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# RELIGION AND THE PUBLIC SQUARE: MAKING DEMOCRACY SAFE FOR RELIGIOUS MINORITIES

*Suzanna Sherry\**

## INTRODUCTION

In 1995, Judge Richard Posner ruled that the state of Illinois could not celebrate Good Friday as a statewide holiday for the public schools.<sup>1</sup> Closing all Illinois public schools on Good Friday, Posner declared, violated the Establishment Clause of the Constitution by “plac[ing] the support of the state behind a wholly sectarian holiday.”<sup>2</sup> The Ninth Circuit has disagreed, upholding Good Friday as a state holiday in Hawaii.<sup>3</sup> Federal courts have similarly reached varying conclusions about the constitutionality of other symbolic endorsements of Christianity, including the use of a cross as part of a government seal, the inclusion of the phrase “in the year of our Lord” in government documents, and the singing of religious Christmas carols in public schools.<sup>4</sup> Still other Christian rites are so intertwined with American life that they are largely uncontroversial: for example, no federal court has ever invalidated Sunday closing laws or the celebration of Christmas as a national holiday.

Despite these numerous overt governmental endorsements of Christianity, a number of legal scholars have begun to conclude that there is not enough religion in our public life.<sup>5</sup> They argue that in our

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1. *Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995).

2. *Id.*

3. *Cammack v. Waihee*, 932 F.2d 765, 782 (9th Cir. 1991); *accord Granzeier v. Middleton*, 955 F. Supp. 741, 750 (E.D. Ky. 1997) (holding that the State did not violate the Establishment Clause by closing courthouses on Good Friday).

4. See Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2087-89 (1996); see also Kenneth L. Karst, *The First Amendment, The Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503 (1992); Julian R. Kossov, *Preaching to the Public School Choir: The Establishment Clause, Rachel Bauchman, and the Search for the Elusive Bright Line*, 24 FLA. ST. U. L. REV. 79 (1996).

5. See, e.g., WILLIAM J. BENNETT, *THE BOOK OF VIRTUES* (1993); STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993); MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991); Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78

secular society, religion is marginalized. Pointing to Supreme Court doctrines that prohibit the government from funding religion or religious education, that limit the religious symbols that may be displayed in public places, or that invalidate government-sponsored prayer, they charge that in the United States, religion has become a mere hobby.<sup>6</sup> To reinvigorate the American religious spirit, these scholars urge that the government be permitted to engage in even more religious symbolism, and indeed to fund religion and religious education.<sup>7</sup> In short, the government ought to encourage religious belief of all denominations.

This Article focuses on one particular aspect of this growing debate over the appropriate role of religion in our society. What is often called the question of religion in the public square asks about the basis on which citizens and legislators ought to make public policy decisions. What, in our society, constitutes a legitimate *reason* for government action and public policy? The debate about religion in the public square is between those who maintain that all policies ought to be justified by secular reasons accessible to believers and non-believers alike, and those who maintain that religious justifications are as legitimate as secular ones.<sup>8</sup>

Focusing in this way on the factors influencing and justifying public policy formation, rather than on the content of public policy itself, subtly changes the nature of the debate. Judge Posner, in his opinion striking down the Good Friday holiday,<sup>9</sup> captured the difference between religious public policies and religious justifications for general public policies. After finding the Illinois law unconstitutional, he

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V.A. L. REV. 671 (1992); Michael W. McConnell, "*God Is Dead and We Have Killed Him!*": *Freedom of Religion in the Post-Modern Age*, 1993 BYU L. REV. 163 (1993).

6. See *supra* note 5.

7. See *supra* note 5.

8. For a representative sampling of this debate, see, for example, KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988); PERRY, *supra* note 5; JOHN RAWLS, *POLITICAL LIBERALISM* (1993); Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259 (1989); J. David Bleich, *Godtalk: Should Religion Inform Public Debate?*, 29 LOY. L.A. L. REV. 1513 (1996); Christopher L. Eisgruber & Lawrence G. Sager, *Unthinking Religious Freedom*, 74 TEX. L. REV. 577 (1996); Edward B. Foley, *Tillich and Camus, Talking Politics*, 92 COLUM. L. REV. 954 (1992); Franklin I. Gamwell, *Religion and Reason in American Politics*, 2 J.L. & RELIG. 325 (1984); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993); Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989); David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067 (1991); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992); Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747 (1993).

9. *Metzl v. Leininger*, 57 F.3d 618, 623 (7th Cir. 1995).

noted: “Had Illinois made a forthright official announcement that the public schools shall be closed on the Friday before Easter in order to give students and teachers a three-day spring weekend, rather than to commemorate the crucifixion of Jesus Christ, we might have a different case.”<sup>10</sup> Similarly, a “moment of silence” statute adopted out of a desire to encourage students to pray raises different questions than one adopted to give students an opportunity to bring their minds and bodies into focus for the coming school day.<sup>11</sup> Even apparently secular policies—such as a law regulating particular types of abortion, or prohibiting homosexual conduct—can be adopted for religious reasons or for secular reasons, and the debate over religion in the public square asks whether it is democratically and constitutionally legitimate to allow laws that cannot be, or have not been, justified in secular terms.

I doubt I will be giving too much away by first suggesting that religious reasons should *not* be deemed legitimate justifications for public policy. All laws should be justified by secular reasons accessible to all citizens, whether religious or not. But rather than repeating the theoretical defenses of such a position, already amply articulated by the likes of John Rawls and Robert Audi,<sup>12</sup> or boring you with an esoteric treatise on how religious justifications violate the Supreme Court’s ever-changing Establishment Clause doctrine, this Article takes a more pragmatic approach, focusing on the consequences of permitting religion into the public square. This Article asks and answers a more practical question: Why *should* anyone fear legislators or citizens who openly speak and vote their consciences, even when those consciences are informed or dictated by religious beliefs?

Put that way, of course, it sounds a little like asking why we should fear motherhood or apple pie. Of course we want legislators to be conscientious and principled, and if individual legislators in fact derive some or all of their principles from their religious beliefs, they should be free to say so. If their constituents do not approve, they can vote the rascals out.

And there, exactly, lies the problem with such a scheme: Relying on constituent desires has different implications depending on whose perspective we take. While mainstream Christians, as members of the dominant religious sect in the United States, may be able to use their power at the polls, members of many minority religions are not so well situated. Thus, this Article explores the effect that allowing religion

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10. *Id.*

11. *Id.*

12. RAWLS, *supra* note 8, at 246; Audi, *supra* note 8, at 272.

into the public square has on the religious freedom of religious minorities—in particular, its effect on the religious freedom of American Jews.

The question is one on which members of minority religions can reasonably differ. Legal scholar and Mormon Frederick Gedicks has recently asked whether minority religions are in more danger from a secularized society or from a religious society in which the majority religion has established predominance.<sup>13</sup> The answer, he says, is “unclear.”<sup>14</sup> Some neo-conservative thinkers, on the other hand, including prominent Jews such as Gertrude Himmelfarb, Irving Kristol, and Norman Podhoretz, have long argued that secular humanism, not Christianity, poses the greatest threat to America’s future, including the future of its religious minorities.<sup>15</sup> Kristol wrote in 1991: “American Jews, alert to Christian anti-Semitism, are in danger of forgetting that it was the pagans—the Babylonians and the Romans—who destroyed the temples and twice imposed exile on the Jewish people.”<sup>16</sup>

Those who advocate increasing the role of religion in public life contend that such a change advances religious freedom for *all* Americans; theirs is a non-sectarian plea for greater religiosity generally.<sup>17</sup> And indeed, they must make that claim, for in our religiously diverse nation religion’s role in public life must be neutral as between religions. But however appealing this plea may sound in the abstract, this Article suggests that in America, in actuality, allowing religious reasons to justify public policy will have a negative effect on religious minorities, especially Jews. The idea of favoring religion in general over non-religion is a chimera, because in America, such a policy will always have the effect of favoring Christianity over other religions.<sup>18</sup>

This Article explores three ways in which allowing religion into the public square injures Jews. Allowing more religion into the public square would hurt American Jews as a matter of politics,<sup>19</sup> psychology,<sup>20</sup> and epistemology.<sup>21</sup> The first two issues have been explored by

13. Frederick Mark Gedicks, *Introduction: An Ambivalent View of the Religious Equality Amendment*, 1996 BYU L. REV. 561, 567-68 (1996).

14. *Id.*

15. Irving Kristol, *The Future of American Jewry*, COMMENTARY, Aug. 1991, at 21.

16. *Id.*

17. See *supra* note 5 and accompanying text.

18. I leave aside the question of the effect on the non-religious, who are outside even truly non-sectarian appeals to religion.

19. See *infra* Part I.

20. See *infra* Part II.

21. See *infra* Part III.

other scholars, so I discuss them relatively briefly, saving the bulk of my remarks for the third question.

## I. POLITICS

What sorts of political outcomes might we expect if we allow religious appeals to influence public policy? The answer may be summarized in two words: Jews lose. Christianity and Christian beliefs are so pervasive in our society that it is virtually impossible for most religiously-inspired political disputes to take place on neutral ground. This is not simply a matter of numbers, of Jews being outvoted. Indeed, some of the strongest evidence that greater accommodation of religion does not benefit—and may even harm—Jews comes not from legislatures, but from the Supreme Court, which is supposedly immune from partisan religious politics.<sup>22</sup>

Despite my promise not to bore you with a legal treatise, I must give a little doctrinal background before documenting the Supreme Court's abysmal record. The religion clauses of the Constitution, taken together, prohibit the government from either establishing religion or prohibiting the free exercise of religion.<sup>23</sup> The Supreme Court has made clear that the government is prohibited from favoring either religion in general over non-religion, or any particular religion over any other religion.<sup>24</sup>

The Establishment Clause doctrine that governs the cases I focus on was laid out in *Lemon v. Kurtzman*<sup>25</sup> in 1971. According to that case, the Establishment Clause generally prohibits the government from engaging in any action that: (1) has no secular purpose; (2) has the primary effect of advancing or inhibiting religion; or (3) results in excessive entanglement with religion.<sup>26</sup> Thus, for example, the government may not subsidize religious schools,<sup>27</sup> may not require

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22. See *Board of Educ. v. Grumet*, 512 U.S. 687, 705 (1994) (striking down a governmental attempt to accommodate Jewish religious beliefs).

23. U.S. CONST. amend. I.

24. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding as unconstitutional state efforts to reimburse private religious schools for salaries, textbooks, and instructional materials).

25. *Id.* at 625.

26. *Id.* at 612-13.

27. *Id.* at 625; see also *Wolman v. Walter*, 433 U.S. 229 (1977) (striking down an Ohio law that supplied instructional material to church-sponsored schools, but allowing diagnostic and therapeutic services); *Meek v. Pittenger*, 421 U.S. 349 (1975) (holding that Pennsylvania's plan of lending money and textbooks to non-public, church-sponsored schools was unconstitutional); *Levitt v. Committee for Public Educ. & Religious Liberty*, 413 U.S. 472 (1973) (ruling that New York's reimbursement plan for private, church-sponsored schools violated the Establishment Clause).

schoolchildren to pray<sup>28</sup> or employers to give employees their Sabbath day off,<sup>29</sup> and may not require religious oaths for public office.<sup>30</sup> There is some uncertainty about whether the *Lemon* doctrine still retains much vitality,<sup>31</sup> but for the purposes of the cases I discuss, that doubt is irrelevant.

As for the Free Exercise Clause, the Supreme Court has recently changed its doctrine.<sup>32</sup> But during the time frame covered by this Article, the Free Exercise Clause did more than simply prohibit the government from intentionally discriminating against or regulating religious beliefs. It also required the government to grant accommodations to those whose religious beliefs might be compromised by laws of general applicability.<sup>33</sup> Thus, Amish parents who objected to compulsory schooling laws had to be exempted from those laws.<sup>34</sup> Sabbatarians who refused to work on Saturdays could not be denied unemployment compensation for that reason.<sup>35</sup> Note that the government was *not* required to accommodate citizens who objected to the laws for serious and important non-religious reasons—such as a philosophical belief that children are better off educated at home, or a desire to spend Saturdays with one's family.

Jews have brought claims under both the Establishment Clause and the Free Exercise Clause, and they have always lost.<sup>36</sup> First, there are the Sunday closing law cases. In one case, Sunday closing laws were challenged as a violation of the Establishment Clause.<sup>37</sup> The Court

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28. See *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (striking down a Pennsylvania law that required school children to recite the Lord's Prayer and other Bible verses at the start of each day); *Engel v. Vitale*, 370 U.S. 421 (1962) (ruling that a New York law requiring the recitation of the official state prayer was unconstitutional).

29. See *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985) (striking down a Connecticut law that provided Sabbath observers with an absolute right not to work on the Sabbath).

30. See *Torcaso v. Watkins*, 367 U.S. 488 (1961) (holding that it was unconstitutional to deny an individual public office for failing to state that he believed in God).

31. See generally Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795 (1993) (arguing that the test established by the Supreme Court in *Lemon* is no longer legally valid).

32. See *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that although it is constitutionally permissible to exempt sacramental peyote use from the operation of drug laws, it is not constitutionally required).

33. *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972).

34. *Id.*

35. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987); *Sherbert v. Verner*, 374 U.S. 398, 410 (1963).

36. See, e.g., *Braunfeld v. Brown*, 366 U.S. 599 (1961) (refusing to accommodate Jewish-owned businesses with Saturday closings in place of the mandatory Sunday closings); *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding a Maryland Sunday closing law, above the objections of non-Christian businessmen).

37. *McGowan*, 366 U.S. at 422.

upheld the laws, finding a secular purpose for both mandating a day of rest and choosing Sunday as the particular day. Chief Justice Warren conceded that Sunday closing laws were originally religiously motivated, but dismissed the claim nevertheless: "Sunday is a day apart from all others," he wrote.<sup>38</sup> "The cause is irrelevant; the fact exists."<sup>39</sup>

In a separate case, Jewish merchants tried to get an accommodation to permit them to close on Saturday and stay open on Sunday, so that they would not be forced to choose between their livelihood and their religion.<sup>40</sup> The Court rejected this Free Exercise claim as well.<sup>41</sup> A polity that does not recognize the religious nature of Sunday closing laws, nor care about their effect on those who celebrate other Sabbaths, despite the apparent protections afforded by the religion clauses, is not likely to be sensitive to minority religions if public policy permits religious appeals. And note, by the way, that Sunday closing laws, while less frequent than they used to be, are still around: in Minnesota, for example, while most stores are open, it is still illegal to sell alcohol or automobiles on Sundays.<sup>42</sup>

Jews also lost in another case requesting a Free Exercise accommodation of religious beliefs.<sup>43</sup> Observant Jewish men are religiously required to wear a yarmulke, or skullcap. Unfortunately, military regulations prohibit wearing headgear indoors.<sup>44</sup> When a Jewish member of the Air Force was disciplined for wearing his yarmulke, the Supreme Court upheld the punishment, rejecting the Free Exercise claim.<sup>45</sup> Thus, the Amish need not send their children to high school,<sup>46</sup> a Seventh Day Adventist need not work on Saturday to be eligible for unemployment compensation,<sup>47</sup> a Jehovah's Witness is entitled to quit work in a munitions factory without forfeiting unemployment compensation,<sup>48</sup> and a Christian, whose refusal to work on Sunday stems not from his membership in a sect that prohibited such work, but rather from his own personal religious beliefs, is similarly

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38. *Id.* at 452.

39. *Id.*

40. *Braunfeld*, 366 U.S. at 602.

41. *Id.* at 609.

42. MINN. STAT. § 340A.504(4) (1997) (banning Sunday retail sales of intoxicating liquors); *id.* § 168.275 (forbidding sale of motor vehicles on Sundays).

43. *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986).

44. *See id.* at 505.

45. *Id.* at 510.

46. *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

47. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

48. *Thomas v. Review Bd.*, 450 U.S. 707, 720 (1981).



protected.<sup>49</sup> All these Christian sects can find solace in the Constitution, but the Constitution offers no protection for Jews in the military.

Finally, there is one case in which the Supreme Court struck down a government attempt to accommodate Jewish religious beliefs.<sup>50</sup> Recall that under the Free Exercise Clause, the Court required the government to accommodate the religious beliefs of various sects. But when the State of New York tried to accommodate orthodox Hasidic Jewish families by allowing them to create a separate school district, so that their handicapped children could receive state-supported educational assistance without having to attend local public schools where they would be ridiculed, the Supreme Court found a violation of the Establishment Clause.<sup>51</sup>

I do not fault the Supreme Court in particular. Its rulings in this context merely reflect the fact that Christianity is so interwoven with American culture that its manifestation is often perceived as secular, while Judaism is either invisible or an alien religion that makes unfamiliar and unreasonable demands. Jews were invisible in one of the Sunday closing decisions, in which the Court wrote that “[p]eople of all religions . . . regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like.”<sup>52</sup> Even the common appeal to a purportedly Judeo-Christian tradition reflects this tendency to overlook the fact that Jews are not Christians. As legal scholar Mark Tushnet has pointed out: “[O]nly Christians can describe a Judeo-Christian tradition because they orient themselves to a set of ideas that includes elements that comprise the essence of Judaism [while] Jews do not orient themselves to a set of ideas that includes elements that comprise the essence of Christianity.”<sup>53</sup>

Outright hostility to Judaism has an even longer history in the United States, even among Supreme Court Justices. Justice Joseph Story held in 1844: “Christianity [is] a part of the common law of the state [in that] its divine origin and truth are admitted . . . [while Judaism is a] form of infidelity.”<sup>54</sup> In 1892, the Court held that the United States “is a Christian nation.”<sup>55</sup> Thirteen years later, Supreme Court Justice David Brewer gave a series of lectures to students at

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49. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987).

50. *Board of Educ. v. Grumet*, 512 U.S. 687, 705 (1994).

51. *Id.* at 690.

52. *McGowan v. Maryland*, 366 U.S. 420, 451-52 (1961).

53. Mark V. Tushnet, *The Concept of Tradition in Constitutional Historiography*, 29 WM. & MARY L. REV. 93, 94 n.6 (1987).

54. *Vidal v. Girard's Executors*, 43 U.S. (1 How.) 127, 198 (1844).

55. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

Haverford College explaining approvingly why the United States was a Christian nation.<sup>56</sup> Justice Brewer explained that it was the patriotic duty of every citizen to extend the principles of Christianity:

From the standpoint of citizenship the treatment of Christianity may be regarded as in some respects similar to that which is accorded and is due the national flag. . . . An insult to it every citizen feels is an insult to himself, and all insist that it shall be accorded its due respect.<sup>57</sup>

I am not the first to note that when it comes to Jews, the Supreme Court has been conspicuously unsolicitous of religious freedom.<sup>58</sup> Nor I am alone in pointing out that Christian America in general has a long history of indifference or even hostility toward Judaism. As one legal scholar has recently put it: "Christian . . . imperialism . . . pulses through the American social body."<sup>59</sup> This history makes me very skeptical of claims that increasing religious participation in government would be good for all religions and not just for Christianity. If Christians making public policy often cannot even perceive the religious nature of their own symbols, or the difference between themselves and Jews, they are unlikely to recognize, much less to rectify, instances where religion in the public square is really just Christianity in the public square.

## II. PSYCHOLOGY

An extensive discussion of the psychological dimensions of religion in the public square is beyond the scope of this Article. Let me just note that the key to understanding the problem lies in the different approaches of Christians and Jews when it comes to making public declarations of religious beliefs. Encouraging citizens and legislators to articulate the religious basis of their convictions necessarily means that one's religious views will be made public. Indeed, the whole point of many of the claims that religion is marginalized in our society is to urge that religion be moved from the private sphere to the public. But Judaism has always been a private, rather than a public religion. Its adherents have felt little need to proselytize (at least in modern times). Jews, unlike at least evangelical Christians, are quite comfort-

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56. See generally DAVID J. BREWER, *THE UNITED STATES A CHRISTIAN NATION* (1905) (containing a collection of Justice Brewer's lectures).

57. *Id.* at 51-52. This was long before flag-burning became a popular pastime and a political football.

58. See, e.g., Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 WM. & MARY BILL RTS J. 153, 154 (1996).

59. Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA L. REV. 833, 872 (1996).

able with “the understanding that one should voice [religious] commitments primarily within one’s community of faith and not abroad.”<sup>60</sup> This is a source of puzzlement to some Christians. Larry Lewis, who supervises Southern Baptist missionaries, asks Jews: “[I]f your religion is so great, why aren’t you on the street evangelizing?”<sup>61</sup>

Privatizing religion and excluding it from the public domain, moreover, was what allowed Jews to escape the ghettos to which pre-Enlightenment regimes confined them.<sup>62</sup> Until religion became formally irrelevant to one’s public standing, Jews could never be full citizens.

Finally, as legal scholar Theodore Blumoff has pointed out: “[T]he fear of identifying one’s religion in public discourse is the Holocaust’s bequest to many American Jews.”<sup>63</sup> Jews are thus less likely to use religious arguments in public debate, further magnifying the effect of Christian domination of the public square.

### III. EPISTEMOLOGY

While politics and psychology thus give Jews reason to fear increased religion in the public square, there is an even greater danger from what might be called the differing epistemologies of Judaism and Christianity. Let me start with a brief overview of my argument, which I will describe in greater detail. I begin, first, with a distinction between two worldviews: a religious worldview and a secular worldview. A religious worldview is based primarily on faith, and a secular worldview primarily on reason. The European Enlightenment marks the transition from the one to the other. To the extent that the conflict between the religious and the secular reflects an underlying difference between an appeal to faith and an appeal to reason, modern American Judaism—especially Reform Judaism, but Conservative Judaism as well—is a post-Enlightenment religion. While some Christian sects may be similarly committed more to reason than to faith, those who prefer religious to secular justifications—and thus those who would most benefit from increased religion in the public square—are mostly faithful in a traditionally pre-Enlightenment way. Moreover, to the extent that faith can be supported by reason, there is no need to inject religion into the argument. Thus, to appeal to religious

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60. DAVID A. HOLLINGER, *SCIENCE, JEWS, AND SECULAR CULTURE: STUDIES IN MID-TWENTIETH CENTURY AMERICAN INTELLECTUAL HISTORY* 31 (1996).

61. Jeffrey Goldberg, *Some of Their Best Friends Are Jews*, N.Y. TIMES, Mar. 16, 1997, § 6 (Magazine), at 42, 43.

62. Alvin J. Reines, *Ontology, Demography, and the Silent Holocaust*, 38 JUDAISM: Q.J. 478, 481-82 (1989).

63. Theodore Y. Blumoff, *The Holocaust and Public Discourse*, 11 J.L. & RELIGION 591, 596 (1994-95).

belief is to appeal to faith rather than to reason, and in the United States the appeal to faith necessarily excludes most Jews.

In drawing a distinction between faith and reason, I do not want to overstate my case. I do not mean that religious beliefs are necessarily unreasonable, nor that secular beliefs can be derived from some abstract reasoning process. What I mean is that faith and reason are ultimately appeals to different sources of knowledge, with different types of proof. To have faith is to believe, despite the absence of what we would ordinarily consider rational evidence. It is to rely on sources of knowledge that are, in the end, inaccessible to those who do not share the same faith. Paul's Epistle to the Romans, in describing Abraham's faith, against all reason, in God's promise that Abraham would be the father of nations, captures the essence of this difference:

And being not weak in faith, he considered not his own body now dead, when he was about an hundred years old, neither yet the deadness of Sarah's womb: He staggered not at the promise of God through unbelief, but was strong in Faith, giving glory to God; And being fully persuaded that, what he had promised, he was able to perform.<sup>64</sup>

Indeed, most of the more extraordinary events recounted in the Bible are, as a matter of historical probabilities, unreasonable. It requires faith to read the Bible as history rather than as allegory, because there is no reasonable evidence of its truth.

Because faith is, as legal scholar Michael McConnell points out, a belief in "the irresistible conviction of the authority of God,"<sup>65</sup> any argument grounded in religious faith can ultimately be reduced to a claim about what God requires. Although some of these arguments can take rational form—such as disputes about the correct interpretation of sacred texts, about appropriate human goals or behavior, about whether particular obligations exist—they are nevertheless disputes about how we should determine what God commands. Those who do not share a belief in the same God or the same sacred texts have little or nothing to contribute to the discussion.

Secular reason, on the other hand, is our ordinary, everyday, shared approach to the world. It is accessible to any normal human adult. It incorporates accumulated observation, scientific knowledge, experience, logical deductions, and judgments of plausibility. And do not be misled by the term *reason*. It is not an abstract process, nor does it

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64. *Romans* 4:19-21 (King James).

65. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 172 (1992).

necessarily yield firm results: a reasonable conclusion need not be shatterproof to be warranted. Nevertheless, despite room for disagreement about outcomes, reasoning can be done well or badly. It can contain inconsistencies and failures to notice logically necessary connections. It can fit poorly with experience or with one's other beliefs, or have unpalatable implications. It can be based on faulty premises, unchallenged only because of a failure to look at them reasonably. Thus, it is reason that tells us not to believe someone who says he was abducted by extraterrestrials, and reason that allows us to accept well-documented reports that a sheep has been cloned.

Faith has no such limitations or qualifications. To have faith is to be able to ignore contradictions, contrary evidence, and logical implications. Indeed one test of faith is its capacity to resist the blandishments of rationality: the stronger the rational arguments against a belief, the more faith is needed to adhere to it. Evolutionary biologist Richard Lewontin quotes Kant scholar Lewis Beck: "[A]nyone who could believe in God could believe in anything. To appeal to an omnipotent deity is to allow that at any moment the regularities of nature may be ruptured, that miracles may happen."<sup>66</sup> Reason (and the scientific method), states Lewontin, excludes "any role for supernatural demons, witches, and spirits of every kind, including any of the various gods from Adonai to Zeus."<sup>67</sup>

Moreover, reason is skeptical in a way that faith cannot be: we should be prepared to alter our reasonable beliefs when confronted with credible evidence of their falsity. Faith cannot be skeptical, because the validity of beliefs based on faith is not testable by ordinary rational means. The methods of science and rational argument are of no avail in evaluating claims based on faith. As one legal scholar puts it: "The process by which one develops belief in a transcendent reality—acquires faith—is not, cannot be, a rational process, for the validity of the objects of one's faith cannot be observed or tested, nor can it be logically proven."<sup>68</sup> Nor can faith ever be rationally *disproven*, for while "incoherence, anomaly, and paradox *always* count as weaknesses in scientific theory," they do not for traditional religious thought.<sup>69</sup> Indeed, "[w]hat we might deem a 'paradox,' and therefore

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66. Richard Lewontin, *Billions and Billions of Demons*, N.Y. REV. OF BOOKS, Jan. 9, 1997, at 28, 31.

67. *Id.* at 29.

68. Frederick Mark Gedicks & Roger Hendrix, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579, 1604 (1987).

69. JEFFREY STOUT, *THE FLIGHT FROM AUTHORITY: RELIGION, MORALITY, AND THE QUEST FOR AUTONOMY* 105 (1981).

a *weakness*, traditional theology christens a ‘mystery,’ to be accepted on faith.”<sup>70</sup>

The European Enlightenment marked the beginning of a transition from a world dominated by faith to a world dominated by reason. The lasting accomplishment of the Enlightenment was to deny the primacy of faith in the public sphere. Religious faith can be comforting, it can be inspiring, it can be sustaining; but the Enlightenment denied that it could govern. The Age of Reason replaced the centuries-long age of religion.

In one sense, then, the demand for greater acceptance of religious justifications in public policy decisions is an attempt to ameliorate the effects of the Enlightenment. Note that this fact does not make it illegitimate: not all historical developments represent progress, and not all demands for a return to an earlier regime should be rejected. Sometimes we might be better off going backwards. I contrast pre-Enlightenment faith with post-Enlightenment reason only as a way of illustrating the difference between them and their relationship to the question of religion in the public square.

What makes a return to pre-Enlightenment faith problematic, however, is that a reliance on faith rather than reason is quintessentially Christian. Modern American Judaism—especially Reform Judaism, but also Conservative Judaism (which together account for more than ninety percent of American Jews)—has so incorporated Enlightenment ideals that it has become largely a religion of reason. This inclination toward reason, incidentally, is of great concern to some Orthodox Jews, who blame Jewish adoption of Enlightenment ideas for what has been called the “silent holocaust”: the decline in religious observance, and the rise in intermarriage, that is seen as potentially leading to the eventual extinction of Judaism.<sup>71</sup>

Most American Jews, however, consider theirs a religion primarily of reason rather than of faith.<sup>72</sup> Indeed, Judaism has never been a “religion” in the same sense that Christianity is; being Jewish has al-

70. *Id.* at 106.

71. Reines, *supra* note 62, at 482-83.

72. See, e.g., NAOMI W. COHEN, *Jews in Christian America: The Pursuit of Religious Equality* 47 (1992) (stating Judaism is a religion based on reason); MICHAEL A. MEYER, *Response to Modernity: A History of the Reform Movement in Judaism* 389-91 (1998) (declaring basic principles of Reform Judaism which serve as a guide for the progressive elements of the faith); MARC LEE RAPHAEL, *Profiles in American Judaism: The Reform, Conservative, Orthodox, and Reconstructionist Traditions in Historical Perspective* 6 (1984) (noting the emphasis placed on the ability of reason to promote the progression of religious beliefs); W. Gunther Plaut, *Emancipation—The Challenge of Living in Two Worlds*, 38 *JUDAISM: Q.J.* 437, 447 (1989) (claiming that the Enlightenment merely espoused views already embraced by Judaism); Eliezer Schweid, *The Impact of the Enlightenment on Religion*, 38 *JUDA-*

ways been at least as much a question of culture and ritual, of community and heritage, as of faith. One scholar notes that at the heart of modern Conservative Judaism was "a refusal to cut Judaism to a preconceived pattern of what a 'religion' should be like," instead viewing it as "a living stream of tradition and aspiration."<sup>73</sup> Early Hebrew had no word for religion, since Jews considered themselves a people, rather than adherents to a faith.<sup>74</sup> For Jews, religion is primarily practice, not theology.<sup>75</sup> Moreover, belief is unimportant in determining who is Jewish. One Jewish scholar writes:

A Christian is such by baptism or conversion, by being called out into a new and sacred vocation of faith. A Jew is never *not* a Jew according to Jewish law. He is *born* into the Jewish situation. There was never a time that he was a man but not a Jew. There can be no time when he will cease to be a Jew . . . . A Jew who does not keep the Covenant still has its imprint engraved in his flesh. . . . The world, moreover, has understood the indelibility of the covenant, for it has persisted in regarding as Jews many who regard themselves as anything but Jewish; and it has murdered the seed of Abraham into the third generation.<sup>76</sup>

The Jewish reaction to the Enlightenment challenge to faith therefore differed from the Christian reaction. The Enlightenment replaced religious authority with secular authority and substituted appeals to reason for appeals to God.<sup>77</sup> Traditional Judaism, like traditional Christianity, was threatened by this move, and fought back against the leaders of the Jewish Enlightenment.<sup>78</sup> But since Judaism had always placed less reliance on faith, it contained within it the possibility of a more accommodating reaction to the Enlightenment. The Enlightenment also offered to Jews the possibility of emancipation and freedom from anti-Semitism, further cementing Jewish attraction to Enlightenment ideas.<sup>79</sup> And so, within Judaism, men like Moses

ISM: Q.J. 389, 393 (1989) (adding that the Enlightenment only renewed beliefs already set forth by Judaism).

73. Jacob B. Agus, *The Conservative Movement: Reconstruction*, in 2 UNDERSTANDING AMERICAN JUDAISM: TOWARD THE DESCRIPTION OF A MODERN RELIGION 199, 205 (Jacob Neusner ed., 1975).

74. CHARLES S. LIEBMAN, *THE AMBIVALENT AMERICAN JEW: POLITICS, RELIGION, AND FAMILY IN AMERICAN JEWISH LIFE* 7 (1973). Liebman also suggests that "[l]abeling Judaism as any kind of religion involves a measure of arbitrariness." *Id.*

75. JACOB NEUSNER, *JUDAISM IN THE SECULAR AGE: ESSAYS ON FELLOWSHIP, COMMUNITY, AND FREEDOM* 55 (1970); see also NATHAN GLAZER, *AMERICAN JUDAISM* 132 (1957) ("[I]t would be an unfortunate sign of Christian influence if Jews were now to start insisting on tenets and doctrine.").

76. NEUSNER, *supra* note 75, at 55-56.

77. See PETER GAY, *THE ENLIGHTENMENT: AN INTERPRETATION* 212-55 (1966).

78. See *infra* note 81.

79. See *infra* note 81.

Mendelssohn tried to incorporate the insights of the Enlightenment without losing their religion.<sup>80</sup> The result was what has come to be called Reform Judaism.<sup>81</sup> Reform Judaism eventually denominated itself a “progressive religion, ever striving to be in accord with the postulates of reason.”<sup>82</sup> One scholar surmises that “Jews lost their faith so easily because they had no faith to lose . . . . All they had . . . was a complete set of practices.”<sup>83</sup>

Indeed, the Jewish incorporation of Enlightenment ideals was so complete that it withstood the nineteenth-century backlash against the Enlightenment.<sup>84</sup> While American Christians were undergoing waves of evangelical religious awakenings, and the Romantic mood swept literature, philosophy, and music, most American Jews remained firmly committed to rationalism.<sup>85</sup> One scholar contrasts the Christian and Jewish experiences during the second Great Awakening: “Emotionally charged individual conversions were the hallmarks of the Christian experience, cold reason characterized the Jewish; the first reflected the stamp of Romanticism, the second the imprint of the Age of Reason.”<sup>86</sup>

Of course, there were still Jews opposed to the rationalism of the Enlightenment. These traditionalists were eventually left with the label “Orthodox.”<sup>87</sup> But fewer than eight percent of American Jews consider themselves Orthodox.<sup>88</sup> The rest are split about equally between Reform and Conservative, although most surveys give the edge to Reform Judaism.<sup>89</sup> The Conservative movement arose in the twentieth century, as an American attempt to bridge the gap between Reform and Orthodox Judaism.<sup>90</sup> Conservatism shares with the Reform

80. See *infra* note 81.

81. For history and descriptions of Reform Judaism, see generally MAX DIMONT, *JEWS, GOD, AND HISTORY* (1962); GLAZER, *supra* note 75; ARTHUR HERTZBERG, *THE JEWS IN AMERICA: FOUR CENTURIES OF AN UNEASY ENCOUNTER: A HISTORY* (1989); LIEBMAN, *supra* note 74; MEYER, *supra* note 72; RAPHAEL, *supra* note 72; Jacob B. Agus, *The Reform Movement, in 2 UNDERSTANDING AMERICAN JUDAISM: TOWARD THE DESCRIPTION OF A MODERN RELIGION 5* (Jacob Neusner ed., 1975).

82. GLAZER, *supra* note 75, at 41-42 (quoting the declaration of principles adopted by a group of reform rabbis in Pittsburgh in 1885, known as *The Pittsburgh Platform*).

83. *Id.* at 69.

84. *Id.* at 28-30.

85. See, e.g., GLAZER, *supra* note 75, at 29-30; MEYER, *supra* note 72, at 180.

86. COHEN, *supra* note 72, at 47.

87. MEYER, *supra* note 72, at 180-81.

88. See Council of Jewish Federations, *1990 National Jewish Population Survey* (visited Feb. 9, 1998) <<http://web.gc.cuny.edu/dept/cjstu/highint.htm>>.

89. *Id.*

90. For history and descriptions of Conservative Judaism, see generally DIMONT, *supra* note 81; GLAZER, *supra* note 75; HERTZBERG, *supra* note 81; LIEBMAN, *supra* note 74; RAPHAEL, *supra* note 72; Mordecai Waxman, *The Ideology of the Conservative Movement, in 2 UNDER-*



movement a largely secularist epistemology, but emphasizes ritual and observance of Jewish law more than Reform Judaism does.<sup>91</sup> Even Orthodox Judaism has its Enlightenment aspects. One eminent scientist has suggested that the claim that science is constantly self-critical, and open to the skepticism of reason, can be belied by comparing scientific to Talmudic argument: "If [Carl] Sagan really wants to hear serious disputation about the nature of the universe," writes Richard Lewontin, "he should leave the academic precincts in Ithaca and spend a few minutes in an Orthodox study house in Brooklyn."<sup>92</sup>

Thus, in the United States, appeals to faith are necessarily appeals to a non-Jewish mode of thought. For American Jews, the rationalism of the Enlightenment is a much more congenial way of approaching the world. Indeed, in this century American Jews both hastened the movement toward, and prospered in, an increasingly secularized society. Intellectual historian David Hollinger has explored the deep connections between Jews and rationalism in mid-twentieth century America in his book, *Jews, Science, and Secular Culture*.<sup>93</sup> He concludes that Jews played a large role in the cultural transformation that turned a Christian America into a pluralist nation, and changed American universities from gentlemen's finishing schools to vibrant cultural and intellectual centers.<sup>94</sup> It was also the liberal ideals of the Enlightenment that allowed Jews to join the American community. The Enlightenment focused on intellect and away from pedigree, on achievement rather than biography, on reason rather than faith, and helped open doors that previously had been closed to Jews.<sup>95</sup> This historical interrelationship between Jews and the Enlightenment further strengthens the proposition that decreasing appeals to reason and increasing appeals to religious faith would have a detrimental effect on Jews.

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STANDING AMERICAN JUDAISM: TOWARD THE DESCRIPTION OF A MODERN RELIGION 247 (Jacob Neusner ed., 1975). It is also said that the Conservative movement got its start when, at a dinner celebrating the graduation of the first class of rabbis from the Reform Hebrew Union College, the kosher caterer served shrimp. GLAZER, *supra* note 75, at 56-57.

91. See GLAZER, *supra* note 75, at 76 ("Despite his deep love of every strand of Judaism and Jewishness, Schechter [the founder of the American Conservative movement] was in other ways an heir of the Reform movement, for he had a great faith in and devotion to modern scholarship."); see also DIMONT, *supra* note 81, at 370 (describing Conservative Judaism); MEYER, *supra* note 72, at 295, 354 (noting Conservative Judaism's greater attention to the observance of Jewish law); RAPHAEL, *supra* note 72, at 90, 101-02 (exploring the differences between Reform and Conservative movements); Waxman, *supra* note 90, at 249 (differentiating Conservative and Reform Judaism).

92. Lewontin, *supra* note 66, at 30.

93. HOLLINGER, *supra* note 60.

94. *Id.* at 62-64.

95. *Id.* at 64.

Moreover, the historical connection between Jews and the Enlightenment also runs in the other direction. Twentieth-century American religious traditionalists are not the first to believe that “secular humanism . . . brings darkness and destruction on humanity.”<sup>96</sup> Intellectual history—to say nothing of the history of the United States—is filled with Romantics and other anti-liberals who viewed the Enlightenment as a tragic mistake.<sup>97</sup> Unfortunately, attacks on the Enlightenment have often been associated with anti-Semitism and other prejudices.<sup>98</sup> In earlier centuries, French counter-revolutionaries and German Romantics, rejecting the Enlightenment and its fruits, argued that reason was bad because it defeated prejudice.<sup>99</sup> One French counter-revolutionary explicitly traced the “noxious” influence of Jews to the Enlightenment, condemning both.<sup>100</sup> In this century, Martin Heidegger, whom one scholar labels “a towering figure of counter-Enlightenment thought,”<sup>101</sup> applauded the Nazis. Another lesser known Nazi theorist, Carl Schmitt, linked Jews, liberalism, and the Enlightenment, blaming all three—especially in the person of “the first liberal Jew,” Spinoza—for Germany’s ills.<sup>102</sup>

This is not to suggest that those calling for increased religion in the public square are themselves anti-Semitic. But it should sound a cautionary note that just as Jews have had a historical attachment to Enlightenment rationalism, anti-Semites have often been drawn from the ranks of various anti-Enlightenment movements.<sup>103</sup> Hollinger’s description of the role that Jews played in the secularization of American universities can be contrasted usefully with the work of the evangelical Christian scholar, George Marsden.<sup>104</sup> Marsden, in his book, *The Soul of the American University*, laments the same secularization that Hollinger applauds, and argues for a greater role for religion, especially for traditional Christianity.<sup>105</sup> If Hollinger’s account is

96. STEPHEN HOLMES, *THE ANATOMY OF ANTI-LIBERALISM* 63 (1993).

97. For histories of some of these anti-liberal movements, see generally LOREN R. GRAHAM, *BETWEEN SCIENCE AND VALUES* (1981); PAUL R. GROSS & NORMAN LEVITT, *HIGHER SUPERSTITION: THE ACADEMIC LEFT AND ITS QUARRELS WITH SCIENCE* (1994); HOLMES, *supra* note 96; LEO MARX, *THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA* (1964).

98. HOLMES, *supra* note 96, at 98.

99. *Id.* at 102-03.

100. *Id.* at 103.

101. *Id.* at 123.

102. *Id.* at 52 (quoting CARL SCHMITT, *DER LEVIATHAN IN DER STAATSLHRE DES THOMAS HOBBS: SINN UND FEHLSCHLAG EINES POLITISCHEN SYMBOLS* (1982)).

103. *Id.* at 98-99.

104. Compare HOLLINGER, *supra* note 60, with GEORGE MARSDEN, *THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF* (1994).

105. MARSDEN, *supra* note 104.

correct, Marsden's condemnation of the secularization of American universities is necessarily detrimental to Jews.

### CONCLUSION

Two relatively recent developments highlight the dangers that religion in the public square can pose for religious minorities. In June 1996, the second-largest American religious body, the Southern Baptist Convention, passed a resolution calling for Baptists to direct their energies toward converting Jews.<sup>106</sup> Baptist leaders were stunned by the hurt and angry reaction this provoked not only among Jews but among many Christians as well.<sup>107</sup> "Not a single one of us," said one Southern Baptist leader, "imagined such a reaction."<sup>108</sup> A large group of American Christians seemed utterly unable to perceive the harm their religiously-motivated actions might cause to Jews. And Southern Baptists are not alone. Richard Neuhaus, a prominent and politically vocal Catholic priest, recently praised the Baptist resolution.<sup>109</sup>

Neuhaus is also one of the protagonists in the other recent development.<sup>110</sup> For many years, conservative Christians like Neuhaus and conservative Jews like Himmelfarb, Kristol, and Podhoretz worked together to challenge the reigning liberal paradigm in the United States.<sup>111</sup> Apparently sharing the same political aims, the two groups called for an abandonment of elite culture in favor of what they called religious populism.<sup>112</sup> As noted earlier, the Jewish neo-conservatives dismissed Jewish fears of Christian fundamentalism, arguing that religion, of whatever kind, was the solution, not the problem.<sup>113</sup> Then last November, Neuhaus published a symposium in his journal, *First Things*, that amounted to a declaration of war on his erstwhile allies.<sup>114</sup> The symposium makes clear that the goal of Neuhaus's Catholic and evangelical Protestant alliance is to establish America as a

106. Goldberg, *supra* note 61, at 42-43.

107. *Id.* at 43.

108. *Id.* (quoting Larry Lewis, who until recently was the Southern Baptists' chief missionary in North America).

109. Richard John Neuhaus, *The Public Square: A Continuing Survey of Religion and Public Life*, *FIRST THINGS*, Dec. 1996, at 48-49.

110. The events in this paragraph are described in David Glenn, *The Schism*, *LINGUA FRANCA*, Feb. 1997, at 24; Jacob Heilbrunn, *Neocon v. Thecon*, *NEW REPUBLIC*, Dec. 30, 1996, at 20.

111. *See supra* note 110.

112. *See supra* note 110.

113. *See supra* note 110.

114. *Symposium: The End of Democracy? The Judicial Usurpation of Politics*, *FIRST THINGS*, Nov. 1996, at 18-42.

Christian nation, even if that takes a Christian revolution.<sup>115</sup> Several Jewish neo-conservatives immediately resigned from the editorial board of *First Things*, and conservatives of many religions condemned the journal.<sup>116</sup> Neuhaus, unchastened, praised the Baptist resolution in December<sup>117</sup> and then published a discussion of the November symposium in the January issue.<sup>118</sup> The battle continues.

What lesson are we to take from all this? It is the lesson that the Jewish neo-conservatives have just learned the hard way: In America, public religion is always Christian.

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115. *Id.*

116. Glenn, *supra* note 110, at 24; Heilbrunn, *supra* note 110, at 20.

117. Neuhaus, *supra* note 109.

118. William J. Bennett et al., *The End of Democracy? A Discussion Continued*, *FIRST THINGS*, Jan. 1997, at 19–28.

