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OH GOD! CAN I SAY THAT IN PUBLIC?

DOUGLAS W. KMIEC*

The papers in this symposium inquire whether there is an appropriate place for religious discourse in the American public square. It is a jarring, but necessary, inquiry for a Nation founded upon both the presupposition of the existence of a Supreme Being and the unfettered individual freedom to deny, disregard, and even disparage such belief. The founding generation, of course, saw no necessary conflict between a simultaneous corporate or sovereign affirmation of a Creator and individual immunity from legal coercion in matters of religion. The Declaration of Independence fixed a national philosophy and a location of unalienable (that is, pre-political and pre-governmental) rights in a Creator. The Bill of Rights and its two-part security for the individual pursuit of religious freedom—a protection against both having to attend or support a national church (no establishment) and immunity from interference with one’s chosen means of religious belief or practice (free exercise)—abides analytically then, and now, in harmony. After all, that my government sees God’s hand does not force mine.

The modern age—or present circumstance—puts corporate or sovereign philosophy and individual freedom on a collision course. In the last half century, accommodating religious freedom has come to be misconstrued as impermissible religious endorsement, and the democratic process has obscured the proposition that a government by consent was only possible because we were all declared to be equal—not in talent or advantage—but before God, and a century and Civil War later, “under law.” For this reason, the question of religiously-grounded argument in the public discourse is a sensitive one. Failure to allow religiously influenced perspectives can reasonably be argued not only to deny the Nation’s foundational presupposition, but also to

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start us down the road of censorship, whether by self or legal proscription. Alternatively, over reliance upon religious source can be claimed to result in divisiveness and discord among a free people immersed in the cultural uniformity of the same cable channels and fast food restaurants. More threateningly, when rogue nations, or menacing individuals with alliances with those nations, anchor public policy upon religion, there may even be an invitation to religious war—a prospect that before 9-11 seemed distant or remote, but now has some regrettable plausibility.

How is one to know the proper scope of public reliance upon God? Most of us are introduced to the faith of our families. Family instruction, being both highly personal and early given, inevitably gives this handed-down religious tradition a place of far greater theoretical significance in our individual formation than the accidents of money, politics, or other temporal influences. Yet, when we leave home, how free are we to speak and act upon religious obligation in public settings—the schoolhouse, the legislative assembly, or the judicial bench? Each religious tradition would surely give a somewhat different answer. For example,

Islam is not a faith of isolation or a faith which encourages monasticism. Its moral order demands an ethical system which requires the Muslim to meet and fulfill the responsibility and obligation (taklif) of the divine trust. . . . The ideal for Muslims is to live in an Islamic State where the Islamic ideals of rule and shari'ah prevail.¹

By contrast, since the Second Vatican Council, Catholic teaching is that "the human person has a right to religious freedom" premised upon the very dignity of that human person.² "The right of the human person to religious freedom is to be recognized in the constitutional law whereby society is governed and thus it is to become a civil right."³ Of course, this has not always been the Catholic view. Pope Leo XIII wrote as late as 1895 in Longinqua oceani that "it would be very erroneous to draw the conclusion that in America is to be sought the type of the most desirable status of the Church, or that it would be universally lawful or expedient for State and Church to be, as in America, dissevered

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³ Id.
The word "religion" may well be derived from the Latin religio, meaning "to bind," but it is obvious that to what one is bound differs across denominations, and by change in interpretation, within denominations as well.

All this is further complicated by some unique American confusions over the meaning of the religion clauses in Constitutional text. There is a profound difference between the separation of church and state and the constitutional freedom of religion. The difference was of immense importance to the founders, yet, as a comprehensive recent history reveals, "[f]or many Americans, the difference between these ideals has become difficult to discern." The founding generation may have differed over the wisdom of established churches among the several States, or even direct financial assistance to churches generally, but they "did not reject the utterly conventional assumption that there was a necessary and valuable moral connection between religion and government."6

While Thomas Jefferson is credited with coining the metaphor of a "wall of separation between church and state," it is now well-documented that separationism took hold in America late in the nineteenth century—prompted by Protestant fears of Catholic immigrants and stoked by the bigotry and violence of the Ku Klux Klan.7

Protestants assumed that the separation of church and state limited Catholics in their relations with government but not Protestants, because whereas Catholics seemed to defer to their church and act on its behalf, Protestants presumably followed the dictates of their individual consciences and, in any case, belonged to diverse denominations.8

Separationism became the mantra by which particular religious believers were screened out of political matters.

In the 1870s the National Liberal League attempted to use the idea of separation of church and state to limit the political participation of religious groups and to challenge otherwise secular laws that benefitted these groups, that were

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5. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 480 (2002).
6. Id.
7. Id. at 407-31.
8. Id. at 481.
influenced by them, or that coincided with their distinctive moral obligations.9

It is too glum a tale to recount here how Hugo Black, whose association with the Klan did not become public until after the Senate confirmed him as associate justice of the United States in 1937, would go on to enshrine the erroneous assumption of separationism into Court precedent. This account is now objectively and dispassionately documented.10 The Klan had provided the young Justice Black with his vehicle of prominence in election to the U.S. Senate from Alabama. With the Grand Dragon of the Klan his unofficial campaign manager, Black crisscrossed the State. Said James Esdale, the Klan leader, “I arranged for Hugo to go to Klaverns all over the state, making talks on Catholicism . . . Hugo could make the best anti-Catholic speech you ever heard.”11 Ten years after his appointment to the Supreme Court bench, Justice Black in Everson v. Board of Education of the Township of Ewing,12 would transform religious freedom into separation with the following assertion: “[t]he ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another.”13 While shrouded between two unassailable precepts against a national church or religious favoritism, the middle proposition proposing to make government separate (and therefore indifferent) from all religion would thereafter trouble the Court and the nation.

The extent of that separation is no better revealed than in the Ninth Circuit’s insustainable proposition that the pledge of allegiance cannot contain the words “under God.” In Newdow v. United States Congress,14 Michael Newdow, a self-proclaimed atheist, sought to prevent a local California school district from having the school day begin with the pledge of allegiance. California state law requires schools to begin with a patriotic exercise,15 and the pledge satisfies this requirement. No student is compelled to recite the pledge, so Newdow’s complaint—which he filed against the Congress, the President, the school

9. Id. at 484.
10. Id. at 429.
11. Id. at 427 (citing ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 104 (1994); see also DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 117 (1977)).
13. Id. at 15–16.
14. 292 F.3d 597 (9th Cir. 2002) (subsequently corrected in minor respects).
district, and various others—complained merely that his daughter had to “watch and listen.”

Since 1954, the pledge has contained the words, “one nation under God.” Newdow wanted the court to order the President and Congress to remove the words. Properly, the court found that neither the President nor Congress were proper parties and that the federal judiciary could not simply order them to strike words from duly enacted statutes.\(^\text{16}\) It was surprising that the court even found Newdow to have standing, since he is reported to be a non-custodial parent whose wishes directly contradict those of the custodial parent and the child.\(^\text{17}\) Be that as it may, the court enjoined the school district from the recitation of the pledge.\(^\text{18}\)

The court’s thinking, in addition to being in direct contradiction of the Declaration, which it nowhere acknowledges, and the reasoning of the Seventh Circuit, which it dismisses,\(^\text{19}\) is mechanical and conclusory at best. The court writes: “[t]o recite the Pledge is not to describe the United States,” but it does not explain why not.\(^\text{20}\) Mocking the founders, the court majority proposes that reciting that we are a nation under God is identical to being a nation “under Zeus.”\(^\text{21}\) Here, the court does explain, but it is an explanation anchored in Justice Black’s faux neutrality. The school’s practice, complains the court, is not “neutral with respect to religion.”\(^\text{22}\) So, the court reasons, bring on the censors and the historical revisionists.

Judge O’Scannlain, for himself and five other members of the Ninth Circuit, dissented from the denial of the rehearing en banc of Newdow.\(^\text{23}\) Calling the Ninth circuit panel decision a “serious mistake,” Judge O’Scannlain carefully illustrates the nature of the error by beginning with the rather obvious fact that the pledge is simply not a religious act.\(^\text{24}\) To think it so, is to put the Declaration of Independence, the Gettysburg Address, the National Motto, and even the National anthem in jeopardy of establishment clause invalidation. This would make hypocrites of the founders, say the dissenting judges, and drive “any and all

\[^{16}\] Newdow, 292 F.3d at 602.
\[^{17}\] Id.
\[^{18}\] Id. at 612.
\[^{19}\] See Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992).
\[^{20}\] Newdow, 292 F.3d at 607.
\[^{21}\] Id. at 607–08.
\[^{22}\] Id. at 608.
\[^{24}\] Id. at 776.
references to our religious heritage out of our schools, and eventually out of our public life."\textsuperscript{25}

The Supreme Court has had a difficult time interpreting the religion clauses, but thirteen justices, including five members of the present Court, have opined at various times that the words of the pledge are not a prayer, and by reasoned implication, not unconstitutional. The words may solemnize, they may seek to express confidence in providence, they may anchor human right and dignity beyond legislative repeal, or they may simply serve the function of acknowledging historical fact. They do not, however, create a religious establishment or compel adherence to any particular belief or practice contrary to constitutional text.

The dissent in \textit{Newdow II} does an admirable job of illustrating not only that the pledge is not a religious act, but also how that fact puts it outside the discussion of the Court's school prayer cases. These points are well stated and need not be rehearsed here, but what does bear emphasis in light of these symposium papers is the dissent’s insight that the \textit{Newdow} majority, in the name of protecting neutrality, tolerance, and dissent, denies each. As Judge O'Scannlain writes, "[i]n affording Michael Newdow the right to impose his views on others, [the court] affords him a right to be fastidiously intolerant and self-indulgent."\textsuperscript{26} Here, the dissenters have identified the real harm in this dispute: the opinion "confers a favored status on atheism in our public life."\textsuperscript{27} Insofar as government, through schools and social programs, occupies an ever-expanding portion of all life, this is not to be lightly passed. The Ninth Circuit majority creates a bias against religion, and in so doing stands the First Amendment on its head.

But the denial of the founder's anchoring of American human right upon sovereign presupposition of a Creator does more than deny individual liberty. It also invites the omnipotent state. When the 83rd Congress added the words "under God," it expressly denied any interference with anyone's free exercise, whether that exercise of freedom would individually choose to honor God or deny Him. No, the legislative history is plain: the recital is to prevent expansion of the government; to prevent denial of civil liberties that no government or civil liberty may usurp.\textsuperscript{28} In this, the pledge more accurately reflects how the

\begin{itemize}
  \item \textsuperscript{25} Id. at 778.
  \item \textsuperscript{26} Id. at 785.
  \item \textsuperscript{27} Id. at 786.
  \item \textsuperscript{28} H.R. REP. 1693, to accompany H.J. RES. 243, 83d Cong., 2d Sess., at 3 (1954).
\end{itemize}
founding generation viewed the separation of powers as the surest security of civil right. Anchoring basic rights upon a metaphysical source is very much part of that structural separation, for without God, the law is invited to become god. This was well known to Rousseau and Marx who both complained that acknowledging God creates a competition or check upon the secular state.

Ironically, the drafter and promoter of the originally drafted pledge in 1891, socialist Frances Bellamy, misdescribed his nation in the original pledge with the purpose not of affirming the United States of America, but with the desire of promoting Hegel’s “total state” or world government. Bellamy’s plan was for civic creed that would not distinctively describe America, but would remind those who recited it that the state was to prevail over the individual or any competing source of authority, whether church or family. That the original pledge did not even mention America by name, calling only for a pledge of allegiance to “my flag,” was ultimately noticed, and much to the distress of Bellamy, the first re-wording of the pledge in 1942 specified that the allegiance was being promised to the United States of America. The 1954 reference to God merely completed that descriptive exercise.

So we come to the contributions of this volume. They cover quite a range. Each adds unique insight into religious expression in public space. Staying for a moment, however, with the correction of bad history, David Barton’s responsible correction of the Jeffersonian record must surely rank high. Quoting Chief Justice Rehnquist, Barton reminds us that “[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history . . . .” Barton’s case that Jefferson has been misused, misquoted, and misunderstood is dramatic and convincing. The need to correct this error is, of course, basic since, as Barton reveals, Jefferson has been relied upon by the Court in all of its establishment clause cases. Observing that Jefferson’s presidential and public actions would

30. Id.
31. Id.
32. Id.
34. Id. at 418.
"abysmally fail" the contemporary Court's jurisprudence, Barton tries to untangle matters.

Going to the heart of the matter—Justice Black's misuse of the "wall of separation" metaphor in *Everson*, Barton observes how the letter to the Danbury Baptist association was a natural outgrowth of the Baptists' affinity for the third president and his anti-federalist views. The Baptists had suffered in the early republic when power was centralized, with ministers frequently subjected to violence. It was this profound interference with *free exercise* that prompted the Danbury association to write Jefferson. The Baptists expressed anxiety that religious freedom was understood by some as only a positive, not a natural, law right, and thus, capable of being withdrawn selectively. Jefferson fully understood their concern, since, as Barton nicely reminds us, it was "his own." But it was not a concern addressed to impermissible establishment, but to reminding the Congress of the United States that it was deprived of all legislative power over mere religious opinion, and could regulate practice only when such practice undermined the public order. Yet, when Black misapplied Jefferson's metaphor and the balance of his letter to the establishment clause, he invited the Court onto an odyssey of using federal power to deny individual expressions of religious belief, exactly contrary to Jefferson's concern. Provocatively, Barton writes: "[i]magine the results if Jefferson's metaphor were used as originally applied: virtually every one of the Court's Establishment Clause decisions of recent years would be reversed because the 'wall' would prohibit the government from interfering with the 'free exercise of religion' . . . ." Given that Jefferson has so often been portrayed as a ceremonial Deist, Barton's historically grounded reappraisal needs to be absorbed fully to reveal its importance. Suddenly the dichotomy between reason and faith, with Jefferson the child of the enlightenment pictured as resentful of faith's pursuit of human truth, melts away. Jefferson knew that man would be inclined to look for truth in both revealed and empirical sources, as he had done since Roman times. It was free inquiry that Jefferson sought to protect, whether the inquiry is of religious or nonrelig-

35. *Id.* at 412-13.
36. *Id.* at 412.
37. *Id.* at 414.
38. *Id.*
39. *Id.* at 415.
40. *Id.* at 418.
41. *Id.*
42. *Id.*
gious source. Wrote Jefferson: "[h]ad not the Roman government permitted free inquiry, Christianity could never have been introduced."\textsuperscript{43} Yes, Jefferson feared coercion—whether from civil authority or hide-bound church—that would obscure or narrow the pursuit of knowledge, but in doing so, he did not deny revelation’s capability to inform us about the nature of the human condition. As Barton nicely summarizes, "Jefferson was not anti-clergy, only anti-autocratic and anti-hierarchical clergy."\textsuperscript{44}

Student writer Christine Niles takes on what she describes as the incoherence of the secular/religious distinction.\textsuperscript{45} In doing so, her thinking is much aligned with Barton’s rehabilitated Jefferson who, as just noted, saw the pursuit of truth as drawing on all sources, religious included. Niles argues that secularism and neutrality are not synonyms, though much of the Court’s modern establishment clause jurisprudence, until lately, has assumed them to be so.\textsuperscript{46} Carefully evaluating the secularist assumptions that attempt to privilege reason and empiricism, she illustrates the extent of “faith” lurking beneath these seemingly secular terms.\textsuperscript{47} Niles sees faith as analogous to trust or reliance upon authority and nicely elaborates how both rationalism and scientific inquiry beg the essential question and assume rationalism or scientific inquiry as its trusted authority or major premise.\textsuperscript{48} By this means, Niles de-thrones science and rationality from its presumed “high ground” above the sectarian. Quoting David Novak, Niles reminds us that “[t]he question, then, is not a god or no-god. The question is whose god.”\textsuperscript{49}

What does this mean for religious discourse in the public square? Niles contends that it ought not mean banishment or censorship, a position she ascribes to important scholars like Kathleen Sullivan of Stanford and others. Implicitly admitting that a vibrantly pluralistic and religiously informed discussion might lead to strife and disagreement, Niles nevertheless posits that this is better than arbitrary favoritism for irreligion over religion.\textsuperscript{50} What’s more, she argues, Madison and the founding

\textsuperscript{43} THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 232–34 (Query XVII) (1794), cited in Barton, supra note 33, at 417.
\textsuperscript{44} Barton, supra note 33, at 445.
\textsuperscript{46} Id.
\textsuperscript{47} Id. at 581.
\textsuperscript{48} Id. at 565.
\textsuperscript{49} Id. at 569 (quoting David Novak, Law, Religious or Secular?, 86 VA. L. REV. 569, 594 (2000)).
\textsuperscript{50} Id. at 577.
generation anticipated that there would be contending factions, even religious ones, seeking to win over the democratic process.\(^5\) Can this work? Has the Nation become so diverse or fractious as to deny what Niles and legal scholar Michael Perry call the testing of all ideas in political debate? One would think not. Even in the midst of an international war with distinctly religious overtones, there is spirited debate over the morality of that war, largely informed, no surprise, by a panoply of religious belief.

Nevertheless, moving to a specific subject and context—the origin of human life as presented in public school classrooms, Professor Kent Greenawalt posits that limits on religiously-grounded instruction need to be erected.\(^5\)\(^2\) In particular, Professor Greenawalt elegantly endeavors to sketch his limitations or guidelines for the appropriate consideration of evolution, creationism, and intelligent design.\(^5\)\(^3\) Because he supposes from constitutional jurisprudence that public schools should not teach the truth or falsity of religious ideas, his guidelines necessitate exploring what these competing theories of human origin mean as well as the background definitions of science and religion.

Greenawalt differentiates science from religion by finding that the former recounts empirically verifiable natural processes, while the latter is dependent upon metaphysical, philosophical, or spiritual belief.\(^5\)\(^4\) From this, Greenawalt concludes that creationism as retold in the Book of Genesis has “little scientific plausibility” and therefore ought not be included within a public school science course.\(^5\)\(^5\) By contrast, intelligent design theory is given a place at the scientific table. The underlying assumptions of intelligent design theory are that intelligent causes exist and that these can be observed empirically by virtue of specific examples of human complexity (such as the growth and operations of the human eye).

Professor Greenawalt is particularly open to intelligent design since standard Darwinian theory—dependent as it is upon natural selection and the origin of multiple species from one—is not fully explainable in scientific terms. Fossil records have yielded relatively few species intermediate between earlier and later ones and little explains how complex organisms evolved from simpler ones.\(^5\)\(^6\) Given that, Greenawalt’s prescription is

\(^{51}\) Id. at 578.


\(^{53}\) Id.

\(^{54}\) Id.

\(^{55}\) Id. at 271.

\(^{56}\) Id. at 325.
merely one of academic humility, though he is careful to emphasize that intelligent design cannot be taught as the alternative to evolution since that would be subscription of religious belief.

Dr. Francis Beckwith writes a concurring essay to Professor Greenawalt with both further elaboration of the scientific basis for design theory as well as a nice reflection on how establishment clause jurisprudence gets reconciled with academic freedom.57 As retold by Beckwith, the Supreme Court allows freedom of inquiry in the classroom so long as it does not transgress other specific constitutional guarantees.58 This has not resulted in much freedom for public school teacher expression of religious sentiment, of course, since neutrality has been assumed to mean secularity. This has broken down slightly in the Court's tendency to allow students some leeway to bring their own private religious beliefs into public school classroom under equal protection or free speech rubrics, but the teachers—those state agents behind the lectern—pretty much still need to keep quiet.

Even as a bald-faced claim of academic freedom may not secure teacher supplementation of the secular materials in the curriculum, Beckwith, like Greenawalt, thinks the scientific basis of design theory allows such discussion.59 This remains a far cry from the robust forum envisioned by Niles. What allows some of the gap between these positions to be filled is Beckwith's thoughtful distinction between legislation that has the purpose of establishing religious belief and that which is merely motivated, in part, by such belief. As Beckwith reminds us, in criminal law, a defendant is guilty if he acted with the purpose of accomplishing a particular outcome.60 It doesn't matter whether the defendant had a kind or malevolent motivation. It is possible that if a similar purpose/motivation distinction were to be observed in constitutional decision-making, religious discussion in the classroom from either teacher or student could round out the universe of thought. But some ground clearing would need to be done, since earlier cases unsuccessfully tried explaining references to God in the Ten Commandments61 by drawing a related, but ultimately more subjective, argument that there is a difference between teaching that seeks a religious commitment,

58. Id.
59. Id.
60. Id. at 515 n.220.
and teaching that does not. If teacher-led classroom discussion is not directed at conversion or indoctrination, some of the Court's most recent establishment case law might be read to find no constitutional transgression.  

Interestingly in light of the pledge of allegiance controversy, Beckwith concludes his essay by exploring whether intelligent design theory is out of bounds because the designer is inherently religious. Beckwith does not respond to this by making the corporate acknowledgment point made earlier in this essay that a sovereign presupposition of a Creator has no bearing on the scope of individual right to believe or disbelieve. Perhaps Beckwith is reluctant to do so because the exclusionary force of the misuse of Jefferson's wall metaphor has yet to be fully dislodged from the Court's jurisprudence. Certainly, the Ninth Circuit failed to fully appreciate the corporate acknowledgment/individual right dichotomy, and the U.S. Supreme Court has thus far only commented in dicta about the pledge and other corporate or sovereign recognition of the Divine. Beckwith simply takes the path of not disqualifying intelligent design inquiry, even if it is inherently religious, since it is not a specific creed and it has a bearing on a substantial number of unanswered scientific questions.  

In another essay seeking to bring constitutional theory into practical application, student Kyle Forsyth applies the Court's establishment clause jurisprudence to conclude, soundly, that President Bush's faith-based initiative is constitutional. Forsyth decries older establishment clause models premised upon strict separationism and deftly illustrates that a program designed to enhance the effectiveness of social service fits squarely within the Court's present approach. As he notes, it is easier to withstand constitutional attack if social service beneficiaries make their own choice between religious and nonreligious providers, but direct funding of the nonreligious aspects of such services are also acceptable, even if likely to spur initial litigation and challenge.  

To complete this essay, let me make mention of the fine submissions from my colleagues, Professors Shaffer and Garnett. Virtually everyone who has thought about the influence of religious belief on public questions has been influenced for the better by the scholarship of Thomas Shaffer. Here, as elsewhere, he

64. Id. at 618.
65. Id. at 609.
writes with the authenticity of a genuine witness of faith. Shaffer’s essay seeks to draw out a comparison between lawyers and Biblical prophets. Those who seek to be lawyer prophets, says Shaffer, necessarily must be in politics and in community. And being there, they are often called by faith to be "relentlessly radical." The last supposition is one of Professor Shaffer’s persistent themes in writing, and in life. He is radically dedicated to the manifestation of love of neighbor.

Drawing on Catholic social thought, Shaffer knows that a lawyer prophet will necessarily need to address the poor and the disaffected. Professor Shaffer references another erstwhile Notre Dame colleague of mine, Dennis Goulet, who seeks to pierce the claimed objectivity of economic analysis as much as Christine Niles sought to illustrate the non-neutrality of secularism. Goulet is not a lawyer, but he is prophetic to Shaffer since his "new economics" attempts to put people at the center of economic thought rather than people as expressed in supply and demand curve. Shaffer especially likes Goulet’s disaggregation of technological, political, and ethical argumentation. The first focuses on the practicality of getting things done; politics maintains the rules of the game; but importantly, ethics is promoted for its own intrinsic value. On the last score, work is a manifestation of the human personality, whether the work is seen as valuable in the market or not. This point is illuminated wonderfully in Catholic social teaching, and indeed is hard to find elsewhere in coherent form. For this reason, Shaffer rightly concludes that "prophetic politics in the law involve . . . a radical point of beginning; an insistence on clear religious substance; and steady endurance in the face of resistance and indifference . . . ."

Richard Garnett touches on the issue of capital punishment and argues that the moral questions raised there, as elsewhere, require an anthropological answer responsive to the deeper question of what it means to be human. In this, Professor Garnett stands foursquare against the trivialization of faith—the proposition that it is no more significant than a hobby. Like the others in the symposium, Garnett thinks the Court’s establishment jurisprudence has been misled by the Jeffersonian meta-

67. Id. at 522.
68. See id. at 534.
69. Id.
The Constitution, Garnett writes, "neither mandates nor implies a duty of self-censorship by believers; [nor] demand a Naked Public Square; and active and engaged participation by the faithful is perfectly consistent with the institutional separation of church and state . . . ." A liberal democracy requires civility, but it imposes no restriction on the religious vocabulary or reasoning a believer may give for supporting or opposing public decisions. Professor Garnett doubts whether every public discussion needs a moral/religious referent, but he is certain that the State's claimed authority to punish with death does.

The symposium papers do not present a unidimensional view of religion in public life. That is how it should be. Rather, it continues a debate that has been with us since the founding. The predominant view in eighteenth century America is best associated with Tocqueville and the proposition that religious belief weaves moral value into the body politic in vital ways. Religious faith encourages forgiveness and the care of others and it reduces harmful and injurious behavior with far less coercion than could be accomplished under law. Religion also supplies the truth of the human person, and in so doing, places the foundation of human right on a far more secure footing than any positive enactment.

At the same time, there have always been dissident views that feared religious influence on public decision. This was most notably true where clergy and ecclesiastical hierarchy seemed to demand obedience, not thought. The fears of clerical authority were greatest in relation to the Catholic church, and as already referenced, frequently exaggerated by those who propagated hate or sought political advantage from it. Perhaps, because of these irrational hatreds or suspicions of Catholicism, this volume from a preeminent Catholic university law school is so welcome. Indeed, the work presented here continues the tradition of this fine journal by bringing faith to bear upon questions of law and public policy. It is fair to see these excellent submissions not as ideology, but as intellectual re-commitment to being always open to ask what that relationship is or should be. This publication is thus a living rejoinder to those who would deny the relevance of faith to law and public question. Long may it flourish.

71. See id. at 550.
72. Id.
73. Id. at 554.