

224. LPT

Draft

Published in *Political Theology* 16 (2015): 543-559

Law, Religion, and Reason in a Constitutional Democracy: Goodman v. Rawls

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Abstract

This Article responds to Lenn Goodman's book, Religious Pluralism and Values in the Public Sphere (2014). Part I evaluates Goodman's argument that John Rawls excludes "comprehensive" religious and moral arguments from public discourse. Part II analyzes Professor Goodman's prediction that it will be practically difficult to enforce Rawlsian standards of public reason, and then shows how this is the case in U.S. constitutional law wherein American courts have had difficulty applying "secular purpose" norms to contested legislation. Part III describes more recent trends in constitutional law that accommodate religious pluralism in laws and legislative processes. The authors argue that Goodman's interpretation of Rawls should be tempered by fuller engagement with Rawls's later writings, which were relatively open to the substantive roles of religion in public reason and public discourse. They further argue that recent trends in U.S. constitutional law may promote the types of pluralistic discourse that Goodman and the later Rawls advocate.

Keywords: Lenn Goodman; John Rawls; liberalism; religion in public life; secularism; secularization; secular purpose test; neutrality; values; pluralism; civility; comprehensive doctrines; United States Supreme Court; First Amendment; Establishment Clause; secular purpose test; *Lemon v. Kurtzman*; *Lynch v. Donnelly*; *Harris v. McRae*; *Webster v. Reproductive Health Services*; public religion; religious accommodation; religious freedom

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Introduction

In *Political Liberalism* (1993), John Rawls reflects on the roles of reason and morality in public discourse and political governance. The closing lines of his introduction are poignant and unapologetic about the argument he had developed in his famous book, *A Theory of Justice* (1971):

The wars of this century ... with their extreme violence and increasing destructiveness, culminating in the manic evil of the Holocaust, raise in an acute way the question whether political relations must be governed by power and coercion alone. If a reasonably just society that subordinates power to its aims is not possible and people are largely amoral, if not incurably cynical and self-centered, one might ask with Kant whether it is worthwhile for human beings to live on the earth? We must start with the assumption that a reasonably just political society is possible, and for it to be possible, human beings must have a moral nature, not of course a perfect such nature, yet one that can understand, act on, and be sufficiently moved by a reasonable political conception of right and justice to support a society guided by its ideals and principles. [*A Theory of Justice*] and [*Political Liberalism*] try to sketch what the more reasonable conceptions of justice for a democratic regime are and to present a candidate for the most reasonable. They also consider how citizens need to be conceived to construct those more reasonable conceptions, and what their moral psychology has to be to support a reasonably just political society over time. The focus on these questions no doubt explains in part what seems to so many readers the abstract and unworldly character of these texts.

I do not apologize for that.³

Lenn Goodman demands an apology. In his powerful new book, *Religious Pluralism and Values in the Public Sphere*, this formidable Jewish philosopher condemns Rawls' vision of justice as "fairness" for being hopelessly abstract – detached from nearly everything that gives meaning and dignity to real human beings and their relationships with one another. Where Rawls would have citizens of liberal democracies reason toward principles of justice from behind a veil of ignorance, Goodman encourages his readers to look hard and long at themselves, the world, and the people around them as they really are, in all of their complexities and particularities. Where Rawls would have citizens translate their distinctive "comprehensive" moral and

³ John Rawls, *Political Liberalism*, Extended Edition (New York: Columbia University Press, 2005), lix-ix.

religious convictions into idioms and norms that the general public can understand and appreciate, Goodman asks his readers to encounter their fellow citizens “with integrity” – honest and candid dialogue about their deepest convictions and dearest values, while listening attentively and critically to those with whom they differ. Where Rawls contemplates international consensus only around the barest moral minima of freedom from slavery, mass murder, and genocide, Goodman thinks that inclusion of candid and juxtaposed religious arguments and experiences in public debate would yield a much longer list of moral minima for just international relations – prohibitions not just of genocide but also induced famine, germ warfare, physical and psychological torture; terrorism, hostage taking, and impressment of child warriors; slavery, polygamy, and incest; rape, and female genital mutilation, and a good deal more. Goodman sometimes portrays Rawls’s view of religion in political discourse in ways that are uncharitable, even misleading. But he makes clear that the diversity of religious and moral commitments in pluralistic societies is a resource to be tapped, not a problem to be solved.

We respond to *Religious Pluralism and Values in the Public Sphere* in three parts. First, we evaluate Professor Goodman’s analysis of Rawlsian “public reason” and the restrictions (that he claims) Rawls imposes on public discourse. While we applaud Goodman’s thesis, we argue that Rawls, especially in his later works, was not nearly so averse to “comprehensive” moral and religious arguments in public discourse as Goodman contends. Second, we analyze the “secular purpose test” that the U.S. Supreme Court adopted in 1971 in its interpretations of the First Amendment prohibition on the establishment of religion. The test sought to impose on the legislative process some of the same ideas of mandatory secularism that Rawls allegedly proposed for public deliberation. The Supreme Court’s cases since 1971 illustrate nicely some of the conceptual and practical difficulties that Goodman predicts for a public and political process that purposely brackets religion. Third, we show that just as the later Rawls softened his stance on the value of religion in public debate, in a way that Goodman champions, so the Supreme Court has relaxed its mandatory secular purpose requirements and allowed for more substantive interaction between law and religion in public life and political deliberation. The United States is now closer to Professor Goodman’s ideals of public and political deliberation than it was a generation ago.

I. Religion in Public Reason and Political Discourse

Religious Pluralism and Values in the Public Sphere is more than a critique of John Rawls. Building on his previous works, including *God of Abraham* (1996) and *On Justice* (2008), Goodman articulates a vision of collaborative moral reasoning that is rooted in clear-eyed engagement with the contingencies of human experience, and the deeper truths upon which those experiences rest. In Goodman’s view, social bonds are forged through authentic encounters with the genuine other. Moral truth and political justice are best approximated when persons bring their best arguments, their deepest convictions, and a sense of mutual respect for one another to the conversation table. He offers “a simple thesis: that we humans, with all our differences in outlook and tradition,

can respect one another and learn from one another's ways, without sharing them or relinquishing the commitments we make our own."⁴

This thesis is not, in itself, objectionable. Even the most committed Rawlsian liberal would not contest its normative and descriptive force. Goodman's broader argument, however, cuts a sharp-edged path between the milquetoast relativisms and searing fundamentalisms that characterize so much of today's political discourse. Members of pluralistic societies, he argues, should not censor themselves, privatize or gloss over their differences, or naively romanticize the exotic other while showing contempt for the more familiar, domestic other. Nor should citizens foist sectarian parochialisms on their unreceptive neighbors. Instead, members of pluralistic societies ought to mine their respective moral traditions – including their religious moral traditions – for wisdom and insight about how to live together with integrity. "The profit of pluralism," Goodman contends,

is the space it allows for individuals and groups to *retain* their identity and commitments, not blurring the differences that make all the difference or blunting the seriousness that distinguishes high seriousness from mere entertainment.... [F]ruitful dialogue demands our knowing something about who we are ourselves, what we believe and care about, and how what is other *actually is other*.⁵

Thus, for Goodman, discerning the meaning of justice is anything but an abstract thought experiment conducted behind a veil of ignorance. It is a real and historical process: an actual debate among actual people – people who have actual lives and actual beliefs, hopes, fears, plans and needs. "[T]he kind of pluralism I advocate finds its ideal in an ongoing conversation among cultures in all their richness and among individuals in all their uniqueness." When it's done right, such pluralism sharpens our values like a whetstone sharpens a blade. "[I]t is in our big ideas," Goodman explains, "that we humans find ways of integrating thoughts with acts and find structural affinities that may help us link our local truths to one another. The logic of our commitments stands in relief as the family resemblances in our diverse ways of thought and action come into focus."⁶

⁴ Lenn E. Goodman, *Religious Pluralism and Values in the Public Sphere* (New York, NY: Cambridge University Press, 2014), 1. Also see Goodman at 86-87: "But religious voices may see harms that contractual models of human relations fail to register...The humanism that invigorates many a religious tradition is protective of human bodies and spirits. It vigorously contests the notion that we human beings are social isolates with no obligations to self or other beyond what we contractually assume...Religion, at its fairest reach, welcomes daylight unafraid of fair debate, even thoughtful probing of its deepest mysteries. But the public has little to fear in religious thoughts and proposals. What is strictly parochial will not win much purchase in an open society."

⁵ Goodman, *Religious Pluralism*, 2-3.

⁶ Goodman, *Religious Pluralism*, 107; 79.

Pluralistic discourse thus allows diverse persons and groups to learn and evaluate the contours, and limits, of their own moral traditions. Diverse communities discover which values they hold in common, and which they do not, by explaining to one another what they actually believe – not by imagining which values they might hold if they didn't know who they were. In short, the pursuit of justice, both as a concept and as an institutional reality, requires candid and thoroughgoing debates within and between moral communities. “A good government will foster religious thought and expression and promote metaphysical conversation and inquiry, not hide behind a factitious or fictitious scrim of value neutrality.”⁷

It is precisely this “scrim of value neutrality” – and the implicit privatization of religious and moral reasoning which it requires – that Professor Goodman finds so objectionable in Rawls's theory of justice. Goodman knows that Rawls doesn't, in any of his writings, advocate a formal ban on religious expressions in public spaces. He notes that Rawls “labors to delimit the scope of his restraints,” and he admits that Rawls never claims that the “duty of civility” – which implores citizens to make public arguments using idioms and norms that their fellow citizens can understand and appreciate – is anything more than a moral duty. “Rawls proposes no philosophical thought police,” Goodman concedes, and the type of “lively conversation that I envision might also occur under the high, plain arch that Rawls constructs.”⁸

Despite these caveats, Goodman argues that Rawls forbids religious and moral metaphysical arguments from playing any meaningful role in public discourse. In Goodman's view, Rawls argues that “religious and metaphysical discourse *has no proper place* at the deliberative table in a democracy,” and that citizens must, instead, “anchor their political activity and ground their political speech *solely on what their fellow citizens would find reasonable.*” Rawls's supposed exclusion of religion from public discourse makes his theory of justice anathema. Cutting out religion, morality, and their accompanying metaphysics from public discourse effectively saps the public sphere of its most vital and organic moral resources. It also sacralizes, under the banner of religious neutrality, the culturally flaccid values of a secular agenda. If political and other public spheres are closed to the ideas and values that citizens hold dear and believe true, Goodman asks, what's left to talk about? Why bother even to show up?⁹

Goodman's portrait of Rawls is unflattering and, in places, surprisingly uncharitable. His caveats about the restrictions that Rawls places on public reason and

⁷ Goodman, *Religious Pluralism*, 101.

⁸ See Goodman, *Religious Pluralism*, at 4-5; 54-55; 61; 69; 107. Goodman, *Religious Pluralism*, 107. Also see Rawls, *Political Liberalism*, at 213: “That public reason should be so understood and honored by citizens is not, of course, a matter of law.” And at 253: “I stress that the limits of public reason are not, clearly, the limits of law or statute but the limits we honor when we honor an ideal: the ideal of democratic citizens trying to conduct their political affairs on terms supported by public values that we might reasonably expect others to endorse.”

⁹ Goodman, *Religious Pluralism*, 5; 60. Emphasis added.

discourse don't do justice to Rawls's actual views, especially as they were expressed in two late works that Goodman does not analyze in this book. There is no doubt that, in *A Theory of Justice* (1971), Rawls excluded comprehensive moral and religious doctrines from the thought experiment he called the "original position." Goodman notes that Rawls's views on the place of religion in public reason and discourse shifted substantially in *Political Liberalism* (1993). Rawls's views shifted again, however, in a 1997 article, "The Idea of Public Reason Revisited" and his 2001 book, *Justice as Fairness: A Restatement*.¹⁰ In *Political Liberalism*, Rawls proposed an "inclusive view" of public reason that allowed citizens to introduce comprehensive doctrines in public discourse, but only in certain "nonideal" circumstances – for example, in the ante-bellum South, and the Civil Rights movement of the mid-1900s – and on the condition that such arguments also be translated into public, religiously neutral forms.¹¹ Rawls goes further, however, in "The Idea of Public Reason Revisited," and *Justice as Fairness: A Restatement*. There, he defends what he describes as a "wide view" of public reason. Under this wide view, citizens can introduce comprehensive doctrines "at any time" in public and political discussions.¹²

On the one hand, Rawls maintains that, in keeping with the duty of civility and the principle of reciprocity, even the "wide view" of public reason requires that people should eventually articulate "proper political reasons," instead of relying solely on comprehensive doctrines and distinctive insider language.¹³ Rawls refers to this norm as "the proviso," and points out, correctly, that citizens "will normally have practical reasons for wanting to make their views acceptable to a broader audience."¹⁴ On the other hand, Rawls insists that, under the "wide view" of public reason, citizens

¹⁰ John Rawls, "The Idea of Public Reason Revisited," *The University of Chicago Law Review* 64, no. 3 (1997); John Rawls (Erin Kelly, ed.), *Justice as Fairness: a Restatement* (Cambridge, MA: Harvard University Press, 2001).

¹¹ Rawls, *Political Liberalism*, 247-254.

¹² Rawls, "The Idea of Public Reason Revisited," 784.

¹³ Rawls, "The Idea of Public Reason Revisited," 783-784. Also see Rawls, *Justice as Fairness*, at 89-91. Rawls does not specify precisely when citizens should articulate "public" reasons. "It is important that it be clear and established that the proviso is to be appropriately satisfied in good faith. Yet the details about how to satisfy this proviso must be worked out in practice and cannot feasibly be governed by a clear family of rules given in advance. How they work out is determined by the nature of the public political culture and calls for good sense and understanding. It is important also to observe that the introduction into public political culture of religious and secular doctrines, provided the proviso is met, does not change the nature and content of justification in public reason itself. This justification is still given in terms of a family of reasonable political conceptions of justice. However, there are no restrictions or requirements on how religious or secular doctrines are themselves to be expressed; these doctrines need not, for example, be by some standards logically correct, or open to rational appraisal, or evidentially supportable. Whether they are or not is a matter to be decided by those presenting them, and how they want what they say to be taken. They will normally have practical reasons for wanting to make their views acceptable to a broader audience."

¹⁴ Rawls, "The Idea of Public Reason Revisited," 784.

themselves are responsible for working out when it is appropriate to translate between comprehensive and “proper political reasons.” In addition, he says:

there are no restrictions or requirements on how religious or secular doctrines are themselves to be expressed; these doctrines need not, for example, be by some standards logically correct, or open to rational appraisal, or evidentially supportable. Whether they are or not is a matter to be decided by those presenting them, and how they want what they say to be taken.¹⁵

Rawls isn't just stating the obvious fact that citizens are legally free to state their “comprehensive” moral and religious arguments in political debates. Rather, he argues that open and candid discourse about citizens' core values and beliefs can serve important functions. Such discourse reflects the sociological reality that “public reason” grows out of citizens' diverse comprehensive doctrines, and it engenders social trust. Rawls explains:

Citizens' mutual knowledge of one another's religious and nonreligious doctrines expressed in the wide view of public political culture recognizes that the roots of democratic citizens' allegiance to their political conceptions lie in their respective comprehensive doctrines, both religious and nonreligious.... We may think of the reasonable comprehensive doctrines that support society's reasonable political conceptions as those conceptions' vital social basis, giving them strength and vigor.¹⁶

Rawls goes still further, naming three viable forms of arguing from comprehensive doctrines:

One is declaration: here we each declare our own comprehensive doctrine, religious or nonreligious. This we do not expect others to share. Rather, each of us shows how, from our own doctrines, we can and do endorse a reasonable public political conception of justice with its principles and ideals.... In this way citizens who hold different doctrines are reassured, and this strengthens the ties of civic friendship.

The second form is conjecture, defined thus: we argue from what we believe, or conjecture, are other people's basic

¹⁵ Rawls, “The Idea of Public Reason Revisited,” 784.

¹⁶ Rawls, “The Idea of Public Reason Revisited,” 784-785.

doctrines, religious or secular, and try to show them that, despite what they might think, they can still endorse a reasonable political conception that can provide a basis for public reasons.... However, it is important that conjecture be sincere and not manipulative. We must openly explain our intentions and state that we do not assert the premises from which we argue, but that we proceed as we do to clear up what we take to be a misunderstanding on others' part, and perhaps equally on ours....

[The third form is] witnessing: it typically occurs in an ideal, politically well ordered, and fully just society in which all votes are the result of citizens' voting in accordance with their most reasonable conception of political justice.... While on the whole these citizens endorse reasonable political conceptions of justice supporting a constitutional democratic society, in this case they nevertheless feel they must not only let other citizens know the deep basis of their strong opposition but must also bear witness to their faith by doing so.¹⁷

Unlike in his earlier works, Rawls in these passages is describing a wide range of legitimate ways in which citizens can listen to, and give voice to religious and non-religious comprehensive doctrines in public and political fora. Citizens can declare their comprehensive doctrines, conjecture about the comprehensive doctrines of others, and witness to their comprehensive doctrines even in relatively just circumstances. This is very much along the lines that Goodman calls for – a discursive framework that is conducive to pluralistic members of society living and reasoning together “with integrity.” Not only are citizens legally free to voice their comprehensive doctrines in political discourse; Rawls positively encourages them to do so, not only to indulge their private reasons but also to deepen public reason.¹⁸

Rawls's critics, and perhaps Professor Goodman among them, might respond that these late developments in Rawls's thought are superficial concessions intended to pacify a certain set of (religious) critics. After all, Rawls still insists that citizens should, in due course, articulate their arguments and justify their votes in terms and norms that other “reasonable” citizens can understand and appreciate. Under this view, Rawls still treats “comprehensive doctrines” as mere decorations that must be taken down before the real business of democracy begins. And, his notion of “reasonableness” is just

¹⁷ Rawls, “The Idea of Public Reason Revisited,” 786-787.

¹⁸ Professor Goodman, in places, conflates the implications of Rawls's early conception of the “original position,” with its corresponding “veil of ignorance,” with Rawls's later conception of “public reason” and the “overlapping consensus” of reasonable comprehensive doctrines. See, for example, Goodman, *Religious Pluralism*, at 61-62; 75-76.

another way of describing norms that are consistent with the status quo.¹⁹ Such an interpretation, however, fundamentally distorts the notion of an “overlapping consensus” that Rawls proposes in *Political Liberalism* and subsequent works, and unjustly trivializes the deep shifts in Rawls’s view on the sociological and political roles of religion (and other comprehensive doctrines) in public reason and discourse.²⁰

It is true that the overlapping consensus consists of a limited set of political values. As such, those who would use the machinery of the state as a means of imposing a totalitarian view of human flourishing won’t be welcome in a Rawlsian democracy. But the overlapping consensus also presumes that citizens endorse this limited set of political values for comprehensive reasons. How is a just political order possible, given the moral, cultural and religious diversity that inevitably characterizes modern liberal democracies? Rawls contends that it’s possible if and when people are “reasonable” – reasonable in the moral (not epistemological) sense of being willing to treat others with reciprocity, as free and equal members of society. Even Goodman admits, “Naturally it is obnoxious to have dogmas drummed into one’s head or to be bombarded with symbols one cannot revere. Such treatment is exclusionary and invidious. Nor is it enough to hope that prudent advocates will spurn parochial appeals. History, including recent history, teaches all too bitterly that chauvinism can win a mass following.”²¹ If this is the case, however, is it really too much to ask citizens to consider how legal norms and institutions might affect their free and equal fellows? Does that norm truly stifle substantive moral and political debates?

All of this is to say that Professor Goodman might have more in common with (the later) John Rawls than he acknowledges in this book. Goodman emphasizes the moral imperative for diverse citizens to speak with authenticity and “integrity” in their discussions with one another about moral and political norms, whereas Rawls emphasizes the imperative for citizens to consider the diverse perspectives of others who will be subject to the laws and institutions that citizens of liberal democracies devise together. These different emphases belie deeper, substantive differences between Goodman’s “Mosaic liberalism” and Rawls’s “political liberalism.” But Goodman surely overstates his case when he accuses Rawls of attempting to silence all religious

¹⁹ See Goodman, *Religious Pluralism*, at 59: “[Rawls] fights shy of asking everyone to reach identical conclusions, but insists we invoke only grounds that all citizens will find reasonable. What people find reasonable, however, is often what sounds familiar. So, proposals grounded in considerations that might seem novel, revolutionary, even eye-opening can be ruled out of court.”

²⁰ See Goodman, *Religious Pluralism*, at 57.

²¹ Goodman, *Religious Pluralism*, 60. Also see Goodman at 89: “Clearly we should resist the sectarian suborning of state authority, the imposition of religious dogmas and practices whose meanings and trappings are unwanted by those over whom they are cast. But the risks in such a case are hardly just political. The loss of spiritual sincerity is also a great danger. Religious establishment breeds decadence and saps the values that make religions worthy of encounter. There is enough hypocrisy attendant on the institution of religion without the confounding influence of the powers of the state and the privileges at its command. But what follows is the need to separate religious from political institutions, not to isolate policy from thought whenever thinking lifts its eyes above the pragmatic.”

and metaphysical claims in public discourse, and when he argues that, for Rawls, “all speech aiming to steer public policy ... is ultimately coercive.”²² The later Rawls was, in fact, far more liberal in allowing religious and moral metaphysical claims to play a substantive role in political discourse and law-making processes than Professor Goodman suggests.

II. Experimenting with the Constitutional Exclusion of Religion from Legislation

These debates about the place of comprehensive doctrines of religion and morality in public deliberation are not just idle academic exercises – the stuff of political theory, political science, or political rhetoric. These are also core topics of constitutional law. In the 1970s and 1980s, the United States Supreme Court tried enforcing a strictly secularist approach to law-making along the lines of early Rawlsian liberalism. The experiment largely failed. In more recent years, the Court has retreated to a more pluralistic recognition of religious and non-religious voices and values in public debate and political law-making, seemingly heeding the lessons taught to us by Goodman and the later Rawls.

The First Amendment to the United States Constitution proclaims famously that “Congress shall make no law respecting an establishment of religion.” In 1971 – the same year that Rawls published *A Theory of Justice*, and secularization theories were in full flush on many university campuses – the United States Supreme Court adopted a constitutional doctrine known as the “secular purpose test.” The Court formulated this test in *Lemon v. Kurtzman* (1971) as a means to evaluate the constitutionality of federal, state, and local laws challenged under the Establishment Clause. In order for any contested law to be valid, the Court declared:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’²³

This *Lemon* test, as it is conventionally called, proved to be a widely influential method for applying the Establishment Clause for the next quarter century. The Supreme Court itself applied this test primarily in cases challenging the traditional state

²² Goodman, *Religious Pluralism*, 58. Also see Goodman at 57-59; and 62: “Does a liberal society silence public expression of the deepest conviction of its members or of the views that those members expect to resonate most deeply in hearts they hope to win over? To invoke social pressure to limit the range of values to which advocacy might appeal is in effect to squelch thought, speech, and action in ways inherently abhorrent to the liberal dispensation.”

²³ *Lemon v. Kurtzman*, 403 U.S. 602 (1971), 612-13.

patronage of religious education, devoting nearly three quarters of its Establishment Clause cases to this issue. Public schools, the Court held repeatedly, could not offer prayers or moments of silence, could not read Scripture or religious texts, could not house Bibles or prayer books, could not teach theology or creationism, could not display Decalogues or other religious symbols, and could not use the services, facilities, or teachers of religious schools. The Court also removed religious schools from much traditional state support. States could not provide salary and service supplements to religious schools, could not reimburse them for administering standardized tests, could not lend them state-prescribed textbooks, supplies, films, or counseling services, could not allow tax deductions or credits for religious school tuition, and more.²⁴

Following the Supreme Court's lead, the lower courts further used this "secular purpose" test to outlaw all manner of government subsidies for religious charities, social services, and mission works, government use of religious services, facilities, and publications, government protections of Sundays and other holy days, government enforcement of blasphemy laws, government participation in religious rituals and religious displays, government use of religious arguments or premises in crafting legislation, prosecuting crimes, or implementing services. It must be emphasized that it often did not take law suits to effectuate these reforms. In much the same way that traffic laws affect how people drive, even though relatively few drivers receive traffic tickets on a given day, constitutional norms and methods affect how citizens and legislators legislate, even if relatively few laws are overturned on constitutional grounds. Particularly local governments, sensitive to the political and fiscal costs of constitutional litigation, often voluntarily ended their prayers, removed their Decalogues, silenced their religious speeches in chambers, and closed their coffers to religion long before any case was filed against them. The "secular purpose" test of the Establishment Clause seemed to demand this.

In many of these cases, however, the "secular purpose test" proved to be as conceptually and practically problematic for courts as Professor Goodman would have predicted.²⁵ The Supreme Court and lower courts have argued variously that the "secular purpose" of a statute refers to (1) the end, purposes or functions of the law as it stands; (2) the legislators' apparent motives or rationales for enacting a law; (3) the legislators' stated reasons for enacting a law in the state, legislative history and record; or (4) the meaning, or "message" that legislative acts seem to convey to reasonable citizens, regardless of the legislators' motives, intent, or stated rationales for the law.²⁶

²⁴ See John Witte, Jr. and Joel A. Nichols, *Religion and the American Constitutional Experiment*, 3rd ed. (Boulder, CO: Westview Press, 2011).

²⁵ Goodman, *Religious Pluralism*, 5.

²⁶ For detailed sources and discussion see Justin J. Latterell, "The Constitution of Religious Liberty: Religion, Power, and the Birth of the Secular Purpose Test, 1844-1971" (PhD Diss., Emory University, 2014). Also see Josh Blackman, "The Lemon Comes as a Lemon: The Lemon Test and the Pursuit of a Statute's Secular Purpose," *George Mason University Civil Rights Law Journal* 20 (2009-2010); Mark DeForrest, "The Use and Scope of Extrinsic Evidence in Evaluating Establishment Clause Cases in Light

The ample slippage in these approaches to mandatory “secular purposes” has allowed individual judges to find ways of arguing both for or against the constitutionality of a law or policy challenged under the Establishment Clause.

The 1984 case of *Lynch v. Donnelly* is a good example. There litigants challenged the inclusion of a crèche, or nativity scene, as part of a large annual Christmas display erected in a private park by the city of Pawtucket, Rhode Island. The crèche was positioned in the midst of other figures, including Santa Clause, reindeer, talking wishing wells, candy-striped poles, a clown, an elephant, a teddy bear, colored lights, and a large banner that read, “Seasons Greetings.” The Court narrowly affirmed the constitutionality of the city’s display, interpreting the secular purpose test as a requirement that government entities must not intentionally advance or otherwise promote religion.²⁷

Writing for the *Lynch* majority, Chief Justice Warren Burger concluded that, viewed as a whole, the display did not reflect “a purposeful or surreptitious effort to express some kind of subtle government advocacy of a particular religious message.” The display seemed intended to acknowledge a significant holiday, without endorsing or promoting the religious meaning of that holiday. It did not celebrate Christmas so much as it celebrated the community’s celebration of Christmas. “In a pluralistic society a variety of motives and purposes are implicated,” Burger explained. “The City, like the Congresses and Presidents [of the United States], has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.... These are legitimate secular purposes.” The primary effect of displaying the crèche as part of the broader holiday display was not to advance Christianity, but to “engender a friendly community spirit of good will” that “brings people into the central city, and serves commercial interests and benefits merchants.” Governmental participation in and support of such “ceremonial deism” cannot be assessed by “mechanical logic” or “absolutist tests” of establishment, Burger concluded. “It is far too late in the day to impose a crabbed reading of the Establishment Clause on the country.”²⁸

In concurrence, Justice Sandra Day O’Connor described the display as a form of government speech the constitutionality of which depended both on the intentions of city officials who erected the display and on its objective meaning viewed by a reasonable observer. The “secular purpose” prong of the *Lemon* test, “asks whether [the] government’s actual purpose is to endorse or disapprove of religion.” The primary effect

of the *Lemon* Test’s Secular Purpose Requirement,” *Regent University Law Review* 20 (2007-2008); Andrew Koppelman, “Secular Purpose,” *Virginia Law Review* 88, no. 1 (2002).

²⁷ *Lynch v. Donnelly*, 465 U.S. 668 (1984). For a particularly insightful analysis of the *Lynch* opinion, see Winnifred F. Sullivan, *Paying the Words Extra: Religious Discourse in the Supreme Court of the United States* (Cambridge, Mass: Harvard University Press, 1994).

²⁸ See *Lynch v. Donnelly*, at 680; 687.

prong asks whether “the practice under review in fact conveys a message of endorsement or disapproval.” Applying this logic, O’Connor concluded that this display did not violate the Establishment Clause. City officials had not intended “to convey any message of endorsement of Christianity or disapproval of non-Christian religions” but to celebrate “the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.”²⁹

In dissent, Justice William Brennan insisted that the crèche injected an overtly religious symbol into the display. “To be found constitutional,” Brennan wrote, “Pawtucket’s seasonal celebration must at least be non-denominational and not serve to promote religion. The inclusion of a distinctively religious element like the crèche, however, demonstrates that a narrower sectarian purpose lay behind the decision to include a nativity scene.” The crèche is inherently religious in nature, Brennan noted, and the city’s mayor was on record stating that removing the crèche would represent “a step towards establishing another religion, non-religion that it may be.” Based on this testimony, Brennan concluded that the crèche served the “wholly religious” purpose of keeping “Christ in Christmas.”

Unlike such secular figures as Santa Claus, reindeer and carolers, a nativity scene represents far more than a mere ‘traditional’ symbol of Christmas. The essence of the crèche’s symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His son into the world to be a Messiah. Contrary to the Court’s [majority] suggestion, the crèche is far from a mere representation of a “particular historic religious event.” It is, instead, best understood as a mystical re-creation of an event that lies at the heart of Christian faith.³⁰

The Supreme Court would remain divided like this in later religious symbolism cases. For example in *Van Orden v. Perry* (2005), a 5-4 Supreme Court concluded that a large stone monument depicting the Ten Commandments on the grounds of the Texas State Capitol was valid, in part, because it conveyed “a predominantly secular message.” But in *McCreary County v. ACLU*, issued the same day, a 5-4 Supreme Court struck down a Ten Commandments display in a Kentucky county courthouse, because its erection was inspired by an improper “religious motive” contrary to the secular purpose requirement.³¹

²⁹ *Lynch v. Donnelly*, 690.

³⁰ *Lynch v. Donnelly*, 700-701; 711.

³¹ *Van Orden v. Perry*, 545 U.S. 677, 702 (2005); *McCreary Co. v. ACLU*, 545 U.S. 844, 863 (2005).

The secular purpose test has also informed Supreme Court rulings on laws regulating abortion, sex, and end-of-life issues – where deep religious and moral arguments have always been preeminent. In *Harris v. McRae* (1980), for example, the Court reaffirmed the principle that laws could “harmonize with the tenets of some or all religions” without thereby violating the secular purpose test and establishing religion. Appellees in *Harris* had argued that a controversial law known as the Hyde Amendment, which barred federal funding for most abortion procedures, essentially gave legal force to “the doctrines of the Roman Catholic Church,” and thereby violated the Establishment Clause. The Court refuted this claim, however, concluding that the Hyde Amendment reflected “traditionalist” values as much as it embodied “the views of any particular religion.” The fact that certain provisions of the law coincided with “the religious tenets of the Roman Catholic Church” did not, in the Court’s view, “contravene the Establishment Clause.”³²

By contrast, in *Webster v. Reproductive Health Services* (1989),³³ Justice John Paul Stevens took the opposite approach. The preamble to the Missouri statute at issue in *Webster* stated declared that: “(1) The life of each human being begins at conception; (2) Unborn children have protectable interests in life, health, and well-being.”³⁴ The *Webster* Court’s majority opinion did not address Establishment Clause issues; Justice Stevens’ concurring opinion did, and he argued that the preamble violated the secular purpose requirement. Such “an unequivocal endorsement of a religious tenet of some by no means all Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause.”³⁵ For Stevens, religious moral “tenets” were not merely insufficient or irrelevant as grounds for the State’s definition of personhood; they were constitutionally suspect. Personhood, as far as the state was concerned, could only be based on “secular” considerations, Stevens argued, such as an organism’s level of sentience or capacity for suffering. Legal personhood was not a function of an organism’s supposed possession of a soul:

³² See *Harris v. McRae*, 448 U.S. 297, 319-20 (1980). Appellees also argued that the Hyde Amendment unduly restricted the Free Exercise rights of Protestant and Jewish women who might feel religiously compelled to have an abortion under circumstances that were prohibited by the law. The Court did not address this argument in its written opinion. Briefs submitted to the Court, however, outline the substance of this claim in detail, with references to the writings of numerous religious ethicists, including Philip Wogaman, Paul Ramsey, and others. See WL 339642 (U.S.), at 68ff.

³³ See *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

³⁴ The statute further provided, among other things, that: “Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.” See Mo. Ann. Stat. § 1.205 (West).

³⁵ *Webster v. Reproductive Health Services*, 566-67 (Stevens, concurring).

As a secular matter, there is an obvious difference between the state interest in protecting the freshly fertilized egg and the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth. There can be no interest in protecting the newly fertilized egg from physical pain or mental anguish, because the capacity for such suffering does not yet exist; respecting a developed fetus, however, that interest is valid. In fact, if one prescind the theological concept of ensoulment—or one accepts St. Thomas Aquinas' view that ensoulment does not occur for at least 40 days—a state has no greater secular interest in protecting the potential life of an embryo that is still “seed” than in protecting the potential life of a sperm or an unfertilized ovum.³⁶

We can duplicate cases illustrating how the seemingly simple “secular purpose” test of *Lemon* has been twisted in all manner of shapes by the Supreme Court and lower federal courts both to uphold and strike down statutes. This is not to castigate the Court for its casuistry, but to illustrate the difficulties and dangers of trying to exclude religion from public life, logic, and law-making.

One salutary effect of the secular purpose test is that, in an increasingly pluralistic age, legislators have had to work harder to translate their religious arguments into more inclusive terms, and to adduce further rationales for pressing their laws than simply invoking sacred texts or traditions. This has sometimes strengthened traditional laws, sometimes led to their reform.

But a less salutary effect is that the secular purpose test has too often led to strategic obfuscation of religious purposes, motives, or language in legislative debate. Scholars of the legislative process have shown that legislators have sometimes camouflaged their religious motives or rationales, at the cost of deeper, more candid, and more meaningful deliberation about fundamental legal issues. Some legislators have censored themselves or remained silent during legislative debates, feeling duty-bound or socially pressured to neither voice religious arguments nor apply religious norms when casting their votes. Others have manipulated the legislative record to convey permissible legislative purposes where impermissible ones may have, in fact, carried the day. Others have made tortured arguments that religious symbols, services, programs, teachings, or practices in question are actually secular. All this has often served to create, in Professor Goodman's apt phrase, “a factitious or fictitious scrim of value neutrality” in laws that inevitably reflect deep moral and religious convictions.³⁷

³⁶ *Ibid.*, 569.

³⁷ As Josh Blackman has argued, “Knowing that courts are forced to rely on extrinsic evidence like legislative history to analyze the purpose prong of the *Lemon* test, politicians have a strong incentive to

Professor Goodman aptly describes how citizens' political ideals are often closely bound with their religious and metaphysical values and beliefs. Attempting to peel apart, or distill purely secular arguments from their religious and metaphysical foundations is difficult at best, and folly at worst, Goodman urges. The secular purpose test has forced this issue to the constitutional fore. Both courts and legislatures have struggled to discern what makes a legislative purpose "secular" enough to pass constitutional muster. The problem is only compounded when attempting to discern the purpose of a statute that was likely enacted by a simple majority of a religiously and morally diverse legislature. After all, legislative bodies and constituencies might seek to promote secular ends for religious reasons, or religious ends for secular reasons. Anti-poverty programs, abortion regulations, marriage laws, and even basic property rights have deep ties to, and implications for many religious traditions. In that case, against which secular or religious benchmarks should courts evaluate the character of a statute's purposes? At what point does the overlap between religious and nonreligious rationales, language, and norms behind a given law become too substantial to clear the secular purpose test? To date, the secular purpose test has provided few clear answers.

III. Toward a New Constitutional Understanding of Law, Religion and Morality

While firm "secular purpose" tests and a strict "separation of church and state" logic remain for many the enduring teachings of the First Amendment, the U.S. Supreme Court has largely abandoned this approach and is moving toward a more pluralistic conception of public life and public law.³⁸ Beginning already in the late 1980s, and escalating in more recent cases, the Court has numerous times upheld government policies that support the public access and activities of religious individuals, groups, and services – so long as these religious parties act voluntarily, and so long as non-religious parties also benefit from the same government support. Under this new approach, clergy were just as entitled to run for state political office as laypersons and non-religious candidates. Church-affiliated pregnancy counseling centers could be funded as part of a broader federal family counseling program. Religious student groups could have equal access to state university and public school classrooms that were open to non-religious student groups. Religious school students were just as entitled to avail themselves of general scholarships, remedial, and disability services as public school students. Religious groups were given equal access to public facilities or civic education programs that were already opened to other civic groups. Religious parties were just as entitled as non-religious parties to display their symbols in public forums. Religious student newspapers were just as entitled to public university funding as those of non-religious student groups. Religious schools were just as entitled as other private schools

manipulate the legislative history so a future case can be resolved in accordance with their personal views. Blackman, "The Lemon Comes as a Lemon," 409-10.

³⁸ See detailed case analysis in John Witte, Jr. and Joel A. Nichols, *Religion and the American Constitutional Experiment*, 3rd ed. (Boulder, CO: Westview Press, 2011), chs. 7-12.

to participate in a state-sponsored educational improvement or school voucher or educational program.

The Court has defended these holdings on wide-ranging constitutional grounds – as a proper accommodation of religion under the establishment clause, as a necessary protection of religion under the free speech or free exercise clauses, as a simple application of the equal protection clause, among other arguments.

One theme common to many of these cases, however, is that public expressions of religion must be as free as private exercises of religion. Not because the religious groups in these cases are really non-religious. Not because their public activities are really non-sectarian. And not because their public expressions are really part of the cultural mainstream. To the contrary, these public groups and activities deserve to be free, just because they are religious, just because they engage in sectarian practices, just because they sometimes take their stands above, beyond, and against the mainstream. They provide leaven and leverage for the polity to improve.

A second theme common to these cases is that the freedom of public religion sometimes involves interaction with the state. Today's state is not the distant, quiet sovereign of Jefferson's day from whom separation was both natural and easy. Today's modern welfare state, whether for good or ill, is an intensely active sovereign from whom complete separation is impossible. Few religious bodies can now avoid contact with the state's pervasive network of education, charity, welfare, child care, health care, family, construction, zoning, workplace, taxation, security and other regulations. Both confrontation and cooperation with the modern state are almost inevitable for any religion. When a state's regulation imposes too heavy a burden on a particular religion, the free exercise clause should provide a pathway to relief. When a state's appropriation imparts too generous a benefit to religion alone, or imposes overtly religious duties on the general public, the establishment clause should provide a pathway to dissent. But when a general government scheme incidentally provides public religious groups and activities with the same benefits afforded to all other eligible recipients, establishment clause objections are misguided.

A third theme common to these cases is that a public religion cannot be a common religion. If the religious gerrymandering of *Lynch v. Donnelly* and its progeny had not already made this clear, more recent cases underscore the point. Today, our public religion must be a collection of particular religions, not the combination of religious particulars. All religious and nonreligious voices, visions, and values should be heard and deliberated in the public square. Every religious idea and activity, unless criminal or tortious, should be given a chance to come forth and compete, in all their particularity. The fact that an argument is rooted in a moral tradition or set of experiences that others find unfamiliar is, in a pluralistic democracy, all the more reason to welcome such arguments, if only to vet them, in the public sphere.

The burgeoning of religious voices in the public square in recent years should not be met with glib talk of censorship or habitual incantations of Jefferson's metaphorical wall of separation between church and state. Nor should nonreligious voices be silenced or dismissed with claims that United States' is a narrowly "Christian nation." Pluralism, as Professor Goodman explains, "means openness, interest, and recognition of the room the universe affords for those who differ intellectually, morally, and spiritually."³⁹ Pluralistic politics, therefore, should be open to a wide range of religious and nonreligious constituencies who test and contest one another's premises, prescriptions, and policies. That is how a healthy democracy ultimately works. The real challenge of public religion is not to the integrity of American politics, but to the apathy of the American public. It is a challenge for peoples of all faiths and of no faiths to take their place in the marketplace of ideas.

American courts have not solved all of the riddles facing lawmakers and citizens in today's pluralistic society. More than a few of the Supreme Court's recent decisions have been puzzling, if not baffling. Yet, along with thinkers like Lenn Goodman and John Rawls, American courts are coming to recognize plausible alternatives to purist forms of secularism and sectarianism. The law is beginning to make room for religious pluralism in public life.

This trend is cause for optimism. For all of the potential pitfalls facing modern democracies, open and candid dialogue between diverse constituencies can serve as a path between the Scylla and Charybdis of social apathy and totalitarian government. In light of shifting norms in constitutional law, Americans would do well to heed the complementary insights of both Rawls and Goodman. With Professor Goodman, we should seek to engage one another with integrity, bringing the richness of our respective experiences and traditions to bear on our shared pursuit of the common good. Citizens have real interests and ideas that deserve a public hearing; winnowing down public discourse to a predetermined list of "basic goods" jettisons too many important matters. Lest our quest for authenticity lapse into base forms of political egoism, however, we should also heed Rawls, and engage one another with civility and reciprocity, treating those with whom we share the task of self-governance as free and equal members of society. The rights of suffrage and free speech, after all, come with a host of moral and political duties – not least of which is the duty to devise laws that advance the rights and interests of all, not just the few or the powerful. The right to speak and vote with integrity is most useful and just when coupled with a duty to listen to others when they do the same.

³⁹ Goodman, *Religious Pluralism*, 3.

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