best addressed by the legislature, where pluralistic compromise may be more naturally achieved. Of course, into which legal institution or branch such matters ought to be placed is ultimately a political-philosophical, and not simply a logical, issue.

163. Prudence will likely have to be employed not only in a court's analysis, but also in a court's decision to entertain religious arguments in the first place. Notwithstanding free exercise concerns, one may suppose that the Wisconsin Court of Appeals employed this kind of prudence when it heard the pro se appeal of one Leonard Svee, who was convicted of operating a motor vehicle while his license was revoked:

Some of the arguments raised in the trial court and ostensibly on appeal are incomprehensible and summarily rejected. Among these is that a gold-fringed flag displayed in the courtroom suggests that the court was limited to admiralty jurisdiction; that Svee is an ambassador of the Supreme Law Giver with diplomatic immunity, and that the common
For the purpose of illustration, former Chief Justice Burger's concurrence in *Bowers v Hardwick* can be considered an improper use of religious values. At issue was the constitutionality of Georgia's criminal anti-sodomy statute as applied to male homosexual sodomy. Expanding on his opening claim that "proscriptions against sodomy have very 'ancient roots,'" Burger asserts that "[c]ondemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards." What is problematic here is not Burger's reliance on historical evidence or religious tradition per se, but rather his mischaracterization and resultant misuse of these factors. Without doubt, Burger's approach to religious tradition and values is distortingly selective and wholly fails to appreciate the theological underpinnings of the Jewish or Christian tradition. As a matter of historical context, for example, Burger ignores the fact that sexual acts between men were openly tolerated by the Christian church during the early Middle Ages. As a matter of both original and contemporary context, moreover, he does not explain why the act of sodomy does not comport with Jewish or Christian morality. Finally, he fails to acknowledge contemporary disagreement within the Jewish and Christian communities about the moral-theological status of homosexual sodomy. In short, Burger's concurring opinion is not flawed because it employed religious law as set forth in the Bible forbids that he make treaties with heathens; that the thirteenth, fourteenth, and fifteenth amendments are unlawful departures of organic constitutional principles; and that as a free white male he has an unlimited right to use the highways without restriction.


165. Id. at 196.
166. Id.
167. For example, both Burger's and the majority's versions of history are unjustifiably selective, and thus improper, in failing to note that "[o]ver the course of Western history, sexual practices between men, like other sexual practices, have been tolerated as well as condemned." Goldstein, supra note 70, at 1086; see also Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 197 ("In the first centuries of Christianity, as in the ancient Greek and Roman cultures in which it first took root, homosexuality was common and widely tolerated.").
168. Goldstein, supra note 70, at 1087.
169. See generally John R. Boswell, *Christianity, Social Tolerance, and Homosexuality* (1981); George Edwards, *Gay/Lesbian Liberation: A Biblical Perspective* (1984); Robin Scroggs, *The New Testament and Homosexuality* (1983). As indicated by their respective dates of publication, all of these texts were available at the time *Bowers* was being decided by the Supreme Court.
values, but because it employed them improperly through a combination of incomplete historical and theological analysis.170

B. The Establishment Clause Revisited

Although this Note is generally critical of positions which would prohibit the judicial use of religious values by means of the Establishment Clause,171 judges must nevertheless conform their actions to the requirements of that clause as construed by the Supreme Court. For Establishment Clause purposes, then, it may be necessary to discriminate among different judicial uses of religious values. In particular, three factors may be helpful in this process: (1) the nature of the religious value, (2) the degree to which it informs the judge’s decision making, and (3) the manner in which it is employed by the judge.172

Under the three-prong Lemon test,173 for example, the particular nature of the religious value may bear upon the first prong—namely, whether the judge’s purpose in using that value is predominantly secular or religious.174 Likewise, the degree to which the judge relies on religious values may relate to both the second and third prongs, measuring effect and entanglement, respectively. If, for instance, a judge substantially or


171. See supra notes 83-89 and accompanying text.

172. This three-factor analysis for discriminating among different uses under the Establishment Clause is proposed only for Establishment Clause purposes. There may be other reasons why different uses of religious values by government should be treated differently, but the analysis presented here should be viewed solely as a means to bring this Note’s thesis in line with current constitutional doctrine. Incidentally, this three-factor analysis is roughly analogous to the Court’s own analysis used to measure effect (Lemon’s second prong) in cases involving financial aid to religious educational institutions. In such cases, the Court’s decision making seems to turn on the educational level of the students, the type of aid provided, and the manner in which the aid is provided. See, e.g., Mueller v. Allen, 463 U.S. 388, 396-402 (1983) (upholding a Minnesota plan allowing taxpayers to deduct certain expenses—e.g., tuition, textbooks, and transportation—incurred in providing for their children’s primary and secondary education, whether public, private nonparochial, or parochial).

173. See supra note 82 for a discussion of Lemon.

174. Cf. Conkle, supra note 57, at 5-6 (distinguishing between “spiritual” and “worldly” religious purposes). Based on this distinction, Professor Conkle argues that when a religious purpose is spiritual—that is, when it is aimed at supporting spiritual activities such as prayer or proclamations of faith—then, in general, government should avoid acting on that purpose. In contrast, when a religious purpose is worldly—that is, when it is aimed at addressing concrete social problems such as poverty or racial inequality—then in general government can act on that purpose. See id. at 8-10.
wholly rests her opinion on a particular religious claim, then this would likely have the effect of endorsing (and advancing) religion and may also create an impermissible entanglement between government and religion. And of course the manner in which the judge uses religious values—whether she refers to them solely at the deliberative stage or whether she actually includes them in her written or oral opinion—would obviously relate to Lemon’s second prong, measuring effect. Finally, the judge who purposefully chooses to advert only to one or a select few sources of religious input, particularly in the initial deliberative process, will likely be favoring one religion over others, a form of government action not permitted under current doctrine.175

In light of these doctrinal limitations, is it even possible for a judge to advert to religious values in her decision-making process and not run afoul of the First Amendment? To avoid religious favoritism, first of all, judges can certainly attempt to be inclusive in their examination of religious values and thus avoid arbitrary discrimination among available religious traditions. An inclusiveness requirement should not mean that a judge must advert to all available religious values, or that a judge who ultimately relies on religious values must cite them all in her opinion. Regarding certain issues, in fact, it may be that only a small number of religious organizations have systematically set forth a body of principles and positions to which a judge can refer.176 But judges should at least

175. See supra note 81 and accompanying text.
176. To require a judge to investigate and evaluate all possible sources of religious insight is clearly impractical and arguably unnecessary. First, not all religious traditions or values will be relevant to an issue and, as noted in the text, not all religious traditions will have a concrete, systematic position to which a judge can refer. Second and more important, the responsibility for developing and providing judges with such bodies of doctrine should arguably rest with the religious community, not with the judge. To be sure, a religious organization’s willingness to provide such information to judges—for example, in the form of amicus curiae briefs—will be a direct reflection of whether or not they genuinely desire to participate in the law-making process. And whether or not a group will be granted leave of court to file an amicus brief will in turn reflect the court’s determination of whether or not that group’s input is relevant to resolving the case at hand. Cf., e.g., In re Karen Quinlan, 355 A.2d 647 (NJ. 1976), cert. denied, 429 U.S. 922 (1976): [W]e note the position of [the Roman Catholic] Church as illuminated by the record before us. We have no reason to believe that [the plaintiff’s claim for relief] would be at all discordant with the whole of Judeo-Christian tradition, considering its central respect and reverence for the sanctity of human life. It was in this sense of relevance that we admitted as Amicus curiae the New Jersey Catholic Conference, essentially the spokesman for the various Catholic bishops of New Jersey, organized to give witness to spiritual values in public affairs in the statewide community. Id. at 658. At least one commentator, though, has proposed that judges should in fact have some affirmative responsibility to solicit normative arguments from litigants, through those litigants’ briefs, whenever
attempt to be inclusive, especially at the deliberative stage, and those who fail to do so may be rightly condemned under the First Amendment.

Regarding the first prong of Lemon (measuring purpose), here too the risk of violating the Clause will rest largely with the judge’s own willingness to use religious values within constitutional guidelines. If the judge’s purpose in adverting to religious values is primarily to advance or endorse religion, either in general or specifically over irreligion, then she will almost certainly violate the Establishment Clause. But if instead she adverts to religious values for the purpose of reaching a well-informed, impartial decision—that is, one which takes account of all sources of social, economic, political, and ethical input, including religious insight—then this should suffice as a legitimate secular purpose and the clause would not be violated.1

Regarding the second prong of Lemon (measuring effect), one must examine two kinds of effect: actual advancement and perceived endorsement. The first of these concerns—actual advancement—should not be problematic. Although judicial use of religious values may in fact advance religion, if done prudently, then any such advancement should not be the primary effect as required under Lemon and no violation of
The Clause should be found.\textsuperscript{180} The second of these concerns, perceived endorsement, may not be so easily satisfied and will largely depend on the three factors discussed earlier as well as on the nature or sensitivity of the relevant observer—that is, the one making the perception of endorsement. If the judge, for example, relies heavily or solely on religious values in her decision and if this reliance is clearly expressed in her written or oral opinion, then this could be an impermissible endorsement, particularly from the perspective of a sensitive observer who is nonreligious or whose religious values either were not considered or were dismissed in the judge's analysis. In contrast, if the judge merely acknowledges various religious values in her deliberative process or if she includes in her opinion religious values among numerous other factors, then it would be more difficult to call this an endorsement within the meaning of the Clause, especially from the vantage point of a less sensitive observer.

Of course, if a concern about endorsement leads judges simply to avoid disclosing their use of religious values when it comes time to writing opinions—a phenomenon which this Note argues is already occurring\textsuperscript{181}—or simply to mix those values in among other sources of input, then this may only underscore the absurdity of using endorsement as the touchstone of establishment in the first place. To put it another way, just as "[E]stablishment [C]lause analysis regarding a nativity scene should not depend on whether a symbol is presented along with other figures and decorations such as Santa Claus, reindeer, candy canes, and clowns,"\textsuperscript{182} Establishment Clause analysis regarding the judicial use of religious values should ultimately not depend on whether those values are hidden from the public's sight or flanked by a host of nonreligious justifications.

Finally, the satisfaction of Lemon's third prong (measuring government-religion entanglement) would be largely contingent on the judge's willingness and ability to remain institutionally and administratively detached from the religious sources which inform her decision.

\textsuperscript{180} The Court's requirement that government may not take actions which have the primary effect of advancing religion is of course foreign to the tone of this Note (particularly Part II.A-C), which argues antithetically that the removal of religion from law making is undesirable and that religion should in fact play a larger role in law making as a matter of tradition, political fairness, and social utility. Accordingly, the Establishment Clause analysis undertaken here should not be perceived, by the sensitive or insensitive observer, to be an endorsement of Lemon and its progeny.

\textsuperscript{181} See supra part II.D.

making. A serious Establishment Clause concern would surely arise, for instance, were a judge effectively to transfer some portion of her judicial decision making capacity to an identifiable religious entity—by regularly employing some kind of religious advisor, for example, or by soliciting the doctrinal imprimatur of her religious institution. Except for these obvious illustrations, however, it seems unlikely that a judge’s use of religious values when deciding cases, without more, would amount to the kind of excessive entanglement envisioned by current Establishment Clause doctrine.

C. The Issue of Judicial Competence

One final concern raised by the prospect of judges using religious values is the ever-present issue of judicial competence. As set forth in this Note, a judge’s proper use of religious values may require her to appreciate religious philosophy—if not also history, comparative religion, and ethics—at a level which she is not likely to possess. While the issue of judicial competence may be troublesome, however, two factors suggest that this concern, like the philosophical and constitutional concerns raised earlier, should not alone preclude judges from advert ing to religious values when deciding hard cases.

First, it is equally true that judges may lack competence in historical analysis or the social or physical sciences, and yet judges nevertheless frequently employ or refer to these areas when deciding cases. What must be important, then, is not the judge’s competence in a particular area, but rather whether that area is relevant to the case and is necessary to yield a well-informed, well-reasoned decision. Second, judges are already deciding disputes—certain Free Exercise Clause cases or child

183. See Tribe, supra note 7, § 14-11.
184. Cf. Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (“Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.”); Larkin v. Grendel’s Den, Inc., 459 U.S. 116 (1982) (invalidating a state statute which empowered churches and schools to veto liquor license applications for establishments within 500 feet of church or school grounds). In addition to finding a primary effect of advancing religion, the Larkin Court found the statute “offensive to the spirit of the Constitution” largely because it “enmeshed churches in the processes of government.” Id. at 127.
185. See Garvey, supra note 78, at 805 (“I see little to suggest that judges are by background skilled in the disciplines of systematic moral philosophy or theology and nothing in the processes of adjudication is likely to bring forth this needed expertise. Furthermore, judicial decisions seldom indicate that the courts have attempted a comprehensive moral analysis.”).
186. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (involving a rather extensive judicial inquiry into the nature of Old Order Amish religious beliefs and community); State v. Swartzentruber, 556 N.E.2d 531 (Ohio Mun. Ct. 1989) (similarly involving an inquiry into the nature and reasoning of Old
custody cases,\textsuperscript{187} for example—which require serious inquiries into the
nature of religious beliefs and values, even though judicial competence
may be a legitimate concern. Indeed, from the empirical perspective
discussed earlier,\textsuperscript{188} judges are inevitably employing religious values
even in cases which do not explicitly involve religion as such.

Therefore, while competence should always be a concern, a possible
lack of competence can hardly justify the exclusion of religious values
when they are relevant or helpful to the resolution of a case.\textsuperscript{189} In short,
judges should and will enter into their decision making all relevant
factors, and if religious values are one such relevant factor, then even
where competence is an issue, recourse to those religious values should
still occur as a matter of fundamental judicial responsibility

CONCLUSION

At a time when lawmakers are facing increasingly complex moral
questions, there ought to be great concern over how those questions are
addressed. Normally abstract inquiries—what it means to be a human
being, for example—are becoming concrete legal issues due to rapid
advances in technologies such as life-prolongation and genetic
engineering. Likewise, as the interrelatedness and fragility of the natural
world are increasingly appreciated, difficult ethical questions about the
human community’s relationship to that world and to other species are
necessarily being raised. If judges and other lawmakers are to find
meaningful answers to these and other hard questions, they must
ultimately go beyond the empirical data and the scientific models and
engage in serious moral inquiry, invoking certain values at the expense of
others.\textsuperscript{190}

\textsuperscript{187} See generally Donald L. Beschle, \textit{God Bless the Child?: The Use of Religion as a Factor in
Child Custody and Adoption Proceedings}, 58 FORDHAM L. REV. 383 (1989); Note, \textit{The Establishment
Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation}, 82
MICH. L. REV. 1702 (1984); Annotation, \textit{Religion as a Factor in Child Custody and Visitation Cases},

\textsuperscript{188} See supra part II.D.

\textsuperscript{189} To some extent, this assertion begs the question since the relevance or helpfulness of religious
values in any particular case is in part contingent on the judge’s own capacity to use those values in a
competent manner. As a result, there may be some point at which a lack of judicial competence might
actually outweigh the legal relevance of those religious values, such that their use would ultimately be
less, not more, helpful.

\textsuperscript{190} In this regard, the noted English jurist Lord Denning has remarked:

[\textit{I}f we seek truth and justice, we cannot find it by argument and debate, nor by reading
and thinking, but only by the maintenance of true religion and virtue. Religion concerns
As one response to the challenge facing lawmakers, this Note advocates the use of religious values as a legitimate, constructive, and even necessary element of judicial decision making. Despite the possible constitutional and philosophical concerns it raises, the inclusion of religious values in the law-making process can be justified—as this Note has attempted to do—by critically evaluating various assumptions about religious knowledge and by reexamining the relationship between religion and judicial law making from historical, constitutional, philosophical, utilitarian, and empirical perspectives. From the empirical perspective, in fact, the concern may not be one of justification, but rather of how competently judges are in fact using religious values.

Ultimately, a debate about the role of religious values in judicial decision making is necessarily part of the ongoing debate about the role of religion in public life. That larger debate is complex and at times quite heated, in no small measure because it asks core questions about who we are as citizens and as a country—as individuals and as a community—and about our competing normative visions of the law. To some, perhaps, the law should strive to be an arena of secular triumph; to others, the law should seek to be a profane embodiment of divine will. To the judge, however, the law must be a forum of justice, a precarious balance between these normative visions, lest it will become fundamentally illegitimate. Without such a balance the law will not work. Without justice, it will be dead.

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the spirit in man whereby he is able to recognise what is truth and what is justice; whereas law is only the application, however imperfectly, of truth and justice in our everyday affairs. If religion perishes in the land, truth and justice will also.
