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CHURCH-STATE RELATIONS AND THE SOCIAL ETHICS OF REINHOLD NIEBUHR

THOMAS C. BERG*

In this Article, Professor Thomas C. Berg explores the life and writings of Reinhold Niebuhr (1892-1971), using Niebuhr's theology and social philosophy as a basis for approaching issues of religion and politics, church and state. Niebuhr's philosophy, Professor Berg suggests, provides a framework for a politics that, without being cynical, recognizes limits on human capacities to achieve perfection through any social or political ideal—in Niebuhr's own words, a system of "proximate solutions to insoluble problems." Such a framework in America, Professor Berg argues, demands a government that is neither purely secularized nor purely sanctified—in legal terms, a government that accommodates religion instead of actively establishing or suppressing it. In a Niebuhrian world, religious viewpoints and insights must be able to participate in the making of secular policy, but religious citizens and activists should remain humble about translating ultimate values directly into solutions for political problems. The government should also permit religiously affiliated institutions providing education and social services to participate in government-funded programs in those areas, and government should recognize its limits by allowing conscientious religious objections to general laws.

To many observers, debates in the past decade over church-state relations often have been frustratingly polarized. On one side, groups committed to a highly secular government and political system argue that religion is a backward and divisive force standing in the way of society's progress toward mutual understanding and tolerance. On the other side, traditionalist religious groups claim that secular forces

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are leading America to collapse, and that a return to certain historic religious tenets and an incorporation of those tenets into government policy and public ceremonies can save the nation from its social ills.¹

People on each side in these "culture wars"² tend to make sweeping claims about both the goodness of their own perspective and the evil of the other.³ What too often is missing from the debate is any sense of humility, any awareness that one's own perspective may be partial, and any acknowledgement that although moral views (left or right) must relate to politics, social life is usually too complex to allow for simple solutions.

When a social commentator complains about a missing sense of complexity and ambiguity, he or she often is said to have raised a "Niebuhrian" point.⁴ The reference is to Reinhold Niebuhr, the American Protestant theologian, social theorist, journalist, and political activist. In a public career spanning from the Great Depression to the Vietnam War, Niebuhr earned a reputation as a biting critic of claims to final virtue or knowledge in the social and political spheres. First assaulting the early twentieth century's confidence in "progress," he later attacked Marxism's faith in

1. For general discussion of this polarization, see STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 15, 22 (1993) (deploring the ways in which secular-oriented culture treats religious belief as "just another hobby," as well as the "liberal-bashing that often characterizes the rhetoric of the religious right"); JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 250-71 (1991) (describing "polarization" of views of religion and politics held by "orthodox" and "progressive" groups). As Hunter points out, the arguments over the legal propriety of religion in politics play a role in the broader "culture wars" because law sets "the rules for resolving public differences." *Id.* at 253.

2. HUNTER, *supra* note 1, at xi.

3. In the words of Professor Douglas Laycock:

As between some serious secularists on one side, and some serious religious believers on the other, there is little more equal concern and respect than four hundred years ago, when we were burning each other at stakes. If you read the direct mail fund-raising literature some of these groups send out, it is clear that there are people on all sides of these issues who think that folks on the opposite side are a force for evil in the world, and a serious threat to the things we hold dear.

Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 842 (1992); see also HUNTER, *supra* note 1, at 161-70 (cataloging "extreme" and "superficial" attacks by each side in publicity campaigns).

4. See, e.g., JOHN PATRICK DIGGINS, *THE RISE AND FALL OF THE AMERICAN LEFT* 19 (1992) (outlining "Niebuhrian" approach critical of overconfidence of both "the anticapitalist Left" and "the antigovernment Right"); Richard Wightman Fox, *Lasching Liberalism*, 109 THE CHRISTIAN CENTURY 277, 281 (1992) (reviewing CHRISTOPHER LASCH, *THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS* (1991) and describing historian Lasch's critique of political optimism as "Niebuhrian").

proletarian revolution and criticized the complacency of American culture and religion in the 1950s.

While attacking such "pretensions," however, Niebuhr maintained the necessity of relating moral and religious values to political decisions; he himself kept up a continuing stream of journalism on current issues and a running involvement in a series of political and social causes. He thereby outlined and personally exemplified an approach to religion, morality, and politics that has influenced statesmen and theorists from Martin Luther King, Jr., to George Kennan to Jimmy Carter.⁵ As Arthur Schlesinger, Jr., put it, Niebuhr "cast an intellectual spell on [the] generation" that came of age during economic depression, world war, and nuclear threat.⁶ And although Niebuhr's analyses were grounded in a religious outlook, they have appealed to many thinkers with little or no religious impulse.⁷

This Article explores various implications of Niebuhr's social ethics for current issues of religion and politics, including specific legal issues of church-state relations. I argue that Niebuhr's thought can contribute to our understanding of church-state legal relations by illuminating the roles that religious and secular views play in public life—both their virtues and their dangers. I also point out ways in which Niebuhr's insights are particularly valuable for modern America. His ethical theory, of course, does not ineluctably lead to particular legal solutions; moreover, legal rules themselves are blunt instruments for the application of any sophisticated social theory. But one can explore the problems Niebuhr identifies and suggest how legal doctrines can serve (in Niebuhr's words) as "proximate solutions" to those problems.

The time is ripe for close examination of Niebuhr's thought on church and state. In recent years, interest in Niebuhr has resurged across the political and religious spectrum,⁸ and political conservatives

5. See *infra* part II.A; see also E. J. DIONNE, JR., WHY AMERICANS HATE POLITICS 225 (1991) (discussing Carter's devotion to Niebuhr's thought).

6. Arthur Schlesinger, Jr., *Reinhold Niebuhr's Long Shadow*, N.Y. TIMES, June 22, 1992, at A17.

7. For example, Southern historian C. Vann Woodward relied on the "ironic approach to history" found in Niebuhr's writings: "I realize that Niebuhr's view of human strivings is based on theology, a subject definitely beyond my province. Whatever its theological implications—and I have frankly never explored them—the view has a validity apart from them that appeals to the historian." C. VANN WOODWARD, THE BURDEN OF SOUTHERN HISTORY 193 (3d ed. 1993).

8. See, e.g., CHARLES BROWN, NIEBUHR AND HIS AGE: REINHOLD NIEBUHR'S PROPHETIC ROLE IN THE TWENTIETH CENTURY (1992) (describing how the liberal Protestant view is indebted to Niebuhr); HENRY B. CLARK, SERENITY, COURAGE, AND

and liberals alike have jostled to claim him as authority for their positions.⁹ His influence, unparalleled among American religious thinkers from the Depression into the Cold War, waned in the 1960s as a new generation of activists labeled his views too "pessimistic about radical social change."¹⁰ Lately, however, much religious activism on the left has been chastened, although not defeated.¹¹ At the same time, many Americans are uncomfortable with aspects of politically active fundamentalism. Thus, Niebuhr has proven an attractive alternative for a new generation of thinkers. Scholars are exploring Niebuhr's views on church-state legal relations as well, but they have focused only on the question (albeit a crucial one) of religious influences on public policy and lawmaking, ignoring the implications of his thought for other issues, ranging from prayer in public schools to funding of religious institutions.¹²

In examining church-state problems through the writings of one modern religious thinker, I obviously am not focusing directly on the language of the Constitution's religion clauses or on those clauses'

WISDOM: THE ENDURING LEGACY OF REINHOLD NIEBUHR (1994) (same); RICHARD FOX, REINHOLD NIEBUHR: A BIOGRAPHY (1985) (general biography); MARK A. NOLL, ONE NATION UNDER GOD? CHRISTIAN FAITH AND POLITICAL ACTION IN AMERICA 160-61 (1988) (endorsing Niebuhrian insight from a conservative evangelical Protestant perspective); REINHOLD NIEBUHR AND THE ISSUES OF OUR TIME (Richard Harries ed., 1986) (same); REINHOLD NIEBUHR TODAY (Richard J. Neuhaus ed., 1989) (presenting a variety of political and religious perspectives on Niebuhr); RONALD H. STONE, PROFESSOR REINHOLD NIEBUHR: A MENTOR TO THE TWENTIETH CENTURY (1992) (same).

9. Compare MICHAEL NOVAK, THE SPIRIT OF DEMOCRATIC CAPITALISM 315-32 (1982) (using Niebuhr to argue for free-market economy on basis of need to limit government and to harness self-interest) with STONE, *supra* note 8, at 244-45 (arguing that throughout his life Niebuhr believed "[s]trong governmental leadership was . . . necessary to correct disproportionate economic power").

10. Ronald Preston, *Reinhold Niebuhr and the New Right*, in REINHOLD NIEBUHR AND THE ISSUES OF OUR TIME, *supra* note 8, at 89-90.

11. See, e.g., K. LLOYD BILLINGSLEY, FROM MAINLINE TO SIDELINE: THE SOCIAL WITNESS OF THE NATIONAL COUNCIL OF CHURCHES *passim* (1990) (describing loss of political influence of liberal-leaning National Council of Churches).

12. See, e.g., Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J.L. & RELIGION 1, 21 (1994) (commending Niebuhr's approach for political debate). The particular issue of religion in politics is also the sole focus of Stanley Hauerwas & Mike Broadway, *The Irony of American Christianity: Reinhold Niebuhr on Church and State*, SOUNDINGS 33 (1994) (erroneously stating that "Niebuhr seems never to have thought specifically about the legal relation of church and state in America").

Other legal scholarship explores the contributions that Niebuhr's ethical theories can make to lawyers' professional ethics. See Timothy W. Floyd, *Realism, Responsibility, and the Good Lawyer: A Niebuhrian Perspective*, 67 NOTRE DAME L. REV. 587 (1992); Eric E. Jorstad, Note, *Litigation Ethics: A Niebuhrian View of the Adversary Legal System*, 99 YALE L.J. 1089 (1990).

historical background. Nevertheless, Niebuhr's approach is relevant to the interpretation of the religion clauses because it has significant parallels with the approaches taken by the framers. Niebuhr sought to construct a social ethic, including an analysis of religious tolerance, by balancing the views of the Enlightenment and the Protestant Reformation, without uncritically accepting either source.¹³ Likewise, the American commitment to religious freedom, both in 1791 and later, has been characterized by a combination of Enlightenment and evangelical Protestant views concerning conscience and the political realm.¹⁴ Although much of this Article focuses on the function of religion in modern society rather than on the original understanding of the religion clauses,¹⁵ the arguments here are not irrelevant to constitutional discussion. Indeed, the precise import of the religion clauses' broad principles is affected at least in part by current conditions. Professor Suzanna Sherry has challenged religion clause scholars to answer forthrightly the question: "What purposes does religion serve in a modern democracy, and how should we best foster those goals?"¹⁶ This Article's discussion of Reinhold Niebuhr is one response to that challenge.

Theologically based arguments, such as Niebuhr's, are crucial participants in any discourse about religious freedom. Religious thought offers "some of the richest resources for thinking about the human"¹⁷ in general, and especially about the interaction of religion and politics. Recent legal scholarship on religion and government has probed the insights of writers from Dostoevsky¹⁸ to feminist

13. See *infra* part II.C.

14. See *infra* notes 47-62 and accompanying text.

15. Even if the non-originalist nature of these arguments makes them irrelevant to constitutional interpretation, Niebuhr's insights are still relevant for making policy regarding church and state. Nonconstitutional arguments are important, since the Supreme Court recently has pursued a (halting) path of turning over matters of religion to elected policymakers. See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (holding that a state may prohibit sacramental use of peyote but also may accommodate such religiously motivated behavior by exempting it from law); *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) (holding that the Adolescent Family Life Act, under which religious groups receive government grants to develop youth counseling programs, does not, on its face, violate the Establishment Clause). Nonconstitutional considerations play a particular role in the issue of the influence of religious beliefs in lawmaking. See *infra* part III.A.

16. Suzanna Sherry, Lee v. Weisman: *Paradox Redux*, 1992 SUP. CT. REV. 123, 149.

17. MICHAEL J. PERRY, *MORALITY, POLITICS & LAW* 183 (1988).

18. William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 847-53 (1993) (discussing the Legend of the Grand Inquisitor from *The Brothers Karamazov*, as told in FYODOR DOSTOEVSKY, *NOTES FROM THE UNDERGROUND AND THE GRAND INQUISITOR* vii (Ralph E. Matlow trans., 1960)).

theologians.¹⁹ With the Supreme Court's jurisprudence on religious freedom in continued disarray,²⁰ we need all the insights we can get.

This Article begins by setting forth three paradigmatic current views of church and state—including "Enlightenment" and religious views—and the need to critique and balance them.²¹ Part II then turns to Niebuhr: his life, his overall theory of social ethics, and themes in his work that criticize and balance the church-state perspectives presented in part I. Those Niebuhrian themes indicate that while close religious involvement with government can present dangers of religious arrogance and coercion, a thoroughly secularized public order presents its own dangers, either because it recognizes no moral values in politics at all or because it reintroduces arrogance and coercion in the form of secular ideals. Part III suggests how church-state legal doctrines can reflect Niebuhr's insights concerning the need for both moral vigor and humility in politics. Treating first Niebuhr's own favorite subject of religious involvement in political decision-making, I argue that religious views can and must play a role, but that it is legitimate to ask that proponents of such views express a degree of humility by putting their arguments in terms to which other citizens can relate. Turning to other church-state questions, I suggest that a secularization of culture fueled by an activist secular government is a serious problem, but that the way for government to address that problem is not by sponsoring its own religious activities, such as school prayers or municipal religious displays. Instead, government should accommodate the independent religious activity of citizens and groups by allowing private activities in public forums, by affording conscientious exemptions from burdensome laws, and by permitting religiously affiliated institutions that provide education and social services to participate in publicly funded programs on the same terms as other groups. The Article concludes with some final reflections on religion and politics.

19. Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 458-74 (1992) (discussing how religion has often harmed and sometimes helped women).

20. In *Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2491-94 (1994), the Court once again, as it has for six years, decided an Establishment Clause case without setting forth a clear majority standard for Establishment Clause analysis. For discussion, see Thomas C. Berg, *Slouching Toward Secularism: A Comment on Kiryas Joel School District v. Grumet*, 44 EMORY L.J. (forthcoming 1995).

21. See *infra* part I.

I. CURRENT PERSPECTIVES ON CHURCH AND STATE

At the risk of oversimplification, current perspectives on the proper relationship between religion and the state in America can be placed into three paradigmatic groups.²²

A. *The Leading Church-State Perspectives*

1. Enlightenment Secularism

The first perspective on religion and politics is the "Enlightenment" or "secularist" perspective. This outlook tends to focus on the dangers to liberty and public peace that may be posed when religion allies with or influences government. To prevent such dangers, adherents to this view claim that strong rules should be set up to prevent the state from aiding religion or incorporating religious influences.

The Enlightenment perspective has been expressed vividly by Justice Blackmun. Concurring in the result in *Lee v. Weisman*,²³ in which the Court held that the practice of government-initiated and -sponsored prayers at public school graduation ceremonies violated the Establishment Clause, Justice Blackmun defended strict separation of church and state:

When the government arrogates to itself a role in religious affairs, it abandons its obligation as a guarantor of democracy. Democracy requires the nourishment of dialogue and dissent, while religious faith puts its trust in an ultimate divine authority above all human deliberation. When the government appropriates religious truth, it "transforms rational debate into theological decree." Those who disagree no longer are questioning the policy judgment of the elected but the rules of a higher authority who is beyond reproach. . . . Democratic government will not last long when proclamation replaces persuasion as the medium of exchange.²⁴

22. These are broad, heuristic categories and, to some extent, represent polar viewpoints. I do not now address more nuanced standards put forward by various courts and scholars, such as the "endorsement" as opposed to the "coercion" test for Establishment Clause violations.

23. 112 S. Ct. 2649 (1992).

24. *Id.* at 2666 (Blackmun, J., concurring) (citing Jonathan E. Nuechterlein, Note, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127, 1131 (1990)); see also *id.* at 2666 n.10 (Blackmun, J., concurring in the

This view emphasizes, as Justice Blackmun expressed elsewhere, that the purpose of church-state separation is to protect "secular liberty" from the threat of religious fanaticism.²⁵

Until the early 1980s, this perspective on church and state informed many of the leading decisions under the religion clauses, especially those involving state aid for religiously affiliated schools. Under this view, religion is seen as a "private matter"²⁶ that must not become too intertwined with public institutions because it will engender the kind of coercion and "divisiveness" that pose "a threat to the normal political process."²⁷

This interpretation of the religion clauses is also common among legal scholars. Kathleen Sullivan, for example, argues that the First Amendment's ban on establishments of religion "implies the affirmative 'establishment' of a civil order for the resolution of public moral disputes."²⁸ This "secular civil order," the "culture of liberal democracy," reflects the framers' primary goal of privatizing religion in order to prevent wars of religious strife like those that plagued sixteenth- and seventeenth-century Europe. In Sullivan's view, the "secular civil order" demands that religiously affiliated services be denied a role in publicly funded education or welfare programs and religious beliefs not serve as the basis for legislation.²⁹ Likewise, William Marshall argues for "a presumptive," though not absolute, "barrier against religious participation in the public square."³⁰ In his account, "[b]ecause fear is a primary motivation for the adoption of a belief structure"—especially, apparently, a religious one—"the believer may be upset by any suggestion that her adopted belief system is fallible." Such "[f]ervent beliefs fueled by suppressed fear," in turn, "are easily transformed into movements of intolerance,

judgment) (" '[A] religion, even if it calls itself the religion of love, must be hard and unloving to those who do not belong to it.' ") (quoting SIGMUND FREUD, *GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO* 51 (James Strachey trans., 1922)).

25. *County of Allegheny v. ACLU*, 492 U.S. 573, 612 (1989) (plurality opinion).

26. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) ("The Constitution decrees that religion must be a private matter for the individual, the family, and institutions of private choice.").

27. *Id.* at 622-23 (striking down state aid to religious schools on this ground among others); see also *Aguilar v. Felton*, 473 U.S. 402, 413-14 (1985) (same); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 795-97 (1973) (same); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982) (relying on "political divisiveness" argument to invalidate ordinance allowing church to object to licensing of a liquor store within 500 feet of the church).

28. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992).

29. *Id.* at 197-98, 208-14.

30. Marshall, *supra* note 18, at 863.

repression, hate, and persecution.”³¹ For several scholars, this separationism based on a suspicion of active religion counsels against giving religious practice special protection from state regulation, despite the Constitution’s specific protection of free exercise.³²

2. Evangelical Separationism

A second paragraph in Justice Blackmun’s *Weisman* concurrence presents a very different argument for a strict separation of church and state, which may be called the “evangelical” argument.³³ This view tends to come from within religious communities, and primarily seeks to ensure that churches and believers are able to follow divine commands and pursue other forms of religious mission free from interference or corruption by the state. Justice Blackmun wrote:

[W]e have recognized that “[r]eligion flourishes in greater purity, without . . . the aid of Gov[ernment].” . . . [E]ven the favored religion may fear being “taint[ed] . . . with a corrosive secularism.” The favored religion may be compromised as political figures reshape the religion’s belief for their own purposes; it may be reformed as government largesse brings government regulation.³⁴

This theme runs back through American history to the writings of Roger Williams, the early Baptist dissenter from Massachusetts Puritanism, who portrayed the true church as a garden threatened by

31. *Id.* at 858.

32. See Steven G. Gey, *Why Is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 178 (1990) (arguing that “the very structure of religious ideas and practice are contrary to the mode of thought necessary to foster democratic self-governance”); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 597 (1991) (arguing that strong protection of religious freedom “may undercut the project of constitutional democracy” because religions “frequently claim divine inspiration” and thus “discourage skepticism”); Sullivan, *supra* note 28, at 220-22 (arguing that “secular civil order” requires that religion be subject to requirements of welfare state); cf. Sherry, *supra* note 16, at 152 (raising possibility that special protection for religious freedom is inappropriate because “the purpose of the religion clauses is to allow a secular government to operate independent of the varied religious beliefs of the citizenry”).

33. I use the term “evangelical” to focus on the fact that this view originated in America among evangelical Protestant dissenters. Analogous concerns are voiced by believers from other traditions.

34. *Lee v. Weisman*, 112 S. Ct. 2649, 2666 (1992) (Blackmun, J., concurring in the judgment) (quoting *Memorial and Remonstrance Against Religious Assessments* (1786), in *THE COMPLETE MADISON* 309 (S. Padover ed., 1953); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985) (second and third alterations in original)).

the wilderness of society and the state.³⁵ Ultimately, it can be traced to theologies of the Protestant Reformation that distinguished "two kingdoms," temporal and spiritual, neither of which should interfere in the other's jurisdiction.³⁶

One might expect this approach to play a strong role in supporting the free exercise rights of churches and believers.³⁷ Although this has been true, the evangelical approach surprisingly has played more of an explicit role in Establishment Clause rulings. For example, one of the reasons the Court gives for striking down government-sponsored religious exercises is that they produce a watered-down "civic religion" tailored to the purposes of the government rather than to the religious variety of the people.³⁸ Moreover, in decisions striking down funding of religious schools, the Court has stated that government supervision designed to ensure proper use of the funds raises the "spectre of government 'secularization of a creed.'"³⁹

3. The Evangelical "Christian Nation" Perspective

Within the evangelical approach to church-state separation, however, there has regularly appeared a significant twist—one that Mark de Wolfe Howe pointed out in the essay in which he called lawyers' attention to Roger Williams and the evangelical view.⁴⁰

35. For discussion of this point, see MARK DE WOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 1-15 (1965); Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 471-83 (1991).

36. The genesis of the Protestant "two kingdoms" theory was Martin Luther's *On Secular Authority: How Far Does the Obedience Owed to It Extend?*, in LUTHER AND CALVIN ON SECULAR AUTHORITY 3, 8-9 (Harro Hopfl ed., 1991); see also Michael W. McConnell, "God is Dead and We Have Killed Him!": *Freedom of Religion in the Postmodern Age*, 1993 B.Y.U. L. REV. 163, 167-72 (tracing connection between "two kingdoms" theology and the First Amendment).

37. For arguments to this effect, see Hall, *supra* note 35, at 513-23; McConnell, *supra* note 36, at 171-72. In free exercise cases, this view probably has been reflected, though only implicitly, in the Court's (sometimes) conclusion that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

38. See, e.g., *Weisman*, 112 S. Ct. at 2656-57 (rejecting such "an official or civic religion"); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (maintaining that government-composed school prayers tend not only to "destroy government" but also to "degrade religion").

39. *Aguilar v. Felton*, 473 U.S. 402, 414 (1985) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 650 (1971)); see also *Lemon*, 403 U.S. at 619-20 (striking down aid because government supervision of parochial schools might "intrude on religion").

40. See HOWE, *supra* note 35 *passim*.

While the evangelical tradition has wished to keep the churches free from government interference, many within it have simultaneously insisted that Christianity or religion in general be favored by law. Such advocates seek not simply to have Judeo-Christian values reflected in the secular laws, but to promote distinctively Christian (particularly Protestant) religious practices through the laws. Historically, therefore, while calling for the institutional separation of church and state, the evangelical tradition has simultaneously encouraged a host of religious public practices that belied any strong separation, from official prayers to Sunday closing laws to various kinds of government aid for churches. Professor Howe saw this "host of favoring tributes to faith" as "so substantial that they have produced in the aggregate what may fairly be described as a *de facto* establishment of religion"⁴¹—of generic Protestantism, for the most part.

This nonseparationist thrust of evangelical Protestantism is particularly strong today in the arguments of some on the religious right. An instructive example is fundamentalist David Barton, who attacks separation of church and state as a "myth":

That "wall" [of separation] was originally introduced as, and understood to be, a one-directional wall protecting the church from the government. . . . In other words, separation of church and state pertained to denominational differences, not to basic Christian principles.⁴²

Barton begins with the typical evangelical affirmation that the sole or overwhelming purpose of religious freedom is to protect the church from the state. From this conception, he concludes that it is consistent with religious freedom for the United States to be a "Christian nation" in a legal sense. Barton argues not only for returning government-sponsored prayer to the public schools, but also, for example, for requiring legislators to swear a belief in "eternal rewards and punishments" to ensure that they feel ethical demands to exercise power responsibly.⁴³ The sharp contrast between this theme and that of "evangelical separation" is illustrated by the fact that when such a "test oath" provision was proposed for federal offices in the

41. *Id.* at 11.

42. DAVID BARTON, *THE MYTH OF SEPARATION: WHAT IS THE CORRECT RELATIONSHIP BETWEEN CHURCH AND STATE?* 42-43 (6th ed. 1992).

43. *Id.* at 83, 257-58. To accomplish this latter goal at the federal level, at least, would require amending or repealing the constitutional provision that "[n]o religious test shall ever be required as a qualification to any office or public trust under the United States." See U.S. CONST. art. VI, § 3.

Constitution, Isaac Backus, fiery evangelical leader of the New England Baptists, opposed it on separationist grounds. Backus argued that "[n]o man or men can impose any religious test, without invading the essential prerogatives of our Lord Jesus Christ."⁴⁴

The strong "Christian America" view probably has few adherents in the academy or on the courts. The closest theory proposed by any prominent judge or scholar would limit the Establishment Clause to prohibiting a preference for one particular sect⁴⁵ (although even these theorists should, in theory, oppose a preference for Christianity in general). The view that government may officially favor Christianity or theism and disfavor alternatives is, however, more prevalent in the broader culture.⁴⁶

B. The Need to Critique and Balance Perspectives

Both Enlightenment and evangelical perspectives on religion and government contain truth. But each one is partial and must be balanced with insights provided by the other—insights that Reinhold Niebuhr's thought can help uncover. As I will argue in greater detail in part II, those evangelical perspectives that seek to promote religion through government underestimate the costs of such efforts both to social cohesion and to the independent role of religion as a counterforce to government, while evangelical perspectives that emphasize maintaining the purity of religion through strict separation risk losing all relevance to political life. Neither, however, is it likely that an adequate public order in America can be built purely on secular foundations from which religious influences are scrupulously excluded. Religious involvement in politics provides moral vigor, a counterweight to the power and pretensions of the state, and, in this nation, an essential link between the beliefs of the people and the actions of their government.

Moreover, none of the views above alone presents a complete account of the history surrounding the enactment of the First

44. Isaac Backus, *Religion and the State, Slavery, and Nobility* (1788), reprinted in 1 THE DEBATE ON THE CONSTITUTION 931, 931 (Bernard Bailyn ed., 1993) (relating comments delivered to the Massachusetts ratifying convention on Feb. 4, 1788).

45. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION *passim* (1982).

46. See, e.g., HERBERT MCCLOSKEY & ALIDA BRILL, DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES 131-33 (1983) (reporting that nearly half of survey respondents would deny atheists the right to "make fun of God and religion" and that 80% believe prayers in public schools should be permitted).

Amendment's religion clauses. Both secularist and evangelical arguments influenced the framers. The decision to protect religious liberty was based on an "overlapping consensus," with different persons supporting the principle based on different normative premises.⁴⁷ For example, one of the prime episodes in the struggle for religious liberty, the defeat of religious tax assessments in Virginia in the 1780s, was engineered by such a coalition. While James Madison and Thomas Jefferson crafted and pressed the theoretical arguments in the legislative halls, "[t]he necessary political pressure, the demand for disestablishment, the threat not to ratify the Constitution unless something were done about religious liberty, came from the evangelical dissenting churches."⁴⁸ Madison's *Memorial and Remonstrance*⁴⁹ itself skillfully interwove Enlightenment concerns about religiously based strife with evangelical arguments about the primacy of religious duties and the weakness and corruption of established religions. On the one hand, Madison made the Enlightenment argument that taxation to support religion "will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced amongst its several sects."⁵⁰ On the other hand, he pressed the evangelical argument that "employ[ing] religion as an engine of civil policy . . . [is] an unhal- lowed perversion of the means of salvation," and pointed out that "ecclesiastical [sic] establishments, instead of maintaining the purity and efficacy of religion, have had a contrary operation."⁵¹

For much of the last fifty years, discussions of religious freedom in legal writings have tended to emphasize the secularist justifications and ignore the religious. For example, in its first and most enduring

47. See John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987) (introducing the concept of an overlapping consensus); Henry S. Richardson, *The Problem of Liberalism and the Good*, in LIBERALISM AND THE GOOD 1, 10-11 (R. Bruce Douglass et al. eds., 1990) (defining the concept in such terms); see also Timothy P. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87, 89-90 & nn.11-12 (1992) (exploring arguments "which together create an overlapping consensus in favor of a robust principle of religious liberty").

48. Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 374 (1992). The Establishment Clause also had a significant element of federalism, that is, protecting state establishments from federal interference. See, e.g., Joseph W. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L. Q. 371. But the various substantive, normative premises described in the text also clearly played a role in the conclusion that the new federal government should not establish a religion.

49. James Madison, *Memorial and Remonstrance* (1785), in CHURCH AND STATE IN AMERICAN HISTORY 68 (John F. Wilson & Donald L. Drakeman eds., 1987).

50. *Id.* at 71.

51. *Id.* at 70.

confrontation with the history of the religion clauses, the Court in *Everson v. Board of Education*⁵² referred solely to the contributions of Madison and Jefferson,⁵³ saying nothing about the role of Protestant dissent in developing the intellectual framework for religious freedom. This omission recently has been corrected by a flood of important historical work showing, at least, that "the religious justification for religious freedom had great force in the colonial and founding periods."⁵⁴ Serious analysis now cannot ignore the influence of members of dissenting Protestant sects, such as Isaac Backus and other Baptists, as well as the theological affirmations even of "enlightened" figures such as Madison and Jefferson.⁵⁵

However, one should not take the corrective too far. William Lee Miller has reminded us that "[t]he Enlightenment, with its edge of skepticism," was indeed also

present in the Revolution, in the new nation's institutions, in key founders, in the mind of significant segments of the people—and, in effect, in the great silences and protections and negations of the Constitution itself When one hears imperialistic claims about the place of religion in the foundation of America's political institutions one needs to be reminded again not only of the diversity of the colonies but also of the role in the American founding of the Enlightenment, of deism, of a certain skepticism about and emancipation from religious preoccupations in the late eighteenth century, precisely in the instruments of the American founding.⁵⁶

52. 330 U.S. 1 (1947).

53. *Id.* at 11-13.

54. Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 158 (1991).

55. See, e.g., ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 21-31 (1990) (tracing the influence of Protestant dissent, especially its influence on Madison); HOWE, *supra* note 35, at 1-15 (arguing that First Amendment reflects the "theological theory of disestablishment" exemplified by Williams "no less firmly" than it does the Enlightenment); Hall, *supra* note 35, at 505-12 (tracing similarity of views between Roger Williams and James Madison); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1425-49, 1452-55 (1990) (tracing the influence of Protestant dissent, especially its influence on Madison); Smith, *supra* note 54, at 156-66 (noting that both Baptists and deists affirmed the "priority" and "voluntariness" of authentic religious beliefs).

56. William Lee Miller, *The Moral Project of the American Founders*, in *ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY* 17, 35, 36 (James D. Hunter & Os Guinness eds., 1990).

Miller likewise argues that "[t]he distinctive . . . feature of the American beginning was neither the religious underpinnings nor the emancipation from them but the combination."⁵⁷

Indeed, the two primary arguments in *Memorial and Remonstrance* reflect affirmations shared by evangelical Protestants and Enlightenment deists. At the outset of the document, Madison argues that the "duty towards the Creator" is "precedent, both in order of time and in degree of obligation, to the claims of Civil Society," and that this duty "and the manner of discharging it . . . must be left to the conviction and conscience of every man."⁵⁸ These claims concerning the "priority" and "voluntary" nature of religious beliefs (to use Steven Smith's terms)⁵⁹ resonate with both Enlightenment and evangelical themes. That religious claims are "precedent . . . to the claims of Civil Society" reflects both social-contract theory, stemming ultimately from John Locke, and "two kingdoms" theory, stemming from Luther and other Protestant reformers.⁶⁰ The proposition that religious beliefs must be voluntary to be effective was fundamental both to deists, who thought true religion must follow from the exercise of reason, and to evangelicals, who thought saving faith could follow only from the moving of the Holy Spirit.⁶¹ In short, both views contributed, from their differing premises, to the conclusions "that religion is essentially distinct from civil government, and exempt from its cognizance; [and] that a connection between them is injurious to both."⁶²

At the time the First Amendment was ratified, it was relatively easy for evangelical and Enlightenment views to form an overlapping consensus in favor of religious freedom. Because government was far less active than it is now, a policy of separating the governmental and religious spheres could, for the most part, satisfy both views. By leaving religion alone, government would leave religious conscience free, satisfying evangelical concerns. At the same time, a requirement of leaving religion alone also would satisfy Enlightenment concerns,

57. *Id.* at 37; see also Martin E. Marty, *On A Medial Moraine: Religious Dimensions of American Constitutionalism*, 39 EMORY L.J. 9, 10 (1990) (noting both Biblical and Enlightenment elements in constitutional tradition).

58. Madison, *supra* note 49, at 68-69.

59. Smith, *supra* note 54, at 154-57.

60. *Id.* at 159-63; McConnell, *supra* note 36, at 169-70.

61. Smith, *supra* note 54, at 160.

62. Letter from James Madison to Edward Everett (1823), *quoted in* ANSON P. STOKES & LEO PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 61 (rev. one-vol. ed. 1964).

because it would end the practice of imposing religious uniformity on objectors and would save government from involving itself in and worsening religious controversy.

Government, however, has become far more active now than in the eighteenth century, and this activity affects many areas of life. As a result, it is far more difficult to maintain religious freedom without conscious governmental efforts to do so, efforts that themselves raise concerns among some separationists and "Enlightenment"-minded observers about government involvement with religion. Today, neither of the two views can be taken to its logical extreme without substantially suppressing the other in ways dangerous both to religion and to civil society. What is needed is a regime that balances the two views—what Reinhold Niebuhr would call a "proximate solution." The remainder of this Article describes Niebuhr's thought and how it might help us reach such a solution.

II. REINHOLD NIEBUHR ON ETHICS, RELIGION, AND POLITICS

Reinhold Niebuhr's writings on ethics, religion, and politics provide a perspective on the truth and limits of each of the above ideas, as well as insights on balancing them. Niebuhr critiques the arguments for a "Christian nation," but also the arguments, both Enlightenment and evangelical, for strict separation of church and state. In volume two of his most systematic work, *The Nature and Destiny of Man*,⁶³ Niebuhr himself sought to ground toleration in a balance between competing theories—the "Renaissance" view (which roughly corresponds to Enlightenment liberalism) and the "sectarian Protestant" view (Niebuhr's term for the evangelical approach).⁶⁴ Because Niebuhr's social ethics grew out of a practical engagement with various political and social movements, this part discusses his life before turning to his ethical theories and his views on religion and politics.

A. *Niebuhr's Life: Realism in the Service of Moral/Political Activism*

Reinhold Niebuhr was born of German-speaking immigrants and raised in the practices of a small ethnic religious denomination.⁶⁵ Nevertheless, throughout his life he drew deeply from the socially

63. 2 REINHOLD NIEBUHR, *THE NATURE AND DESTINY OF MAN: HUMAN DESTINY* (Scribner Library ed. 1964) (1943) [hereinafter NIEBUHR, *HUMAN DESTINY*]. Volume 1 of this work, subtitled *Human Nature*, was published in 1941.

64. *Id.* at 220-43.

65. See FOX, *supra* note 8, at 4, 28.

active, reformist tradition of America's mainline Protestants.⁶⁶ As a young pastor in Detroit (1915-28), he attacked Henry Ford's labor policies and worked in pacifist organizations.⁶⁷ During the Great Depression, he was a tireless activist for left-wing causes, twice running for office as a Socialist.⁶⁸ After rejecting both pacifism and Marxism, Niebuhr worked vigorously in 1939 and 1940 to strengthen sentiment against Nazi Germany,⁶⁹ and later in the Cold War to organize liberal opposition to Communism.⁷⁰ In his waning years, he lent his support to protests against the Vietnam war.⁷¹

Niebuhr was distinctive, however, in that he set political activism in the context of an increasingly sophisticated "realism" about the nature of humans and society. The earliest source of his realism was political—Marxist analyses of power. Niebuhr's first prominent book, *Moral Man and Immoral Society*,⁷² relied on Marx in levelling a withering assault against various strains of political and religious liberalism, which Niebuhr claimed had far too much confidence in the possibility of improving society through education, through scientific and empirical analysis,⁷³ or through "appeals to love, justice, goodwill and brotherhood."⁷⁴ Due to his own struggles with Henry Ford,

66. For discussion of the reformist tradition of nineteenth century Protestantism, see ROBERT HANDY, *A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES* (2d ed. 1985); MARTIN E. MARTY, *RIGHTEOUS EMPIRE: THE PROTESTANT EXPERIENCE IN AMERICA* (2d ed. 1970); TIMOTHY L. SMITH, *REVIVALISM AND SOCIAL REFORM* (1956).

67. See FOX, *supra* note 8, at 94-100.

68. *Id.* at 115-24, 133-36.

69. *Id.* at 167-92; see also, e.g., REINHOLD NIEBUHR, *CHRISTIANITY AND POWER POLITICS* 1-32 (1940) [hereinafter NIEBUHR, *CHRISTIANITY AND POWER POLITICS*] (criticizing, in chapter entitled "Why the Christian Church is Not Pacifist," pacifist opposition to aiding Britain against the Nazis).

70. Niebuhr also advised the State Department on resistance to Communism. See FOX, *supra* note 8, at 228-47 (discussing Niebuhr's State Department work and his leadership in Americans for Democratic Action).

71. *Id.* at 283-85.

72. REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS* (Harper & Row 1987) (1932) [hereinafter NIEBUHR, *MORAL MAN*].

73. *Id.* at 211-16. Here Niebuhr primarily attacked John Dewey and his followers. See DANIEL F. RICE, *REINHOLD NIEBUHR AND JOHN DEWEY: AN AMERICAN ODYSSEY* 17-27 (1993).

74. Reinhold Niebuhr, *The Blindness of Liberalism*, *RADICAL RELIGION* 23 (Autumn 1936); cf. Daniel D. Williams, *Niebuhr and Liberalism*, in REINHOLD NIEBUHR: *HIS RELIGIOUS, SOCIAL, AND POLITICAL THOUGHT* 193, 195-97 (Charles W. Kegley & Robert W. Bretall eds., 1956) (arguing that Niebuhr overstated the naivety of early twentieth-century reformers). For examples of Marx's attacks on "bourgeois" reason and "Utopian" reforms, see KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* 33-37 (Samuel Moore trans., 1992); *id.* at 14 (arguing that "[l]aw, morality, religion, are to [the

Niebuhr became convinced that self-interest and the will to power were pervasive in human social behavior, especially the behavior of social groups.⁷⁵ Socializing private property was necessary, he argued, precisely because economic power would give way only to "coercion," not to reason or moralizing.

The source of Niebuhr's "realism," however, soon turned more theological. By the mid-1930s, he (and others) realized the danger in the Marxist "pretension" that a single-minded pursuit of the interests of the working class would produce a final form of justice for all.⁷⁶ He began to locate the roots of society's evils in the self rather than in particular social conditions, thus casting doubt on the idea that any political program could be an ultimate answer.⁷⁷ While remaining committed to socialist policies, he anchored his analysis of human nature in the doctrines of sin found in orthodox Christian writers such as Paul, Augustine, Luther, and Pascal.⁷⁸ It was Niebuhr's increasing sense of the danger of "utopian" views that led him, by the 1940s, to new political commitments—the critique of pacifism and a (qualified) defense of Western democracy and welfare capitalism.⁷⁹ By this time, Niebuhr's ideas had begun to influence a coterie of policymakers and academics, such as George Kennan, Hans Morgen-

proletarian] so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests").

75. "In every human group there is less reason to guide and to check impulse, . . . less ability to comprehend the needs of others and therefore more unrestrained egoism than the individuals, who compose the group, reveal in their personal relationships." NIEBUHR, *MORAL MAN*, *supra* note 72, at xi-xii.

76. REINHOLD NIEBUHR, *REFLECTIONS ON THE END OF AN ERA* 243-44 (1934) (warning that Communism produces "new and stronger centres of political power which will be new occasions for and temptations to injustice").

77. *Id.*

78. *See id.* at ix (arguing simultaneously for "a more radical political orientation and more conservative religious convictions"). Niebuhr's turn to classical Christian sources culminated in 1941-43 in the two volumes of *THE NATURE AND DESTINY OF MAN*, *supra* note 63, on which this part focuses.

79. *See, e.g.*, REINHOLD NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* xiii, 41 (1944) [hereinafter NIEBUHR, *CHILDREN OF LIGHT*] (defending an approach to democracy resting on a "realistic philosophical and religious basis" that recognizes "the power of self-interest in human society without giving it moral justification"); NIEBUHR, *CHRISTIANITY AND POWER POLITICS*, *supra* note 69, at 6 (attacking religious pacifists for believing that preaching "the law of love . . . would have . . . softened" Hitler's demands—"a faith which no historic reality justifies"). In one of Niebuhr's well-known aphorisms, "[m]an's capacity for justice makes democracy possible; but man's inclination to injustice makes democracy necessary." *Id.* at xiii.

thau, and Arthur Schlesinger, all of whom were inclined toward pragmatic but anti-Communist liberalism.⁸⁰

Both realism and a sense of religious judgment, however, led Niebuhr to temper his defense of America with critique. While resisting Communism, he also warned "against the temptation of claiming God too simply as the sanctifier" of the American way, noting "[t]he ironic tendency of virtues to turn into vices when too complacently relied upon."⁸¹ As Cold War nervousness gave way to placidity and self-satisfaction in the mid-1950s, Niebuhr criticized Americans' faith in democracy, material goods, psychological self-fulfillment, and individualistic, complacent religion.⁸² While maintaining that America had achieved considerable social justice, he tempered this with ongoing critiques of injustices in areas such as race relations—where his early "realistic" analyses became an important source of Martin Luther King Jr.'s civil rights strategies of nonviolent resistance.⁸³

For more than forty years, then, Niebuhr combined moral and political activism with a realism borne out of both political and theological insights. The realistic assessment of people and groups did not lead to cynicism, but instead operated in the service of a more

80. See JUNE BINGHAM, *COURAGE TO CHANGE: AN INTRODUCTION TO THE LIFE AND THOUGHT OF REINHOLD NIEBUHR* 368 (1961) (quoting Kennan as calling Niebuhr "the father of us all"); BROWN, *supra* note 8, at 243 n.49 (same); RICHARD H. ROVERE, *THE AMERICAN ESTABLISHMENT* 13 (1962) (describing Niebuhr as America's "official Establishment theologian").

81. REINHOLD NIEBUHR, *THE IRONY OF AMERICAN HISTORY* 173 (1952) [hereinafter NIEBUHR, *IRONY OF AMERICAN HISTORY*].

82. See, e.g., REINHOLD NIEBUHR, *PIOUS AND SECULAR AMERICA* 13 (1958) [hereinafter NIEBUHR, *PIOUS AND SECULAR AMERICA*] (criticizing Americans' "idolatry" of economic efficiency for creating a "gadget-filled paradise suspended in a hell of international insecurity"); Letter from Reinhold Niebuhr to Felix Frankfurter (May 26, 1960) (Felix Frankfurter Collection, Library of Congress), *reprinted in* Daniel Rice, *Felix Frankfurter and Reinhold Niebuhr: 1940-1964*, 1 J. L. & RELIGION 325, 410 (1983) (protesting against "the smugness of the current piety").

83. In 1932, Niebuhr warned that Southern whites would not voluntarily end segregation, identified Gandhian nonviolence as a "particularly strategic instrument for an oppressed group which is hopelessly in the minority," and predicted that "[t]he emancipation of the Negro race probably waits upon the adequate development of this kind of social and political strategy." NIEBUHR, *MORAL MAN*, *supra* note 72, at 252. King encountered these passages in his seminary studies and was heavily influenced by their account of power. See TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-1963* 84-87 (1988) (reporting that King "came to describe Niebuhr as a prime influence upon his life, and Gandhian nonviolence as 'a Niebuhrian stratagem of power' "); MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* 96-99 (1958) (noting Niebuhr's "great contribution" of refuting "false optimism" about social progress).

solid and successful activism.⁸⁴ In the process, Niebuhr developed a series of reflections on the interaction of morality, religion, and politics that is highly instructive as we face issues arising from their interaction today.

B. Niebuhr's Social Ethics

This section reviews several general themes in Niebuhr's ethical theory that are foundational for his specific discussions of religion and politics.

1. Partiality, Power, and the Limits of Morals and Reason in Politics

The first theme in Niebuhr's overall social ethics is an emphasis on a substantial, irreducible element of self-interest, partiality, and power-seeking in human social behavior. As discussed above, Niebuhr emphasized this in reaction to the overconfidence of early twentieth-century liberals who believed love or rationality could triumph over interest and power in social relations.

Niebuhr traced the tendency toward self-interest to a basic tension in human beings. They exist on the one hand in "freedom": They always have some capacity to envision greater progress and justice and possess a corresponding sense of obligation to achieve such goals. At the same time, humans are finite: Their visions of achievement are always partial, conditioned by historical and social location.⁸⁵ This tension makes humans "anxious" (in a term that Niebuhr borrowed from existentialist philosopher Søren Kierkegaard⁸⁶) and ultimately produces what the Jewish and Christian religions call "sin."⁸⁷ Insecure in our finitude, we seek to

84. John C. Bennett, *Reinhold Niebuhr's Social Ethics*, in REINHOLD NIEBUHR: HIS RELIGIOUS, SOCIAL, AND POLITICAL THOUGHT, *supra* note 74, at 46, 50 (observing that Niebuhr sought "to make way for such solutions of our problems as are possible by clearing away the idealistic and utopian illusions which have flourished" among political and religious activists).

85. 1 REINHOLD NIEBUHR, *THE NATURE AND DESTINY OF MAN: HUMAN NATURE* 16 (Scribner Library ed. 1964) (1941) [hereinafter NIEBUHR, *HUMAN NATURE*]. Although Niebuhr was attentive to the ways in which historical factors affect behavior, he argued that the underlying pattern described in text recurs in various forms throughout history. *Id.* at 4-31.

86. *Id.* at 181-83 (quoting SØREN KIERKEGAARD, *DER BEGRIFF DER ANGST* [THE CONCEPT OF ANXIETY] 89 (1960)).

87. *Id.* at 182 (describing this "inevitable spiritual state" of human existence). Niebuhr thus became especially known for his recovery of the theological notion of "original sin." See ROBIN W. LOVIN, *REINHOLD NIEBUHR AND CHRISTIAN REALISM* 130 (1995).

overcome it by asserting the absolute value of some particular idea, activity, or status (race, nation, class, or religion). In so defying our limits, we commit the sin of pride—the fundamental sin in Christian theology, in Niebuhr's view—whether by absolutizing a particular interest or vision ("idolatry") or by subordinating the interests of others ("injustice").⁸⁸ In a variety of examples, Niebuhr showed how the pervasiveness of pride had been revealed by the evils of the twentieth century and by the ambiguity present even in efforts to achieve good. For example, he pointed out how economic and technological progress solved some social problems but created ever more complex new problems, and how Marxism's quest for equality through state power created the conditions for Stalin's reign of terror.⁸⁹ And though he supported strong resistance to Communism in the Cold War, Niebuhr also reminded Americans that their self-image of national "innocence" was, and always had been, an unfounded pretension: Americans had exercised power in settling and transforming the New World, and in the Cold War the resistance to Communism involved the accumulation of nuclear weapons with an unprecedented capacity to destroy.⁹⁰

Because pride stems from the heart of human existence, in Niebuhr's view, it is not tied uniquely to any particular group, idea, or institution; if one occasion for self-assertion is overcome, another

88. NIEBUHR, *HUMAN NATURE*, *supra* note 85, at 164, 179. Feminist and other liberation theologians charge that Niebuhr's condemnation of pride is appropriate only for those who wield power; members of an oppressed group, on the other hand, need to assert selfhood and may commit sin by failing to do so. *See, e.g.*, JUDITH PLASKOW, *SEX, SIN AND GRACE: WOMEN'S EXPERIENCE AND THE THEOLOGIES OF REINHOLD NIEBUHR AND PAUL TILICH* 62-73 (1980); Valerie Saiving Goldstein, *The Human Situation: A Feminine View*, 40 *J. RELIGION* 100, 109 (1960). While this critique has some force, it ultimately does not undermine Niebuhr's insights. First, Niebuhr continually warned that persons "tempted by their eminence and . . . [their] undue power become more guilty of pride and of injustice than those who lack power and position." NIEBUHR, *HUMAN NATURE*, *supra* note 85, at 223. Second, while condemning pride, Niebuhr also spoke directly to the oppressed in arguing that humans must assert responsibility and accept the corresponding risk of guilt (indeed, the desire to avoid such risks and remain morally pure can be another form of pride). *See infra* text accompanying note 104. Moreover, he correctly warned that even a historically oppressed group, when it takes power, will be subject to the temptations and ambiguities that come with exercising responsibility. *See e.g.*, NIEBUHR, *CHILDREN OF LIGHT*, *supra* note 79, at 110-13 (making this argument with respect to the proletariat).

89. *See* REINHOLD NIEBUHR, *AN INTERPRETATION OF CHRISTIAN ETHICS* 97-98 (1935) [hereinafter *NIEBUHR, CHRISTIAN ETHICS*]. As Niebuhr concluded, "[e]very human advance offers new possibilities of catastrophe, and every virtue has the possibility of a vicious aberration." *Id.* at 54.

90. NIEBUHR, *IRONY OF AMERICAN HISTORY*, *supra* note 81, at 1-4, 31-35.

will arise. For example, Niebuhr argued, Marxism unmasked the bourgeois illusion that capitalism always rewards virtue and promotes freedom, but replaced it with the new illusion that serving the interests of the proletariat would produce justice and harmony overall.⁹¹ Moreover, the pervasiveness of self-interest and pride cannot be overcome by appeals to morality and brotherhood, by "rational suasion" and education, or by greater scientific knowledge; modern history shows that "man may, in his freedom, violate, corrupt, and prostitute the canons of reason in his own interest."⁹²

Niebuhr thus stands with one foot in the stream of thought running from Friedrich Nietzsche to postmodern philosophers such as Michel Foucault and Richard Rorty. To one degree or another, all of these thinkers "expos[e] reason as hubris" and "reason and justification as tainted with rationalization," as a "strateg[y] of power and domination, intended or otherwise."⁹³ As historian John Patrick Diggins has commented, "when we read contemporary poststruc-

91. NIEBUHR, *CHILDREN OF LIGHT*, *supra* note 79, at 106-18.

92. NIEBUHR, *HUMAN NATURE*, *supra* note 85, at 112; *see also id.* at 110 (arguing that science will never "achiev[e] the same results in the field of social relations which [it] achieved in the mastery of nature").

Consistent with this outlook, Niebuhr generally rejected strong theories of a "natural law" accessible to all rational beings, holding that such principles were too few and too abstract to be of significant guidance. Since many arrangements held to be "natural" are used and mystified by the dominant class—the aristocracy in a feudal system, the bourgeoisie in a liberal system—they become further examples of "the force of sin in the claim of sinlessness." NIEBUHR, *HUMAN DESTINY*, *supra* note 63, at 253-54.

93. JOHN PATRICK DIGGINS, *THE PROMISE OF PRAGMATISM: MODERNISM AND THE CRISIS OF KNOWLEDGE AND AUTHORITY* 436, 437 (1994); *see also id.* at 436 ("Niebuhr was something of a poststructuralist before the term came into being").

Nietzsche, of course, assaulted the notion of objective rationality, asserting that "[t]he entire knowledge-apparatus is . . . directed not toward knowledge, but rather toward getting control of things," and that "[t]his world is the will to power—and nothing besides!" FRIEDRICH NIETZSCHE, *THE WILL TO POWER* (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., 1967), *reprinted in* NIETZSCHE: *SELECTIONS* 146, 151 (Richard Schacht ed., 1993). Foucault likewise emphasized the role that power plays in the interpretation of texts and practices, warning that "we should not imagine that the world presents us with a legible face. . . . We must conceive discourse as a violence we do to things." MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE* 229 (1972). Rorty, too, asserts that "[t]he Enlightenment idea of 'reason' " has been discredited, as contemporary thought has "blurred the distinction between innate rationality and the products of acculturation" and other influences. Richard Rorty, *The Priority of Democracy to Philosophy*, in *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY* 257, 258 (Merrill D. Peterson & Robert C. Vaughan eds., 1988); *see also id.* at 267 (arguing that this view leads to defending liberal democracy on pragmatic, historically based grounds rather than "as the gradual unveiling, through the use of 'reason,' of 'principles' or 'rights' or 'values'").

turalists [such as Foucault and Rorty] we find what we earlier had found in reading Niebuhr: finitude, contingency, opacity, and irony."⁹⁴ In Diggins's words, then, Niebuhr showed "why political language that speaks of virtue and innocence can only be distrusted as a sinful misuse of words, usually by members of the privileged classes who mistake their power and wealth for 'moral excellence.'"⁹⁵

Niebuhr, however, derived most of his insights about pride from premodern sources—the rich tradition of Jewish and Christian rumination on the dark and mysterious character of human motives and actions (from the Hebrew prophets through Paul, Augustine, Luther, and Pascal).⁹⁶ Niebuhr helped recover for the twentieth century this Augustinian tradition of thought, with its emphasis on the "evil" element in human nature that "threatens the human community on every level."⁹⁷ He was, in one historian's words, able to "draw upon [these] premodern thinkers and demonstrate their relevance to the modern human condition."⁹⁸ Their emphasis on the persistence of evil taught the lesson, above all, that "although reforms are necessary and desirable, they can improve the conditions of men only if they are undertaken in the spirit of humility."⁹⁹

In Niebuhr's view, the tradition of Augustinian or "prophetic religion" (as he calls it), by teaching that "there is only one God," unmask the "vanity and pride by which [man] imagines himself, his nations, his cultures, his civilizations to be divine."¹⁰⁰ Thus it inculcates humility. Nevertheless, institutional religion (including Judaism and Christianity) likewise can "become the vehicle of collective egotism."¹⁰¹ Religion can be especially tempted to claim false absolutes, since it deals with the one absolute: "Every truth can

94. DIGGINS, *supra* note 93, at 439.

95. *Id.* at 438 (citing NIEBUHR, *MORAL MAN*, *supra* note 72, at 113-41).

96. See Richard Kroner, *The Historical Roots of Niebuhr's Thought*, in REINHOLD NIEBUHR: HIS RELIGIOUS, SOCIAL, AND POLITICAL THOUGHT, *supra* note 74, at 185-89 (discussing Niebuhr in the light of these thinkers).

97. REINHOLD NIEBUHR, *Augustine's Political Realism*, in CHRISTIAN REALISM AND POLITICAL PROBLEMS 119, 122 (1953) [hereinafter NIEBUHR, *CHRISTIAN REALISM*] (discussing AUGUSTINE, *CITY OF GOD*).

98. DIGGINS, *supra* note 93, at 436; see also Kroner, *supra* note 96, at 189 ("The basic Paulinism of [Niebuhr's] thought enables him to strike down the pretensions of modern ideologies.").

99. Kroner, *supra* note 96, at 189.

100. NIEBUHR, *HUMAN NATURE*, *supra* note 85, at 137.

101. *Id.* at 217.

be made the servant of sinful arrogance, including the prophetic truth that all men fall short of the truth."¹⁰²

2. The Importance of Moral Values in Politics

For Niebuhr, however (perhaps unlike Nietzsche and some postmodernists), the recognition of power and contingency in social behavior did not call for cynicism or undermine efforts for justice. Niebuhr's position did not imply the stance that there are no absolute truths—only that there are fewer than people are temperamentally inclined to think, and that there generally is no single easy way to relate those truths to the complexities of life. Moreover, although human freedom is dangerous because it often triggers prideful self-assertions, that same freedom is also creative; indeed, it is a precondition for justice and morality in the first place. It is precisely our "uneasy conscience" over our unrealized moral possibilities, Niebuhr said, that helps spur us on to higher moral achievements.¹⁰³

We must not regard the forms and conditions of justice achieved in history "as normative in the absolute sense," Niebuhr said, since they necessarily involve some use of coercion and the attendant element of prideful self-assertion. But

neither will we ease our conscience by seeking to escape from involvement in them. We will know that we cannot purge ourselves of the sin and guilt in which we are involved by the moral ambiguities of politics without also disavowing responsibility for the creative possibilities of justice.¹⁰⁴

For Niebuhr, the norm that continues to call humans to further achievement is the law of *agape*: the demand to express sacrificial

102. *Id.* For example, leaders of the medieval Catholic Church grasped political and economic power by claiming to be the "repository of a revelation which transcends the finiteness and sinfulness of men." *Id.* While Reformation theology emphasized as its fundamental tenet "the imperfect character of all human ambition and achievements," the leading Reformers, Luther and Calvin, exalted the perfection of their own teachings to the extent of imposing or advocating punishment, even death, for dissenters. See NIEBUHR, *HUMAN DESTINY*, *supra* note 63, at 226-28.

103. See, e.g., NIEBUHR, *HUMAN DESTINY*, *supra* note 63, at 244 ("Man's freedom over the limits of nature . . . means that no fixed limits can be placed upon either the purity or the breadth of the brotherhood for which men strive in history."); *id.* at 117 (stating that the human mind "cannot escape an uneasy conscience over its sinful effort to complete its own life about 'itself and its own' ") (quoting Martin Luther).

104. *Id.* at 284; see also, e.g., Reinhold Niebuhr, *The Christian Church in a Secular Age*, in *THE ESSENTIAL REINHOLD NIEBUHR: SELECTED ESSAYS AND ADDRESS* 79, 86 (Robert McAfee Brown Ed., 1986) (warning that religious believers must not be "tempted by their recognition of the sinfulness of human existence to disavow their own responsibility for a tolerable justice in the world's affairs").

love for all humans, even when they do not reciprocate.¹⁰⁵ In Niebuhr's view, this norm is revealed in Jesus' teachings—for example, " '[w]hosoever loseth his life shall find it' "¹⁰⁶—as well as in his death and atonement.¹⁰⁷ Liberal theologians, Niebuhr said, correctly recognized that

[t]he uneasy conscience of man over various forms of social injustice, over slavery and war, is an expression of the Christian feeling that history must move from the innocence of Adam to the perfection of Christ For the freedom of man makes it impossible to set any limits of race, sex, or social condition upon the brotherhood which may be achieved in history.¹⁰⁸

Because, however, liberal theologians failed to appreciate the pervasiveness of human self-interest—in other words, the distance between the ultimate and the human—they wrongly believed that the norm of *agape* could be directly translated into social practice.¹⁰⁹ Instead, the notions of universal love and brotherhood are supra-rational; they are an " 'impossible possibility,' "¹¹⁰ a revelation of the indeterminate possibilities that humans are called toward, but never can reach, in history.

3. "Proximate Solutions" and Pragmatism

In Niebuhr's view, the facts of self-interest and partiality mean that the task for politics must not be to seek utopia, but to pursue more modest goals. Like other realms of culture, political activity (in general or for any particular cause) can "add to the . . . richness of our insights into reality," but "[i]f the effort is made to establish [it] . . . as the clue to the meaning of the whole, the cultural pursuit becomes involved in idolatry" and dangerous pretensions.¹¹¹

Politics thus can only be, in Niebuhr's often-quoted words, a "method of finding proximate solutions for insoluble problems."¹¹² Politics seeks the "best possible harmony," that is, to direct people and society as much as possible, "within the conditions created by

105. *Id.* at 71, 69 (defining *agape* as "disinterested and sacrificial" and not dependent on whether it is mutually reciprocated).

106. *Id.* at 69 (citations omitted in original).

107. *Id.* at 74 (noting that Jesus' life "culminates in an act of self-abnegation").

108. *Id.* at 85.

109. *See id.* at 85-86.

110. *Id.* at 76 (citation omitted in original).

111. *Id.* at 209.

112. NIEBUHR, CHILDREN OF LIGHT, *supra* note 79, at 118.

human egoism," toward the results that would follow from the norm of sacrificial love.¹¹³ Such "proximate solutions" must balance power against power; given the inevitable element of self-interest in the behavior of all social groups, an "equilibrium of power" is necessary, requiring "conscious control and manipulation" by society.¹¹⁴ Thus, the simple pursuit of "brotherhood" is misguided, for "as soon as the life and interest of others than the agent are involved in action or policy," a sacrificial attitude may "become an unjust betrayal of their interests."¹¹⁵ In seeking to manage self-interest in this way, of course, Niebuhr's thought parallels important themes in the thought of the framers, particularly James Madison's arguments in the *Federalist Papers* supporting the Constitution's devices for dividing and balancing power.¹¹⁶

Moreover, political actions must be recognized as relative rather than final, lest they produce either the dangers of "optimistic illusions or . . . the despair which follow[s] upon the dissipation of these illusions."¹¹⁷ Niebuhr summarized: "Higher realizations of historic justice would be possible if it were more fully understood that all such realizations contain contradictions to, as well as approximations of, the ideal of love."¹¹⁸

In his social ethics, then, Niebuhr ultimately settled on a form of pragmatic liberalism "characterized by a rejection of all ideologically consistent political schemes."¹¹⁹ Because government must seek

113. NIEBUHR, *HUMAN DESTINY*, *supra* note 63, at 252.

114. *Id.* at 266; *see also id.* at 258 (acknowledging that any countervailing power itself "contain[s] possibilities of contradicting the law of brotherhood").

115. *Id.* at 88 (noting that "[f]ailure to understand this simple fact . . . has resulted in the unholy alliance between Christian perfectionism and cowardly counsels of political expediency in dealing with tyrants [such as Hitler] in our own day").

116. In addressing the "diseases" of popular government, Madison maintained that "faction," the clash of opposing interests, is "sown in the nature of man," and cannot be fully eliminated by reasoned dialogue because of "the connection . . . between [man's] reason and his self-love." *THE FEDERALIST* NO. 10 (James Madison), at 77, 78 (Clinton Rossiter ed., 1961). The solution, at least in significant part, must be to balance power in the sorts of ways that the checks and balances provisions of the Constitution do: "Ambition must be made to counteract ambition." *THE FEDERALIST* NO. 51 (James Madison) at 322 (Clinton Rossiter ed., 1961). Because neither the citizens nor their rulers are "angels," the policy must be to "suppl[y], by opposite and rival interests, the defect of better motives." *Id.*; *see also* JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 299 (1888) (arguing that the Constitution "is the work of men who believed in original sin, and were resolved to leave open for transgressors no door which they could possibly shut").

117. Reinhold Niebuhr, *Ten Years That Shook My World*, 56 *THE CHRISTIAN CENTURY* 542, 545 (1939).

118. NIEBUHR, *HUMAN DESTINY*, *supra* note 63, at 246-47.

119. STONE, *supra* note 8, at 205.

proximate solutions, and because final moral norms seldom can be reduced directly to practice in a social world marked by self-interest and partiality, Niebuhr's political thought ultimately counsels a focus on "what works." Moreover, Niebuhr came to mitigate his earlier deprecation of the value of reason in politics: Even if reason, or "critical intelligence,"¹²⁰ cannot displace self-interest, it plays a necessary role in managing it. "[T]o arbitrate and adjust between competing interests" requires a "fresh examination" and "critical scrutiny of all the interests involved," lest "shifting circumstances . . . transmute the justice of yesterday into the injustice of tomorrow."¹²¹

Nevertheless, Niebuhr's pragmatism was distinctive from other varieties in two ways that make it useful for analyzing religion and politics in today's context. First, it did not degenerate into accepting politics as nothing more than a series of interest-group power struggles. As discussed above,¹²² Niebuhr maintained the relevance of both moral values and "critical intelligence" to political decisions. This is important for present purposes because only a theory that sees some role for moral principles in politics can give an account of how religion has operated in American politics, and how it can operate in a constructive way.

On the other hand, Niebuhr's thought was devoid of the sense of this-worldly confidence in "critical intelligence"—empirical science, economic theory, reasoned dialogue, or other sorts of instruments—that has characterized much of American pragmatism.¹²³ Niebuhr's Augustinian religious vision kept in focus the ironic and even tragic elements in human striving. This, too, is an important, distinctive contribution that a religiously sensibility can make to politics and that any theory of religion and politics must take into account.

4. The Organic Nature of Society

Niebuhr's mature work also overlapped with certain conservative themes, particularly those in the thought of Edmund Burke. Niebuhr's sense of the dangers of "ideologically consistent political schemes" and the need for caution in social and political reforms was reminiscent of Burke's criticism of the "abstract" doctrines of the

120. NIEBUHR, *CHRISTIAN ETHICS*, *supra* note 89, at 100.

121. *Id.*

122. *See supra* part II.B.2.

123. *See* DIGGINS, *supra* note 93, at 434-43.

French Revolution.¹²⁴ Moreover, like Burke, Niebuhr came to emphasize the "organic" nature of societies: Each society's course of development is highly contingent on the society's particular history and culture, and efforts at reform must take account of this fact if they are to be successful.¹²⁵ This point will be particularly relevant to the question of whether strict separation of church and state is possible in a society as historically and currently religious as is America.¹²⁶

5. Niebuhr's Use of the "Prophetic Religious" Perspective on History and Society

Niebuhr's ethical theories were permeated by insights from his reading of the "prophetic" tradition in Judaism and Christianity. In Niebuhr's view, "prophetic religion" plays a role in politics at several levels. First, its tenets point to a certain disposition toward human knowledge and striving. The believer in prophetic religion understands that all human perspectives are limited and relative in the face of the one God, yet also that human striving is meaningful because absolute norms are revealed (albeit imperfectly) in the world. That basic tension between the absolute and the finite, between freedom and constraint, is not resolved in history. It is, however, addressed by "grace"—a "divine mercy" that enables us to resign ourselves to our limits, neither trying to overcome them through idolizing some cause nor giving up on the quest for relative goodness in history.¹²⁷ As Niebuhr puts it, prophetic religion

understands the fragmentary and broken character of all historic achievements and yet has confidence in their meaning because it knows their completion to be in the hands of a Divine Power, whose resources are greater than

124. See, e.g., EDMUND BURKE, *Reflections on the Revolution in France* (1791), in 8 THE WRITINGS AND SPEECHES OF EDMUND BURKE 53, 88 (Paul Langford ed., 1989) (arguing that violent course of French Revolution stemmed from its being based on "extravagant and presumptuous speculations" about remaking society).

125. REINHOLD NIEBUHR, *The Foreign Policy of American Conservatism and Liberalism*, in CHRISTIAN REALISM, *supra* note 97, at 72 (warning against "abstract modes of social engineering" and advocating caution "not to fall into worse forms of injustice in the effort to eliminate old ones").

126. See *infra* part II.C.2.e. It should be emphasized that although Niebuhr was a "conservative" in the sense just described, his was a conservatism without any great reverence for the status quo or for the individualism common to much conservative thought in America. See STONE, *supra* note 8, at 164-69; Bennett, *supra* note 84, at 99, 107-15.

127. NIEBUHR, HUMAN DESTINY, *supra* note 63, at 114.

those of men, and whose suffering love can overcome the corruptions of man's achievements, without negating the significance of his striving.¹²⁸

The realization that one is finite yet accepted breaks one's pride; it thereby enables one to see the truth in other's views and simultaneously gives "a sense of gratitude in the experience of release from self."¹²⁹ This emphasis on obtaining spiritual resolution through accepting one's limits rather than through directly seeking perfection in conduct—on "justification by faith," not by "works"—has been prominent throughout Christian thought, from Paul to Augustine to Luther.¹³⁰ Niebuhr restated the doctrine of "justification by faith" in terms particularly directed at modern persons facing ethical and political decisions.¹³¹

Second, "prophetic religion" operates in the cultural world, giving an explanation of human nature and history. In Niebuhr's view, the relevance of prophetic religion to social and political decisions is shown—indeed, the truth of its statements is "validated"—"by proving them to be the source of meaning for the seeming contradictions and antinomies of life."¹³² Religious images and stories are particularly able to do this because they capture the paradox, mystery, and irony of life, elements not reducible to logical analysis.¹³³ For example, Niebuhr argued, "prophetic religion" accounts for the paradoxes of human nature far better than do various schools of modern thought, correctly attributing a "higher stature" to humans than do purely naturalistic theories, but also "taking a more serious view of [their] evil" than do idealistic theories.¹³⁴ As will be explored later,¹³⁵

128. NIEBUHR, *CHILDREN OF LIGHT*, *supra* note 79, at 189-90.

129. NIEBUHR, *HUMAN DESTINY*, *supra* note 63, at 115.

130. For both historical and theological discussion, see ALISTER E. MCGRATH, *JUSTIFICATION BY FAITH: WHAT IT MEANS FOR US TODAY* (1988).

131. In Niebuhr's account, the notion that justification comes through forgiveness rather than through perfect conduct—that even those redeemed by God continue to commit sin—reflects an appreciation of "the full seriousness of sin as a permanent factor in human history." NIEBUHR, *CHRISTIANITY AND POWER POLITICS*, *supra* note 69, at 3. Thus, prophetic religion has always correctly "regarded the problem of achieving justice in a sinful world as a very difficult task." *Id.* at 4. Yet the assurance of forgiveness and of divine aid means that such strivings for justice will be meaningful and can achieve some progress.

132. REINHOLD NIEBUHR, *Coherence, Incoherence, and Christian Faith*, in *CHRISTIAN REALISM*, *supra* note 97, at 185 (arguing that under alternatives to Christianity, human life "is either given a too-simple meaning or falls into meaninglessness").

133. *See id.* at 184-85.

134. NIEBUHR, *HUMAN NATURE*, *supra* note 85, at 18.

135. *See infra* part III.A.

this is an important model for how religious views can participate distinctively in political argumentation in a pluralistic society. In Daniel Conkle's words, this model "does not reject America's commitment to deliberative, dialogic decision-making," and yet it "offers a genuinely non-secular source of truth, a source of transcendent judgment."¹³⁶

C. Niebuhr on Religion and Politics

The following section applies Niebuhr's general insights on human nature, ethics, and religion to the relation of religion and politics. It organizes his arguments by addressing them to the various perspectives on church-state relations presented in part I.

1. The Dangers of Religion in Politics

Recall that the first paragraph of Justice Blackmun's concurrence in *Lee v. Weisman* presents what I have called the "Enlightenment" argument for a strict separation of church and state.¹³⁷ Religion, in this picture, has a unique propensity to intolerance and to reliance on irrational decree, both of which threaten the dialogue and rational debate that alone can support politics in a pluralistic democratic society.¹³⁸ The government, therefore, must be kept strictly free of religious influences.

To a significant extent, Niebuhr's insights confirm the potential dangers of too close an alliance between religious and political power. To that extent, Niebuhr's outlook affirms the concerns of the Enlightenment. As already noted, Niebuhr had few illusions that the religious grounding of a political movement would guarantee its virtue.¹³⁹ Religion promises, in principle, to inculcate humility before the "ultimate," but in practice it often produces a new kind of arrogance, "add[ing] an element of pretension to the natural self-

136. Conkle, *supra* note 12, at 21; see also Alan Richardson, *Reinhold Niebuhr as Apologist*, in REINHOLD NIEBUHR: HIS RELIGIOUS, SOCIAL, AND POLITICAL THOUGHT, *supra* note 74, at 291, 293 (arguing that Niebuhr "led [many] to see that the insights of Biblical faith have an existential relevance to their own condition and to the condition of the society in which their lives are set").

137. See *Lee v. Weisman*, 112 S. Ct. 2649, 2661-62 (1992) (Blackmun, J., concurring); *supra* notes 23-32 and accompanying text.

138. See *Weisman*, 112 S. Ct. at 2666 (Blackmun, J., concurring); Marshall, *supra* note 18, at 853.

139. See *supra* notes 101-02 and accompanying text.

righteousness of men"¹⁴⁰—a phenomenon that can be dangerous when allied with political power. Thus, "[r]eligious questions have been a particularly fecund source of fanaticism and conflict," and confining religion to the private sphere of the individual, the home, and the church may produce a "gain in provisional toleration."¹⁴¹ Moreover, politics typically involves moral ambiguity, complex factual situations, and the balancing of interests rather than the achievement of easy or ultimate solutions; these facts suggest that religious doctrines will seldom translate directly into political programs. Because "a complacent religion can easily sanctify immediate ends by claiming ultimate sanctities for them," Niebuhr agreed that "[i]n some respects democracy requires a secular politics."¹⁴²

Niebuhr's warnings should be remembered when society faces attempts to wield government power to favor or impose specific theological ideals. One need only reflect on recent killings of abortion doctors and those around them and the endorsement of such killings by some religious activists,¹⁴³ or on religiously driven conflicts from Bosnia to the Middle East, to be reminded of the continuing possibility of intolerance and violence that lurks within religious zeal. In the minds of some believers, if a certain state of affairs is so important as to be commanded by God's law, there must be no constraints on the pursuit of that result. When government with its powers of force adopts such a posture, the results can be horrible, as history has shown from the Crusades to the Inquisition to Ku Klux Klan-supported repression.¹⁴⁴

Although the possible uses of governmental power for religious coercion in America come in milder forms today, the danger of intolerance still remains. Advocates such as the religious right's David Barton, who call for America to be "Christian" in some official sense—that is, with the laws giving official favoritism to Christianity or theism as such¹⁴⁵—tend simply to ignore the harm that citizens

140. Reinhold Niebuhr, *Christian Faith and Political Controversy*, 12 CHRISTIANITY & CRISIS 97, 98 (1952).

141. NIEBUHR, HUMAN DESTINY, *supra* note 63, at 238.

142. Reinhold Niebuhr, *Prayer and Religious Observances at Political Gatherings*, THE LUTHERAN, Aug. 6, 1952, at 12.

143. See 2 *Die in Abortion Clinic Violence*, CHI. TRIB., Dec. 31, 1994, § 1, at 1; *Abortion Doctor and Bodyguard Slain in Florida*, N.Y. TIMES, July 30, 1994, at A1.

144. See JAMES A. HAUGHT, HOLY HORRORS: AN ILLUSTRATED HISTORY OF RELIGIOUS MURDER AND MADNESS (1990) (cataloging these and other examples of religiously motivated persecutions).

145. See *supra* part I.A.3.

who are non-believers would suffer if such proposals succeeded. They also overestimate the gains from such official favoritism, and they ignore or underestimate the extent to which a religious position in politics can be colored by the self-interest, the will-to-power, of the person asserting it.

2. The Inadequacy of a Secularized Public Order

The potential dangers of religion in politics, however, constitute only one side of the story. Niebuhr's insights also suggest that secular ideals can be similarly dangerous, and that religion can make valuable and necessary contributions to the public order as well. Thus his insights also challenge the ideals of the Enlightenment and incorporate various aspects of "evangelical" approaches to religious freedom and church and state. The varying roles that religious and secular ideals can play in public life make it unwise to invoke secularity and "rational debate"¹⁴⁶ as the sole guides to political decisionmaking. The effort to resist all religious influences on public life, Niebuhr strongly warned, amounts to a dogma of "secularism" that carries its own dangers. Such concerns led Niebuhr to be suspicious of the notion of "separation of church and state" as a rule for all church-state questions,¹⁴⁷ and to support many kinds of government action accommodating the religious practices of groups and individuals.¹⁴⁸

a. The Secular State's Lack of "Neutrality"

The secularist view of church and state has relied heavily on the "neutrality" thesis of modern liberalism: that in a pluralistic society, the government must be neutral between competing or disputed conceptions of the good.¹⁴⁹ The government must be strictly

146. *Lee v. Weisman*, 112 S. Ct. 2649, 2666 (1992) (Blackmun, J., concurring).

147. See, e.g., Reinhold Niebuhr, *Church and State in America*, CHRISTIANITY & CRISIS Dec. 15, 1941, at 1, 1 (criticizing an "absolute separation" under which religion is "regarded as purely a private matter").

148. For examples, see *infra* notes 157-60, 178-80, 192-94 and accompanying text (discussing Niebuhr's support for "release time" programs and aid to children attending religious schools). See also RICHARD E. MORGAN, *THE POLITICS OF RELIGIOUS CONFLICT: CHURCH AND STATE IN AMERICA* 66 (1968) (calling Niebuhr and like-minded colleagues "one of the most important accommodationist groups" favoring some aid to religiously affiliated schools).

149. See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 11 (1980) (arguing for proposition that in political decisionmaking, no citizen may assert "that his conception of the good is better than that asserted by any of his fellow citizens"); cf. MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN*

secular, then, because for it to reflect any disputed religious view in its actions would depart from the requirement of neutrality.

This concept of "neutral" politics has been thoroughly debunked recently on the ground that it is both "impossibly restrictive" and actually non-neutral between beliefs (those that are shared and those that are disputed).¹⁵⁰ Reinhold Niebuhr, however, did such debunking more than a generation ago. Well before today's postmodernists, Niebuhr attacked the liberals of his time who believed in the existence of shared, neutral standards of reason that could solve social problems.¹⁵¹ In Niebuhr's Augustinian view, reason itself often serves as "the instrument of the ego in advancing its claims against another."¹⁵²

There are several factors that, in practical terms, turn a simply secular government into one that is a non-neutral engine of the secularization of society.¹⁵³ One obvious cause is an increase in the scope of government activity, particularly in the cultural and educational areas that overlap with the activities and teachings of religious communities. As Professor Michael McConnell has pointed out,

when the First Amendment was proposed and ratified, the government had little or no involvement in education, social welfare, or the formation and transmission of culture. These functions were predominantly left to the private sphere, and within the private sphere religious institutions played a leading role. As the government has assumed wider and wider responsibility for the funding and regulation of these functions, the idea of a "secular state" has become more and

AMERICAN POLITICS 8-28, 29 (1991) (describing and criticizing arguments that "disputed beliefs about human good should play no or at most a marginal role in political justification").

150. PERRY, *supra* note 149, at 8-28 (criticizing ideal of neutrality from politically liberal perspective); see also Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350, 1358-70 (1991) (same); David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067, 1074-83 (1991) (reviewing PERRY, *supra* note 149, and arguing that rule of neutrality discriminates against views of traditionalist religious believers).

151. See *supra* notes 92-95 and accompanying text.

152. NIEBUHR, *HUMAN DESTINY*, *supra* note 63, at 260.

153. The actively secularizing government is non-neutral in both of the senses that have been distinguished by Professor Douglas Laycock: It treats religion less favorably than secular ideas (thus violating "formal" neutrality), and it has the effect of discouraging religious belief and practice (thus violating "substantive" neutrality). See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001-06 (1990).

more ominous. When the state is the dominant influence in the culture, a "secular state" becomes equivalent to a secular culture.¹⁵⁴

As McConnell suggests, one possible means of returning government to a more nearly "neutral" position is to decrease its activity overall.¹⁵⁵ Niebuhr, however, did not vigorously explore that line of thought. He was a welfare-state liberal who always believed in the necessity and importance of collective action in education, welfare, and the economy.¹⁵⁶

Niebuhr focused on a second factor that magnifies the government's secularizing influence: the rigidity with which the government promotes its own comprehensive views and prevents or discourages efforts to allow religious views to flourish as competitors. Niebuhr set forth his views on this matter in an article criticizing *McColum v. Board of Education*,¹⁵⁷ in which the Supreme Court invalidated a public school's "release time" program that excused students to attend religious classes on school premises. Niebuhr argued that special provision of time for students who wished to go to religious classes was justified because several "modern secular surrogates for historic religious faiths"—particularly the modern confidence in democracy and the "American way"—"have a free course in our public schools. Being only implicitly and not explicitly religious they need not worry about the 'wall of separation.'" ¹⁵⁸ He made the same complaint in a private letter to Justice Felix Frankfurter, a close friend but also an indefatigable champion of a strictly secular public school system. Niebuhr wrote:

154. McConnell, *supra* note 36, at 177.

155. See *id.* at 177-81; cf. Richard A. Epstein, *Religious Liberty in the Welfare State*, 31 WM. & MARY L. REV. 375, 398-99 (1990) (arguing that "[t]he religious liberty of the free exercise clause and the equal treatment [between religion and other activities] of the establishment clause . . . cannot [simultaneously] be preserved" unless government regulation is scaled back across the board).

156. See FOX, *supra* note 8, at 297. As I argue *infra* in part III.B.3, our current situation necessitates that we consider, more than Niebuhr did, reducing government's role as direct provider of services in some areas, while perhaps maintaining its role in giving funding and in setting general program constraints.

157. 333 U.S. 203 (1948).

158. Reinhold Niebuhr, *Editorial Notes*, CHRISTIANITY & CRISIS, Mar. 29, 1948, at 34 [hereinafter Niebuhr, *Editorial Notes*]. Shortly after *McColum*, Niebuhr helped organize and draft a "Statement on Church and State," signed by a number of mainline Protestant leaders, which charged that by disapproving "forms of cooperation between church and state that have been taken for granted by the American people," the Court "will greatly accelerate the trend toward the secularization of our culture." Statement on Church and State (June 17, 1948), reprinted in 26 FIRST THINGS 32, 32 (Oct. 1992).

I am convinced that the prevailing philosophy which is pumped into our public schools day after day is itself a religion, and I think a very erroneous one. It preaches the redemption of man by historical development and by the illusory "scientific objectivity." It does not have to worry about the separation of church and state.¹⁵⁹

The same concerns about the "ideology" of public schools led Niebuhr in the early 1950s to support some forms of government aid to children attending religious (at the time, mostly Catholic) schools.¹⁶⁰ Moreover, at first he even opposed the Court's invalidation of government-composed school prayers in *Engel v. Vitale*,¹⁶¹ a ruling applauded by many liberal Protestants.¹⁶² In a controversial article, he warned that the school prayer ruling might "work so consistently in the direction of a secularization of the school system as to amount to the suppression of religion and to give the impression that the government must be anti-religion."¹⁶³

159. Letter from Reinhold Niebuhr to Felix Frankfurter (March 31, 1948) (Felix Frankfurter Collection, Library of Congress), reprinted in Daniel Rice, *Felix Frankfurter and Reinhold Niebuhr: 1940-1964*, 1 J. L. & RELIGION 325, 346 (1983). On the long-running Niebuhr-Frankfurter correspondence, see *id.* at 325.

John Bennett, a close professional colleague of Niebuhr's and also an adherent of Niebuhr's "Christian realism," also defended the release-time accommodation, arguing that "advocates of secularism as a view of life in place of the historical religions fail to understand this claim that there is injury or unfairness or deprivation of freedom because schools which have no place for religion favor in practice freedom for their [secular] faith." JOHN C. BENNETT, CHRISTIANS AND THE STATE 233-34 (1958).

160. See, e.g., Reinhold Niebuhr, *Protestants, Catholics, and Secularists on the School Issue*, in ESSAYS IN APPLIED CHRISTIANITY 253 (D.B. Robertson ed., 1959) [hereinafter Niebuhr, *School Issue*]. The grants to children at issue at the time were for purposes such as books and transportation. Like almost all Protestants, though, Niebuhr did oppose full funding provided directly to the schools themselves. *Id.*

161. 370 U.S. 421 (1962).

162. The leading journal of liberal Protestantism, *The Christian Century*, called *Engel* "a service of the greatest importance to true religion as well as to the integrity of a democratic state." Editorial, *Prayer Still Legal in Public Schools*, 79 THE CHRISTIAN CENTURY 832, 833 (1962).

163. *The Regents' Prayer Decision*, 22 CHRISTIANITY & CRISIS 125, 125 (1962). As such, Niebuhr would likely have had some sympathy with the claim pressed by fundamentalist parents that the public schools teach an established religion of "secular humanism." See *Smith v. Board of Sch. Comm'rs*, 827 F.2d 684, 690 (11th Cir. 1987) (rejecting that claim). As I will discuss, however, the relief the parents sought in that lawsuit—banning of many books and ideas from the curriculum—is unworkable. Rather, the only ways to achieve an attainable degree of neutrality in government's provision of education are to allow students to "opt out" from objectionable curricula where possible and to provide assistance to parents who choose a religiously informed education. See *infra* part III.B.

Within two years, Niebuhr retracted his opposition to the school prayer decision, concluding that the diversity of religious symbols in pluralistic America was such that "common public religious observances become practically impossible."¹⁶⁴ Significantly, however, he still warned that "[c]ompletely secularized education involves the danger of a completely secularized culture,"¹⁶⁵ and he never regarded such secularization as "neutral." Niebuhr remained suspicious of a secularized public order, even though he had come to regard certain solutions, such as government-led prayers, as coercive and unworkable. The concerns that animated Niebuhr have not gone away. Public schools continue today to promote various moral views—as inevitably they must. Such views, from multiculturalism to Americanism to laissez-faire capitalism to "safe sex," inevitably compete with religious views to give guidance on moral and social issues.

Even if a totally secularized public order is not neutral as to religion, however, it could be defended on the basis that the secular should be privileged over the religious, either because the secular is more likely to lead to political truth or because it is less likely to threaten public peace. Such arguments constitute the crux of Justice Blackmun's first argument in *Lee v. Weisman*.¹⁶⁶ But they cannot be sustained. Indeed, Niebuhr argued in volume two of *The Nature and Destiny of Man* that secularism alone is an inadequate basis for public order because it is too prone to fall into one of two unacceptable extremes—cynicism or fanaticism.

b. The Danger of Secular Cynicism

As noted above,¹⁶⁷ Niebuhr argued that politics must maintain an element of moral perspective on immediate decisions, transcending mere self-interest, and that some such transcendence is possible because of humans' (admittedly limited) freedom. For this task, though, a purely secular public order is likely to be inadequate. "In so far as modern tolerance has been achieved by disavowing religion," Niebuhr warned, "it may rest merely on indifference towards the ultimate problems of life and history, with which religion is con-

164. Reinhold Niebuhr, *Prayer and Justice in School and Nation*, 24 CHRISTIANITY & CRISIS 93, 95 (1964).

165. *Id.*

166. See 112 S. Ct. at 2666 (Blackmun, J., concurring); see also *supra* notes 23-25 and accompanying text.

167. See *supra* part II.B.2.

cerned.”¹⁶⁸ A toleration that is based on simply avoiding dispute over deeply held views is only a step away from “[c]omplete skepticism” and the loss of any sense of truth or ideals in politics: “Skepticism thus becomes the forerunner of cynicism.”¹⁶⁹

Surely this warning is highly relevant to American politics today. Writing in the 1940s, Niebuhr noted that Americans historically had erred toward overconfidence rather than cynicism because our vast resources made social problems “seem[] so much more soluble.”¹⁷⁰ In the last thirty years, however, public cynicism has grown markedly. Theologian Robin Lovin has suggested that today’s society has imbibed too much unadulterated realism about politics and needs to balance it, as Niebuhr did, with a healthy measure of idealism about achieving greater relative justice as a society.¹⁷¹ Large numbers of citizens, disillusioned by Vietnam, Watergate, the intractability of economic and social problems, and the prevalence of naked interest-group politics, have lost all commitment to the political process.¹⁷² Religious citizens have suffered such disaffection as well, an attitude that can only grow worse if religion is confined to the margins of public life.¹⁷³

c. The Danger of Secular Intolerance

On the other hand, Niebuhr argued, secularism as much as religion can lead to what he called “new fanaticisms.”¹⁷⁴ Because pride is a pervasive fact of social behavior, it can “insinuate[] new and false ultimates into views of life which are ostensibly merely provisional and pragmatic.”¹⁷⁵ Thus, when secularists “sigh and hope for the destruction [or privatization] of religion as the only way of emancipating mankind from fanaticism,” they fail to “understand

168. NIEBUHR, *HUMAN DESTINY*, *supra* note 63, at 238.

169. *Id.* at 239.

170. NIEBUHR, *CHILDREN OF LIGHT*, *supra* note 79, at 133.

171. Robin W. Lovin, *Niebuhr at 100: Realism for New Realities*, 109 *THE CHRISTIAN CENTURY* 604, 605 (1992).

172. DIONNE, *supra* note 5, at 332-35 (discussing Americans’ disgust with politics and loss of “all sense of the public good”).

173. See, e.g., FREDERICK M. GEDICKS & ROGER HENDRIX, *CHOOSING THE DREAM: THE FUTURE OF RELIGION IN AMERICAN PUBLIC LIFE* 21-33 (1991) (arguing that marginalizing values of religious citizens will destabilize America); David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 *MARQ. L. REV.* 975, 1065 (1992) (warning that traditionalist religious groups will suffer “profound” disaffection from American society if their perspectives are deemed inadmissible in debates over areas such as family and abortion).

174. NIEBUHR, *HUMAN DESTINY*, *supra* note 63, at 220.

175. *Id.* at 238.

that they are dealing with a more fundamental problem than anything created by this or that religion"; rather, "the problem of the relative and the absolute in history" is common to all viewpoints.¹⁷⁶ For these reasons, a Niebuhrian perspective vigorously questions the claim by Justice Blackmun in *Weisman* that through a public square stripped of religious influences we can substantially achieve dialogue, deliberation, and rational debate.¹⁷⁷

Indeed, Niebuhr worried that the barring of religion creates a space in public moral discussion that easily can be filled by more dangerous alternatives. Writing of the results of the "absolute separation" theory he saw in the *McCullum* "release time" case,¹⁷⁸ he warned that into the "spiritual vacuum" left by the deliberate severing of religion from any connection with education, " 'seven devils more evil than the first' can easily rush."¹⁷⁹ These words rang strong and true to readers who had just seen Stalinist terror and Nazi genocide; recent history had dramatically shown the capacity for tyranny in secular ideals such as nation, race, and class.

Niebuhr's warnings, however, are still relevant today, as Richard John Neuhaus has pointed out in writing of the dangers of the "naked public square."¹⁸⁰ While today's secular causes obviously are mild compared to the mid-century's totalitarian movements, they nevertheless have their intolerant aspects (sometimes lampooned in discussions of "political correctness"). Such intolerance is often trained against the free exercise of religions that controvert the secular ideal toward which the cause is directed. Advocates of gay and lesbian rights and women's rights, for example, try to force conservative churches to hire gay or female ministers against their religious tenets, whether through application of antidiscrimination laws or through the revocation of tax-exempt status.¹⁸¹ In even

176. *Id.* at 220.

177. See *Weisman*, 112 S. Ct. at 2666 (Blackmun, J., concurring).

178. See *supra* notes 157-59 and accompanying text.

179. Niebuhr, *Editorial Notes*, *supra* note 158, at 34.

180. See RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* 80 (1984) ("When recognizable religion is excluded, the vacuum will be filled by *ersatz* religion, by religion bootlegged into public space under other names."). Neuhaus warns that the empty public square can lead to inordinate faith in political ideologies (whether left or right), in technology, or in material fulfillment, as well as to "the relativization of all values." *Id.* at 82-89.

181. See, e.g., Becker, *supra* note 19, at 484-85 (arguing for the withdrawal of tax exemptions from religious organizations that exclude women from positions of leadership); see also Edward M. Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263, 285-90 (1992) (discussing, among other things, physical attacks by some gay rights

broader fashion, Professor Mary Becker argues that because "religion perpetuates and reinforces women's subordination, and religious freedom impedes reform," the First Amendment's religion clauses should "be interpreted or amended to minimize their counter-majoritarian effect"¹⁸²—that is, we should simply eliminate the principle of religious freedom against state power.

Nothing in this discussion is meant to question the justice or the importance of laws protecting women and homosexuals against discrimination in employment or services in the broader society. But we should remember Niebuhr's insights. The tendency of activists is to seek to use the government to pursue their cause into all sectors of life, even—perhaps especially—into those communities that harbor contrary moral and conscientious visions. If a plurality of schemes of meaning is to be preserved in society, laws must affirmatively protect conscience against government encroachments; power must be balanced with power.¹⁸³

Religion particularly presents a counterbalance to the coercive power of the state, a point of resistance to the ideals the state seeks to impose. For Niebuhr, "prophetic religion" reinforces the limited nature of government; the state is "subject to divine judgment and wrath" whenever it "preten[ds] that its power is perfectly virtuous."¹⁸⁴ Indeed, Niebuhr argues, "there is finally *no other* vantage point, other than the religious one, from which to judge the self-deification of nations."¹⁸⁵ This is because prophetic religion

emphasizes the true dimension of the individual, as having his ultimate authority and fulfillment above the political community and the social process in which he is involved. Without this emphasis man is easily debased into a mere instrument of a social or political process and is left powerless to defy the majesties of the world with a rigorous: "We must obey God rather than man."¹⁸⁶

groups on churches and church services).

182. Becker, *supra* note 19, at 459.

183. See *supra* notes 114-16 and accompanying text.

184. NIEBUHR, *HUMAN DESTINY*, *supra* note 63, at 269. Simultaneously, Niebuhr argues, prophetic religion inculcates a respect for the proper functions of government in achieving order and justice. *Id.*

185. Niebuhr, *Church and State in America*, *supra* note 147, at 2 (emphasis added).

186. Niebuhr, *School Issue*, *supra* note 160, at 254. Similar understandings of religious freedom are set forth in CARTER, *supra* note 1, at 272-73, and McConnell, *supra* note 36, at 167-69 (emphasizing connection between theological foundations for religious freedom and "more general" theory of "limited government").

In Niebuhr's view, then, the presence of religious convictions among the people—their allegiance to a higher authority as they understand it—thus becomes a powerful testimony to the limited nature of government. By respecting those allegiances, the state acknowledges its limits. On this score, Niebuhr's religiously based understanding of the limited nature of government tracks closely the "evangelical" view of the basis for religious freedom. Both accounts emphasize government's limited role in matters of conscience because such matters are prior to, and of greater importance than, the limited functions of the state.

d. Religion and Humility in Politics

Niebuhr also emphasized that religion should play a role in public life because certain religious attitudes can provide a crucial missing dimension of humility and grace. People who know they are limited yet forgiven have a resource to see beyond their own perspectives to understand and be forgiving even of their opponents. Niebuhr wrote that "[o]ne of the great resources of [prophetic] faith for social achievement is the sense of humility which must result from the recognition of our common sinfulness".¹⁸⁷

To subject human righteousness to the righteousness of God is to realise [sic] the imperfection of all our perfections, the taint of interest in all our virtues, and the natural limitations of all our ideals. Men who are thus prompted to humility may differ in their ideals; but they will know themselves one in the fact that they must differ. . . . To subordinate the righteousness to which they are devoted under the righteousness of God does not mean to be less loyal to any cause to which conscience prompts them. Yet they will know that they are finite and sinful men, contending against others who are equally finite and equally sinful.¹⁸⁸

Of course, Niebuhr recognized, religion often fails to inculcate such humility in political actors and instead produces its own strains of arrogance. Nevertheless, I think he would argue, the resources that religion offers for inspiring humility in political debate should caution against embracing secularist conceptions of the public order: In throwing out religion altogether, we may throw out the baby

187. REINHOLD NIEBUHR ON POLITICS 207 (Harry R. Davis and Robert C. Good eds., 1960) (citation omitted).

188. Reinhold Niebuhr, *Zeal Without Knowledge*, in BEYOND TRAGEDY: ESSAYS ON THE CHRISTIAN INTERPRETATION OF HISTORY 246-47 (1937).

(humility) with the bathwater (arrogance). Niebuhr went so far as to claim that religion—that is, prophetic religion—was better suited than other modes of thought to produce such humility while avoiding cynicism, for prophetic religion gave the best explanation of why human action in history is imperfect and yet meaningful. For present purposes, it is not necessary to assert that the kind of religion Niebuhr described gives the best answer to these questions, only that it gives an important answer that should be considered. Moreover, as the next subsection will discuss, religion is too pervasive a factor in the lives of Americans to base a theory on the hope or premise that it will go away or retreat to the margins of life. Instead, we must encourage those aspects of religion that produce humility and discourage those that produce arrogance and coercion.

e. Religion and the Organic Nature of Society

A final argument prominent in Niebuhr's work is that secularization of the public order goes hopelessly against the grain in any society, such as America, in which religion plays an important role in the lives of the people. Niebuhr's increasingly Burkean, "organic" understanding of society emphasizes that government must arise from the people, from their concrete, historic patterns.¹⁸⁹ It cannot be based on imposing an abstract and ideologically consistent scheme—in this case, the rigid separation of religion from public moral reasoning—in the name of liberal philosophy (or the "culture of liberal democracy," as Professor Sullivan puts it¹⁹⁰). Given the incurably religious character of the American people, schemes that try to maintain a wholly secular "civil moral order"¹⁹¹ inevitably will fail. Rather, the solution must lie ultimately in encouraging those aspects of religion that are productive in politics, while speaking out against those aspects that are destructive.

Niebuhr sounded this theme in his critique of the *McColum*¹⁹² decision. Justice Frankfurter's concurrence had supported the invalidation of the "release time" program on the ground that public schools "serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people" and therefore "must be kept scrupulously free from entanglement in the strife of

189. See *supra* part II.B.4.

190. See Sullivan, *supra* note 28, at 199-200.

191. *Id.* at 199.

192. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

sects.”¹⁹³ Niebuhr, in his editorial, accused the Court of “trying to preserve our unity at the expense of the vitality of our culture” and asked: “Can we have community only by emptying our culture of all its differences or by pretending that actual differences do not exist? Does community not require that we come to terms with each other despite our differences?”¹⁹⁴

As already noted, however, Niebuhr was no arch-traditionalist.¹⁹⁵ His recognition of the extent of human freedom to reason and to change existing arrangements would doubtless lead him to agree with Justice Holmes that “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”¹⁹⁶ Thus, for him, pointing to the actual importance of religion in society did not entail endorsing every way in which religion enters public discussion. The search, once again, must be for “proximate” solutions that mediate between humans’ boundedness to traditions and communities and their capacity for reason and change.

f. Conclusion

This section and the previous one suggest that Niebuhr sought to maintain a balance in appreciating the social values and dangers of both secularism and religion. Leaders of mainline Protestantism who followed him often chose not to maintain such a balance. Moved by the contribution of secular groups to causes such as civil rights, and incensed by the failure of so many churches to stand against injustice, theologians and leaders in the 1960s embraced “the secular city” wholeheartedly and called on the churches to look to “the world” for guidance in defining their mission.¹⁹⁷ This Article obviously is not the place to discuss whether such “secular” or highly assimilated theologies were an accurate rendering of Christianity. As Daniel Conkle has pointed out, however, such secularized views are not particularly helpful contributors to a theory of religion and politics

193. *Id.* at 216-17.

194. Niebuhr, *Editorial Notes*, *supra* note 158, at 34.

195. See *supra* notes 65-84 and accompanying text.

196. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

197. See, e.g., HARVEY COX, *THE SECULAR CITY* 91-129 (1965). For discussions of the rise of “secular theology” out of civil rights activism, see JAMES F. FINDLAY, JR., *CHURCH PEOPLE IN THE STRUGGLE: THE NATIONAL COUNCIL OF CHURCHES AND THE BLACK FREEDOM MOVEMENT* 30-32 (1993); ELIZABETH MENSCH & ALAN FREEMAN, *THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE?* 83-97 (1993); Thomas C. Berg, “*Proclaiming Together?*” *Convergence and Divergence in Protestant Views of Evangelism, 1945-1967*, 5 RELIGION & AM. CULTURE 49, 64-66 (1995).

because they do not suggest any distinctive role for religion: They tend to reduce it to secular goals and interests.¹⁹⁸

To Niebuhr, secularism also had its dangers, and religion its distinctive contributions; government-fueled secularization of society was therefore objectionable. As described below, however, his writings suggest that he would see the answer to that problem not in government-directed religious exercises, but in making accommodations within the confines of government programs or institutions for the independent religious activity of groups and individuals.¹⁹⁹

3. The Inadequacy of Keeping Religion "Pure"

The final church-state theory that Niebuhr's writings critique is the evangelical argument for a strict separation of church and state. The argument, in the words of Justice Blackmun's concurrence in *Lee v. Weisman*, is that "[r]eligion flourishes in greater purity, without . . . the aid of Government."²⁰⁰ As already noted, this theme has a substantial history in America, beginning with Roger Williams and finding considerable expression in the thought of the founding period. As with the arguments previously discussed, however, Niebuhr suggests approaching this perspective with caution.

Of course, as we have seen, Niebuhr strongly emphasized the need for religions to take a critical, prophetic stance toward government.²⁰¹ To preserve this stance, he argued, some sort of distancing is needed—not merely the minimal separation of church and state into two institutions, but something more. Shortly before his death, Niebuhr published a passionate article attacking Richard Nixon's institution of weekly White House chapel services, charging that they established a "tamed religion" at war with the prophetic traditions of Judaism and Christianity.²⁰² Reflecting the influence of evangelical separationism, Niebuhr argued that the disestablishment of religion "[b]y implication . . . encouraged the prophetic radical

198. Conkle, *supra* note 12, at 20-21.

199. See *infra* part III.B.

200. 112 S. Ct. 2649, 2666 (1992) (Blackmun, J., concurring) (citation omitted).

201. See *supra* notes 184-86 and accompanying text.

202. Reinhold Niebuhr, *The King's Chapel and the King's Court*, 29 CHRISTIANITY & CRISIS 211, 212 (1969). Niebuhr quoted his favorite Hebrew prophet, Amos, on the primacy of social justice over pious ritual: "I hate, I despise your feasts, [God says,] and I take no delight in your solemn assemblies. . . . But let justice roll down like waters, and righteousness like an ever-flowing stream." *Id.* (quoting *Amos* 5:21-24).

aspect of religious life, which insisted on criticizing any defective and unjust social order."²⁰³

Once again, however, this point must be balanced against other Niebuhrian insights that illuminate the nature of religion and politics. As noted above,²⁰⁴ one of Niebuhr's central themes was that an active, responsible religion cannot be entirely "pure"; justice in history can be maintained only by "pressures and counter pressures." Moreover, as Niebuhr pointed out, a separation that counts religion too pure to influence the unseemly world of politics is at odds with American history and culture, which have always witnessed religious involvement in political causes, from the American Revolution to abolition to prohibition to the civil rights and anti-war movements.²⁰⁵

Despite this history, the fact that the religion clauses were partially founded in sectarian evangelical Protestantism has made our understanding of religious freedom susceptible to unqualified rhetoric about the church's need to be separate from the "corruption" of the world. That stance worked as long as the general culture was heavily influenced by evangelical morality: The evangelicals could rely on the implicit connection between religion and government while denying the need for any explicit connection. As the general culture became more secularized, however, more and more evangelicals rejected the notion of separation altogether. Distinctive religious involvement in politics came to be seen as necessary for the religion as strong secular forces cut in the opposite direction. Moreover, even during the heyday of evangelical influence, religious leaders applied the call for purity and separation in selective fashion. For example, for decades much of conservative Protestantism organized politically against certain identified sins—particularly the drinking of alcohol—but avoided involvement in other social issues, such as attacking racial oppression, on the ground of holding to the "pure saving gospel."²⁰⁶ Niebuhr's insights into the necessity of accepting

203. *Id.* at 211.

204. See *supra* notes 104, 112-14 and accompanying text.

205. See Niebuhr, *Church and State in America*, *supra* note 147, at 1. For a brief summary of religious involvement in American politics, see Michael E. Smith, *Religious Activism: The Historical Record*, 27 WM. & MARY L. REV. 1087 (1986).

206. See MARTY, *supra* note 66, at 213 ("Though individualistic Protestants were constantly criticizing liberal efforts to remake the world through law, they were eager to do so themselves on [the drinking] issue."). Compare also how the Rev. Jerry Falwell, in later years a conservative political activist, attacked Dr. Martin Luther King in a 1965 sermon for "mixing religion and politics":

responsibility offer a powerful critique of that tendency to pretend that one can remain aloof from political involvement without thereby supporting the status quo and any injustices that it reflects.

III. "PROXIMATE SOLUTIONS": RELIGIOUS FREEDOM AND ACCOMMODATION OF RELIGION

A Niebuhrian approach appreciates the problems in a government that is sanctified, but also in one that is secularized. As the previous section shows, Niebuhr critiqued both Enlightenment and evangelical views of tolerance ("Renaissance" and "sectarian," in his terminology) and sought to balance those competing forces. Likewise, this part will argue, a solution that takes into account both Enlightenment and religious insights will produce the best "proximate solution" to the problem of religious freedom in America. Such a balance of power is necessary to reflect the combination of Enlightenment and evangelical views that inspired the struggle for religious freedom in the founding period. The balance is also necessary because, left on its own, each view tends to treat its own perspective as absolutely valid and ignore that of the other. As Niebuhr wrote, "neither piety nor enlightenment [is] as simply the guarantor[] of either private goodness or public virtue as the proponents of each side contend."²⁰⁷ At the same time, "each side possesses more common virtue than the opponent [i]s willing to admit."²⁰⁸ Neither side, secularism nor religion, on its own can provide sufficient support for religious freedom in a pluralistic society.

On the one hand, uncritical secularist arguments, such as those of Justice Blackmun's concurrence in *Lee v. Weisman*,²⁰⁹ assume that secular political activism will be rational and tolerant and that the discordant and repressive elements are introduced only by religion. As a result, they believe it necessary to insulate public life from the pressures of religious activity. This, as already noted, allows for

[Our] message is designed to go right to the heart of man and there meet his deep spiritual need. Nowhere are we commissioned to reform the externals. . . . Believing the Bible as I do, I would find it impossible to stop preaching the pure saving gospel of Jesus Christ, and begin doing anything else—including fighting Communism, or participating in civil-rights reforms.

Rev. Jerry Falwell, Ministers and Marchers, Sermon (1965), *quoted in* FRANCES FITZGERALD, *CITIES ON A HILL: A JOURNEY THROUGH CONTEMPORARY AMERICAN CULTURES* 129 (1986).

207. NIEBUHR, *PIOUS AND SECULAR AMERICA*, *supra* note 82, at 5.

208. *Id.*

209. See *supra* notes 23-24 and accompanying text.

secular orthodoxies to use the law to suppress religiously based dissent, in violation of the free exercise of religion.²¹⁰

On the other hand, there are reasons to be skeptical that evangelical or other religiously based theories alone can provide adequate support for religious freedom. Throughout history, the tendency of religiously based accounts has been to grant toleration to similar views and then to deny it to others. As Niebuhr noted, the sixteenth-century reformers, Luther and Calvin, ignored the demands for humility implicit in their own religious insights and pushed for dissenters to be persecuted.²¹¹ Likewise, Niebuhr pointed out, the Puritan faction in seventeenth-century England "pled for liberty of conscience when it was itself in danger of persecution; and threatened all other denominations with suppression when it had the authority to do so."²¹² In America, of course, it is a familiar story that the Puritans who came seeking their own religious freedom immediately denied it to others. Even after official disestablishment, as noted above, American authorities put in place a range of preferences for generic Protestantism, despite the supposed Protestant commitment to "soul liberty" and to the exemption of religious concerns from the cognizance of government.²¹³ It has always proved difficult for religious persons to see the practices familiar to them as anything other than "natural" and necessary to public order.

Still today, some Americans repeat the pattern of ignoring or underestimating the harm done to dissenters from explicit government advancement of particular religious truths. For example, it is fair to say, as does Professor Douglas Laycock, that many of those who advocate government-initiated religious displays and rituals, when they could use nongovernmental outlets for such expression, simply "place little or no value on the costs to religious minorities."²¹⁴ A certain Enlightenment-based distrust of religious triumphalism is necessary to remind us of that fact.

In short, a Niebuhrian perspective shares some features of the Enlightenment: the concern that politicized religion will often lack humility or concern for the views of other citizens; and the hope that citizens can to some extent put aside differences over ultimate matters to reach practical solutions to immediate problems. But in the

210. See *supra* notes 180-82 and accompanying text.

211. NIEBUHR, *HUMAN DESTINY*, *supra* note 63, at 226-31.

212. *Id.* at 227.

213. See *supra* notes 40-42 and accompanying text.

214. Laycock, *supra* note 3, at 844. For further discussion, see *infra* part III.B.1.

Niebuhrian perspective, it is also arrogant and dangerous to believe that secular philosophies can provide the sole basis for public action, without permitting any contribution from the insights of religion. Thus toleration and religious freedom should not mean government hostility or indifference to religion, but rather the preservation of a domain of conscience. In these ways, a Niebuhrian perspective tracks evangelical views on church and state. To the extent a Niebuhrian view regards government as limited in its sphere—to the extent it objects to the efforts to realize either secular or religious utopias through the state—it is consistent with both Enlightenment and evangelical views.

What does this approach suggest in terms of specific doctrine and results in religion clauses cases? It should be acknowledged that a Niebuhrian perspective does not translate directly or simply into legal rules concerning church-state relations. To some extent, of course, the difficulty of articulating such rules is faced by every analyst of church and state in modern America. While the Enlightenment and evangelical views may have coalesced around religious freedom under a regime of generally limited government, they are much harder to reconcile in a time of activist government, when preserving religious freedom requires more specific attention from government, and creates tensions with the Enlightenment model of a secular state.

In addition, however, the Niebuhrian emphasis on ambiguity, paradox, and the wisdom in competing perspectives makes it difficult to translate his insights simply into specific principles for action. Critics of Niebuhr have seen this as a defect in his ethical thought generally. One religious ethicist, for example, has complained that Niebuhr “prefer[red] to maintain a dialectical tension between” the basic demands of love and justice, and never “spell[ed] out any second-order principles which might follow from” those core concepts.²¹⁵ Another argues that after Niebuhr rejected Marxism, he failed to articulate a new “critical social theory” that would guide the choices between conflicting political ideologies; instead, he constructed “not much more than a ‘dispositional ethic’ for politicians and social activists.”²¹⁶ In other words, Niebuhr beautifully taught activists how to combine vigorous advocacy with deep humility, but left little

215. RICHARD HIGGINSON, *DILEMMAS: A CHRISTIAN APPROACH TO MORAL DECISION MAKING* 109 (1988).

216. DENNIS P. MCCANN, *CHRISTIAN REALISM AND LIBERATION THEOLOGY: PRACTICAL THEOLOGIES IN CREATIVE CONFLICT* 80, 102-03 (1981).

guidance (other than context-specific judgments) on what actual goals they should seek.

As I will argue later, there is tremendous value simply in this "dispositional ethic" for combining advocacy and humility, but Niebuhr's work also helps in developing second-order solutions for problems such as religion and politics. Above all, Niebuhr helps us face the fact that for a problem as deep as the relation between religion and politics, any actual solution must necessarily be "proximate" rather than ultimate. Principles of action for a social problem should respond to the basic concerns that underlie and define the problem, but as responses they will always be imperfect.

To recapitulate, the basic problem of religious freedom today is that a government strictly separate from all religious influences, while perhaps tolerable when that government's role is limited, becomes a strong force for secularization and a threat to free exercise of religion when the government's role is active and pervasive. The challenge is to avoid such secularizing pressures without sanctifying the government or allowing it to intrude on citizens' ultimate commitments.

The best legal regime for keeping government free of both religious arrogance and secular arrogance is to allow freedom and pluralism in religious matters rather than to pursue either government-sponsored religion or a secularized civil order. This solution works out in different ways for different areas of church-state interaction. With respect to religious participation in the making of secular laws, it welcomes such religious involvement, rejecting the Enlightenment pretension that religion has little positive to contribute. But a Niebuhrian view also sees the need for activists to remain humble and to retain a sense of the limits of government's ability to achieve ultimate solutions; thus it calls on both religious and secular activists to make efforts to present their political arguments in terms to which other citizens can relate.

With respect to other areas of church-state relations, a Niebuhrian viewpoint recognizes government-fueled secularism as a significant problem, but sees that it is inappropriate for government to respond to this problem by promoting religion itself. The better solution is for government to accommodate the independent religious decisions and activities of individuals and groups by protecting such activities from secular laws that impinge on conscience, and by permitting religiously affiliated institutions that provide education or social services to participate in publicly funded programs in those areas.

A. Religious Participation in Lawmaking

All of Niebuhr's work, in a sense, is about the relation between morality, religion, and politics. Not surprisingly, then, the current church-state issue to which his work speaks most directly is the debate over the role of religion in politics—whether there should be any constraints on the role that religious beliefs may play in political decisions and the enactment of laws.

Despite a recent outpouring of scholarship on this question, for the most part no serious constitutional issues have been raised in litigation. As one part of the longstanding *Lemon v. Kurtzman* test for Establishment Clause violations, the Supreme Court has stated that laws lacking a "secular purpose" are unconstitutional.²¹⁷ Under this test, however, the Court has approved of significant religious involvement in laws limiting abortion.²¹⁸ Elsewhere the Court has recognized that "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right."²¹⁹ The statutes that the Court has actually invalidated under the "secular purpose" prong have involved promotion of distinctively religious materials or rituals, usually in the sensitive context of the public schools.²²⁰

As a first cut, then, the Court's "secular purpose" requirement prevents government from acting with the purpose of affecting the facially religious domain of "theology, worship, and ritual."²²¹ By contrast, it allows substantial religious influences on the formation of policy in the facially secular domains with which government policy is typically concerned. Since the Court's holding specifically approving religious involvement in politics came in the area of abor-

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

218. *Harris v. McRae*, 448 U.S. 297, 303-04 (1980) (rejecting claim that refusal of public funding for abortions "established" Roman Catholic tenets against abortion).

219. *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970); see also *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) ("Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally.").

220. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987) (finding unconstitutional a law requiring the teaching of "scientific creationism" if evolution is taught); *Wallace v. Jaffree*, 472 U.S. 38, 61 (1985) (invalidating law requiring "moment of silence" at beginning of school day); *Stone v. Graham*, 449 U.S. 39, 43 (1980) (striking down law requiring the posting of the Ten Commandments in classrooms).

221. Laycock, *supra* note 48, at 381.

tion—an issue almost uniquely controversial—there is no doubt that, as a constitutional matter, religious beliefs and arguments may serve as a basis for lawmaking on other secular policy issues such as the economy, foreign affairs, poverty, or environmentalism.

Some scholarship about the relation of religion and politics accepts this sharp distinction between direct government advancement of religion and the advancement of secular policies based on religious beliefs.²²² Taken at its sharpest, the distinction would mean that no religious belief, however dogmatic or eccentric, should be disqualified from political debate and action in the secular domain simply on the ground of its dogmatism or eccentricity; it should be addressed on its merits, like all other beliefs. Many scholars have so argued.²²³

A number of scholars, however, contend that the reliance on religious beliefs in the making of laws and policies in the secular domain is unconstitutional, or at least inconsistent with the premises of liberal democracy in a pluralistic society where citizens of all faiths, and no faith, are regarded as equals. Some scholars take this position with respect to all religious beliefs.²²⁴ Others would treat some religious views as legitimate participants but exclude those views that are “sectarian” and “authoritarian,”²²⁵ that are “non-dialogic” and

222. See Daniel O. Conkle, *God Loveth Adverbs*, 42 DEPAUL L. REV. 339, 345 (1992) (distinguishing between “worldly” and “spiritual” matters); Franklin I. Gamwell, *Religion and Reason in American Politics*, 2 J.L. & RELIGION 325, 334 (1984) (distinguishing between “explicit activities of the state” and “the implicit religious ideal by which the laws are properly informed”); Smolin, *supra* note 150, at 1088-89 (distinguishing between “temporal” and “ultimate” peace).

223. Michael J. Perry, *Religious Morality and Political Choice: Further Thoughts—and Second Thoughts—on Love and Power*, 30 SAN DIEGO L. REV. 703 *passim* (1993); Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061, 2077-78 (1992) (reviewing PERRY, *supra* note 149); Smolin, *supra* note 150, at 1094-103 (same).

224. See, e.g., ACKERMAN, *supra* note 149, at 352-55; Robert Audi, *Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259, 274-86 (1989); Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963 *passim* (1993). Professor Kent Greenawalt also argues that religious arguments generally should not serve as the public basis for legislation, although he allows that they may serve as the private basis for a legislator's or voter's decision-making when secular bases provide no determinate answer. KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 12 (1988).

225. PERRY, *supra* note 149, at 106. See generally *id.* at 83-122 (arguing that to merit consideration, beliefs should be articulated in terms that have “public accessibility”). Perry has since changed his position and invited all religious beliefs into public debate. See Perry, *supra* note 223, at 713.

not open to "question, reconsideration, or debate,"²²⁶ or that refuse to "submit to rational review."²²⁷

Niebuhr's reflections on the nature and interaction of religion and politics provide strong support for the distinction between facially religious matters and facially secular matters, and for the participation of religious views in deciding secular matters. For a variety of reasons set forth in the following section of this Article,²²⁸ government must avoid involvement in religious matters and must confine its activity to temporal concerns. Government's sphere, Niebuhr would argue, is limited to seeking and promoting proximate solutions to the problems of life, not the ultimate solutions that are the subject of the distinctively religious domain. On those matters, government should leave decisions up to the people as individuals and groups.

With respect to temporal or secular policy areas, however, Niebuhr's insights strongly counter the arguments of those who would bar religious visions and arguments from serving as bases for political decisions. The whole array of Niebuhrian themes presented in part II²²⁹ shows that such a blanket exclusion is indefensible and impossible, on grounds of both principle and prudence.

While political decisionmaking, in a Niebuhrian view, generally must be directed at proximate rather than ultimate goals, "ultimates" also must affect the calculus. Otherwise, the political enterprise too easily degenerates into cynicism. When ultimates and moral questions are part of the consideration of a political issue, that issue cannot be settled solely by empirical inquiry or "critical intelligence." As Kent Greenawalt argues, secular reasons are "radically inconclusive" as to many questions of policy; they "cannot straightforwardly resolve the political questions involved in [for example] abortion, animal rights and environmental policy."²³⁰ Once the debate is open to various value systems, there is no good reason to exclude religious systems as contributors. To maintain the kind of balance between ideals and reality that Niebuhr showed was necessary, religious views must be able to affect policy along with secular ideals.

226. Daniel O. Conkle, *Religious Purpose, Inerrancy, and the Establishment Clause*, 67 IND. L.J. 1, 10-11 (1991).

227. Gamwell, *supra* note 222, at 341.

228. See *infra* parts III.B.

229. See *supra* part II.C.2.

230. GREENAWALT, *supra* note 224, at 147, 148. Greenawalt actually speaks of "publicly accessible" reasons as being so limited, but since he (wrongly) assumes that only secular reasons can be publicly accessible, the terminology in text is justified.

Niebuhr's own work exemplifies how religion can contribute distinctive insights into human character and action in ways highly useful for political decisionmaking. To give just one example, his discussions of capitalism and socialism address both the call to equality that comes from the transcendent "law of love" and the necessities that arise from the religiously grounded recognition of pervasive human imperfection. The former imposes the obligation "to organize the common life so that the neighbour will have fair opportunities to maintain his life"; but the latter compels recognition of the need for some "special rewards as inducements to diligence," and some "differentials in privilege . . . to make the performance of certain social functions possible."²³¹ These considerations, Niebuhr eventually concluded, pointed generally toward some form of a mixed economy or welfare-state capitalism. One need not agree with his precise analysis of economic systems to recognize the importance both of asserting ideals and respecting limits on the means by which they can be accomplished. In Niebuhr's hands, moreover, the prophetic religious viewpoint offers the resources not only to recognize such a tension between ideals and reality, but also the resources to accept the tension. History may not be perfectible, but it is meaningful.²³² Practically speaking, moreover, Niebuhr's "organic" outlook tells us that religious contributions cannot be excluded from the project of politics in America, for they form the base of moral convictions for so large a part of the population.

Despite these contributions, it might be argued that by legislating on a secular matter on the basis of a religious belief, the government essentially has enforced conformance to that religious belief. Moreover, such compulsion is equal to or greater than that which occurs when the government conducts or sponsors a religious ritual, such as prayer in public schools, and forces citizens to participate in that ceremony.²³³ There are immense differences between the two cases, however. Religious citizens and groups are seriously marginalized if their views are excluded from any influence on policymaking, much more seriously than if they are prevented from having government conduct their preferred religious rituals. As will be discussed below,²³⁴ there are considerable outlets for religious

231. NIEBUHR, *CHRISTIAN ETHICS*, *supra* note 89, at 65.

232. *See supra* part II.B.5.

233. *See, e.g.*, Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 *YALE L.J.* 1611, 1630 & n.64 (1993).

234. *See infra* part III.B.1.

expression besides government ceremonies. But in a complex modern society, a social goal—that is, the realization of a vision of justice—can often be accomplished far more effectively, or perhaps solely, through government action.²³⁵

A more difficult question is presented if we ask whether some religious views should be seen as improper for public debate and as support for laws, because they make relatively little contribution or they pose dangers that outweigh their benefits. Proposals in this area generally have focused on beliefs that are “sectarian,” “authoritarian,” or not “publicly accessible.”²³⁶ The paradigm evil against which these proposals are directed, perhaps, is the flat assertion that some coercive law should be imposed solely because some religiously defined authority—God, the Pope, or the Bible—says so.

Niebuhrian insights do suggest that society should be deeply concerned about political activists who simply assert their own visions in dogmatic fashion, making no effort to present arguments in terms accessible to other citizens. Consequently, it is legitimate to express moral condemnation of such arguments. Take the hotly debated issue of abortion as an example. If an anti-abortion activist argues in the public arena that abortion should be made illegal simply because God’s law forbids it, such an argument may legitimately be criticized on the basis that (apart from whether the position is correct or not) it makes no effort to speak in terms that citizens who do not accept God’s law can understand.

The Niebuhrian reasons for this moral objection have to do with the need for humility in politics—a goal that, I have argued, is properly supported by both Enlightenment and religious values.²³⁷ Niebuhr reminds us that politics is not the place for achieving ultimate goals; it is in substantial part a matter of compromise, a search for proximate solutions to insoluble problems. Accordingly, Niebuhr

235. As Professor Laycock puts the distinction:

Questions of morality, of right conduct, of proper treatment of our fellow humans, are questions to which both church and state have historically spoken. They are questions within the jurisdiction of both. . . . [O]n matters of governmental policy, somebody has to rule. This polity has decided that it should be the majority, but it must inevitably be someone. The government *must* make decisions on political matters.

In the case of religion, no one has to rule. There is no need for the government to make decisions about Christian rituals versus Jewish rituals versus no rituals at all.

Laycock, *supra* note 48, at 379-80, 381; see also Conkle, *supra* note 222, at 345-46.

236. See, e.g., the proposals discussed *supra* notes 224-27 and accompanying text.

237. See *supra* notes 187-89, 207-14 and accompanying text.

affirmed the importance of the secular in politics, including the pragmatic use of reasoning ("critical intelligence") to balance conflicting goals that cannot all be realized perfectly. He also deeply distrusted the "true believer," religious or secular, who would accept no such constraints on the ability to realize a vision through politics.²³⁸

Asking citizens and activists to present their political arguments in accessible rather than authoritarian terms does not guarantee that those persons will maintain a great degree of humility in their political activity, but it certainly points in that direction. It is very likely that an activist who refuses to pursue goals in terms accessible to his fellow citizens is "claiming ultimate sanctities for" such goals, with the attendant dangers that follow: a lack of sympathy and toleration for the situation of others.²³⁹ The refusal even to address the perspective of one's opponents, or of the persons who may be affected by a coercive law, evidences such a lack of sympathy. Such dogmatism simply multiplies the anger and division that already inevitably exist between persons of differing political views.

Moreover, it is not too much to ask as a matter of political morality that citizens in the political arena present arguments in accessible terms. As Professor Michael Perry, who once advocated the "public accessibility" standard, has argued, it is not unfairly burdensome to ask citizens speaking to the broader public to live up to this ideal.²⁴⁰ As I would define the ideal, most religiously based arguments that are typically made in the public arena would satisfy it. Some proponents of politically active religion claim that making one's arguments in such form will too easily lead to abandoning one's religious distinctives and capitulating to the premises of secular culture. Professor David Smolin has echoed this complaint, asserting that the demand for public accessibility in political discussion "requires [traditionalist] religious believers to enter into a dialogue with a willingness to renounce their most cherished religious beliefs."²⁴¹ But if the concept of public accessibility is understood

238. FOX, *supra* note 8, at 335-36.

239. See *supra* notes 142-44 and accompanying text.

240. See PERRY, *supra* note 149, at 116.

241. Smolin, *supra* note 150, at 1075. What Professor Smolin is specifically concerned with in making this change is a slightly different demand: that religious believers accept that their beliefs may be fallible and should be revised in the light of other beliefs in a pluralistic society. Later on, however, he asserts that the two demands really are the same, and both objectionable: "If . . . 'public accessibility' forbids the claim that God, or God's revelation, supports a position, then the requirement of public accessibility is substantially

broadly, this objection should dissolve; Reinhold Niebuhr's own life and work provide an example of why. Niebuhr offered religious arguments that were "publicly accessible" in the sense that they addressed religious concepts such as sin and grace to the concerns of society and politics, in the form of arguments to which other citizens could relate and productively respond. Indeed, Niebuhr's arguments were illuminating to many outside the Christian faith.²⁴² Yet Niebuhr explained and defended such concepts in a way that severely critiqued the dominant religious and political culture of his time, the culture of liberal optimism.²⁴³

There is little reason to doubt that most traditionalist Christians could articulate "publicly accessible" arguments for the wisdom of the policies they support.²⁴⁴ Most traditionalist Christians affirm to some degree the possibility of "apologetics," that is, the rational defense of their faith to those outside it.²⁴⁵ If rational arguments can be made to defend (successfully or not) the central beliefs of the faith, then there seems every reason to suppose that arguments can be made to defend moral and political positions stemming from such beliefs.

In most cases, a citizen should make such arguments in the form of a "positive apologetic": that is, the citizen accepts the premises of her opponents and seeks to argue for the superiority of her own position.²⁴⁶ Again, consider the example of abortion. A religiously motivated opponent of abortion might argue for the full personhood of the fetus by reference to commonly accepted scientific facts such as the presence of full genetic information from conception, or the presence of brain waves early in fetal development.²⁴⁷ Or the

equivalent to the [unacceptable] requirements of fallibilism and pluralism." *Id.* at 1086.

242. See *supra* notes 5-7 and accompanying text.

243. See *supra* notes 73-80 and accompanying text.

244. Whether those arguments would be convincing to others is, of course, another question.

245. An example of such a work by conservative Protestants is R. C. SPROUL ET AL., *CLASSICAL APOLOGETICS: A RATIONAL DEFENSE OF THE CHRISTIAN FAITH* (1984); see also PAUL GRIFFITHS, *AN APOLOGY FOR APOLOGETICS: A STUDY IN THE LOGIC OF INTERRELIGIOUS DIALOGUE* 1-3 (1991) (defending, from a more liberal religious perspective, the necessity for believers of one religion to engage in apologetics with those of different religions).

246. See, e.g., GRIFFITHS, *supra* note 245, at 15 (stating that apologetics "usually uses only methods of argumentation and criteria of knowledge acceptable to the adversary").

247. See, e.g., FRANCIS J. BECKWITH & NORMAN L. GEISLER, *MATTERS OF LIFE AND DEATH: CALM ANSWERS TO TOUGH QUESTIONS ABOUT ABORTION AND EUTHANASIA* 21, 22 (1991) (making both such arguments); David M. Smolin, *Why Abortion Rights Are Not Justified By Reference to Gender Equality: A Response to Professor Tribe*, 23 J.

abortion opponent can bring the fetus within the ambit of society's general commitment to the powerless, the voiceless, and the stranger.²⁴⁸ That commitment, as one such argument points out, is, "in part, historically rooted in the great stories of the Biblical tradition"²⁴⁹ such as the Good Samaritan; there is every reason for the abortion opponent to use such stories to support his claim that abortion violates that fundamental commitment. But to present the stories as compelling on their own terms is a far cry from a dogmatic assertion that abortion is wrong because God forbids it.

In the foregoing examples, the arguments seek to appeal to a standard that citizens on the other side of the debate accept. In most cases, this kind of apologetic is preferable in politics; by presenting arguments based on premises others can accept, the citizen respects the limits of her own perspective and the goodness and truth in those of others. But the requirement of a "publicly accessible" apologetic need not require that a citizen always argue on the basis of the premises of her opponent. In some cases—perhaps including abortion—the issue may be so foundational that it implicates differences in the most basic premises. In such cases, the citizen may also give a "negative apologetic"; she may endeavor to show that the premises on which her opponents rely are incoherent and that her own premises are the only ones that make it possible to reach an answer. This sort of argument will be especially attractive to religious believers who doubt the value of secular reason as a sufficient source of truth, and who wish to maintain the distinctiveness of religious premises in argument without having to "translate" those premises entirely into secular terms.²⁵⁰ My argument here suggests that

MARSHALL L. REV. 621, 656 (1990) (reviewing LAWRENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990), and noting that brain waves have been measured within 40 days of conception).

248. See, e.g., GEORGE WEIGEL, *CATHOLICISM AND THE RENEWAL OF AMERICAN DEMOCRACY* 132-34 (1989) (arguing that "the abortion liberty is at fundamental cross-purposes with America's founding instincts—instincts which once created a welcoming and hospitable culture" in matters such as immigration). As Perry notes, the primary arguments against abortion made by the nation's Roman Catholic bishops appeal to the same commitment to value the lives of other humans. PERRY, *supra* note 149, at 117-18.

249. WEIGEL, *supra* note 248, at 134.

250. "Negative apologetics" as defined in the text will be especially attractive to those religious believers—primarily some conservative Protestants—who adhere to a "presuppositional" method of defending their beliefs. In the presuppositional approach, the religious believer seeks to show that the effort to ground thought in humans' autonomous capacities, rather than in God, is incoherent because human characteristics provide no basis for any sort of objective truth; thus one must begin with the presupposition that God exists and should be followed. See, e.g., CORNELIUS VAN TIL, *THE*

citizens may proceed on such terms in political debate, but they must argue why their religious premises are superior.

Niebuhr made this sort of argument repeatedly. He asserted that other forms of thought besides "prophetic religion" could not explain how human existence could be so partial and limited, and yet at the same time so meaningful.²⁵¹ In particular, he repeatedly assaulted the premise that humans' natural capacities to reason and act morally were sufficient to solve social problems. This "negative apologetic" speaks to the position of other citizens, yet it does not require that the person making the apologetic accept the premises on which other citizens proceed. It is open to the religious believer to try to show (if possible) the incoherence of other systems of thought, and thereby negatively validate her religiously based approach. To return to the example of abortion, some religious opponents of abortion argue that once society abandons the premise that all human beings are made in the image of God, and thus have a divinely conferred intrinsic worth, there is no basis for any kind of human rights; social policy becomes a question of who has brute power to determine which forms of life deserve protection.²⁵² There are many kinds of responses to that argument—from questioning the degree of respect for human dignity that so-called Christian societies manifest, to suggesting ways in which human dignity can be firmly founded under other systems. But the anti-abortionists' argument is publicly accessible, raising challenges that other citizens can understand and to which they can respond.

The above standards place some restrictions on the kind of arguments that should be deemed morally acceptable in political debate. But it is important to realize that they must be applied to secular arguments as well as religious ones. A Marxist who simply assumes the correctness of Marxist premises without arguing for them, or a defender of abortion rights who simply assumes that the fetus lacks any rights, likewise can be condemned for failing to engage in the argument in a fashion that shows humility and sympathy for the other side.

Finally, that highly sectarian political arguments are disfavored should not be translated into a constitutional rule disabling such

DEFENSE OF THE FAITH 99-105 (3d ed. 1967) (discussing reasoning by presupposition).

251. See *supra* notes 132-34 and accompanying text.

252. See, e.g., C. EVERETT KOOP & FRANCIS A. SCHAEFFER, *WHATEVER HAPPENED TO THE HUMAN RACE?* 6 (1979) (arguing that once society removes the teaching that "man is made in the image of God and therefore is unique, . . . there is no adequate basis for treating people well").

arguments from serving as the basis for legislation (by striking down legislation that rests on them). The distinction between "sectarian" arguments and "publicly accessible" arguments is an ideal to which society can point to raise moral objections against divisive rhetoric, but it is too hazy to serve as a standard that can be administered by courts.²⁵³ The quality of public accessibility is a matter of degree. Niebuhr's writings remind us that there is some partiality in all perspectives on society and politics, even in those that speak in a broadly accepted language; partiality is certainly not limited to those who speak from religious perspectives.²⁵⁴

A regime in which all views are admitted into public debate must rest, ultimately, on the capacity of the people to practice humility and embrace tolerance. In a religious nation such as America, such virtues will have to emerge from religious viewpoints as much as from Enlightenment secularism. Here Reinhold Niebuhr provides the final contribution to be discussed in this Article: an argument for toleration and humility arising from central Christian doctrines that assert that even those who are redeemed continue to fall prey to pride and self-aggrandizement. The Niebuhrian view asks the political activist (religious or secular) not to renounce his most basic views, but to be aware of several complicating factors: his own limits, the difficulty in applying general religious truths to complex real-world problems, and the potential good and truth in the views of his opponents. The Conclusion turns to this final point.

B. Other Church-State Issues

Niebuhr wrote less systematically about other church-state issues than he did about the role of religion in politics. Any discussion of the implications of his work for these other issues, therefore, must be more tentative, resting heavily on extrapolation from general themes.

253. As such, even if public accessibility were an ideal found in the Constitution, it might be seen as a "political question," inappropriate for enforcement by courts, because of a lack of "judicially manageable standards." See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

254. Moreover, pragmatic factors undercut the necessity and advisability of actual legal rules restricting government action based on "sectarian" arguments. The need for actual rules is reduced because in a pluralistic society, a religious activist will have strong practical reasons to make political arguments that are persuasive to others, not simply to those in her faith community. See Mark Tushnet, *The Limits of the Involvement of Religion in the Body Politic*, in *THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY* 191, 207-08 (James E. Wood & Derek Davis eds., 1991). Moreover, suppressing religious involvement through actual legal bars is likely to create as much anger and disaffection as is saved. See *supra* note 173 and accompanying text.

Nevertheless, Niebuhr's work does point toward certain proximate solutions to problems of religious freedom in America.

1. Government-Sponsored Religious Activity

As discussed earlier,²⁵⁵ a Niebuhrian perspective warns that an active government that is itself rigidly secular will put a secularizing pressure on culture and will interfere with religious freedom. One common response by those who fear such a secularizing government is to advocate that government itself sponsor religious activities or religious symbols in the spheres that government oversees—particularly in the public schools, but also on public property more generally. Official prayers or sermons and publicly funded crèches and other symbols are examples of this response. Niebuhrian insights suggest that such actions are improper, as the Court has held under the Establishment Clause.²⁵⁶ Such pronouncements by the government create harm to dissenters, who are sent the message that they are not full citizens.²⁵⁷ As Niebuhr ultimately recognized, these practices ignore the reality of pluralism by having government itself voice one particular religious view selected from among the many held by citizens. These Enlightenment-inspired concerns argue strongly against such practices.

Moreover, there are evangelical arguments against such practices too. As Niebuhr emphasized, it is almost guaranteed that the religion created by government-directed rituals and symbols will be government-controlled—"tamed." It will be the religion of the "king's court and the king's chapel," as Niebuhr labeled Richard Nixon's chapel services,²⁵⁸ rather than the prophetic religion that subjects government to limits and criticism from an independent

255. See *supra* part II.C.2.a.

256. *County of Allegheny v. ACLU*, 492 U.S. 573, 598-601 (1989) (holding that free-standing crèche on display in a courthouse was an impermissible governmental endorsement of a religious message); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (prayers). *But cf.* *Lynch v. Donnelly*, 465 U.S. 668, 680-85 (1984) (holding that display of crèche on public grounds among secular Christmas symbols did not violate the Establishment Clause). There is a difference, of course, between using religious symbols and material to celebrate a religious event (as do most government sponsored prayers and public crèches) and using them for other purposes (such as a museum's displaying art or an orchestra's playing music that happens to have been religiously inspired, or a teacher discussing the role that religion has played in history). Although the distinction may be difficult in some cases, it is the one on which courts should focus.

257. Justice O'Connor has often emphasized this point in her opinions in religion cases. See, e.g., *County of Allegheny*, 492 U.S. at 625-27 (O'Connor, J., concurring) (disapproving of government-sponsored crèche because of its message of "endorsement" of Christianity).

258. See *supra* note 202-03 and accompanying text.

perspective. The ceremonial prayer is watered down, at government's direction, so as to appeal to all. With the crèche in the town square, government presses Christian symbols into service in the commercialization of Christmas. Thus the majority in *Lee v. Weisman* properly condemned the practice of government-controlled prayers: "The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds [is] a contradiction that cannot be accepted."²⁵⁹

It might be argued in response that these costs to nonbelievers and to religious integrity are not limited to government-sponsored exercises, but can occur in any other situation in which religion participates in public life. For example, to allow religiously grounded visions to influence public policy in secular concerns carries with it the potential for "imposing" the successful religious vision on some other citizens who do not accept it.²⁶⁰ On the other hand, proponents of government-sponsored religion might argue that government-sponsored prayers or crèches are justified as a response to the secularizing effect on society that would follow if an ever-larger government were required to be scrupulously secular. Does not the exclusion of prayer from school ceremonies, or religious symbols from the Christmas holidays, turn the government's activity into a powerful engine of secularization? Does it not send the message to religious adherents that they are not full members of the community?²⁶¹

The answer to such arguments is to maintain the distinction between government promoting religion itself and government giving individuals and groups room to pursue religious values and, if they wish, to bring religion into the public arena. The distinction between the two is, of course, fundamental to a First Amendment that both prohibits establishment and protects free exercise and free speech. There need not be *government-sponsored* symbols and exercises in order to address the pressures of secularization. Therefore, the harms

259. *Lee v. Weisman*, 112 S. Ct. 2649, 2657 (1992).

260. See *supra* notes 233-35 and accompanying text.

261. See, e.g., Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 152-53 (1992) (criticizing the endorsement test for, among other reasons, permitting the Court to "communicate a 'message of disapproval,' " and querying: "Why is compelled exposure to governmental messages denigrating one's religion constitutional [as in *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988)] while avoidable exposure to governmental messages favorable to another religion is not [as in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989)]?"); Steven Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 309-13 (1987) (arguing that virtually all governmental actions will alienate some people on religious grounds).

that such practices cause are unjustified—"gratuitous," in Professor Laycock's words.²⁶² Religious citizens should be given ample outlets for expression through private displays or ceremonies on public property. Indeed, the First Amendment right of free speech requires that the government give such access to religious groups if it has done so for other groups.²⁶³ A city can and should permit groups to put up their own crèches, menorahs, or other symbols in a public park.²⁶⁴ The public school can, indeed must, permit the valedictorian to include religious expression in her graduation day speech if she wishes.²⁶⁵ By such measures, the government accomplishes several goals. It respects those citizens who have religious commitments, but it also respects the interest of nonreligious citizens in not being excluded by their government's actions and refrains from arrogating the power to define proper religious values itself.

262. Laycock, *supra* note 48, at 380; *Weisman*, 112 S. Ct. at 2677 (Souter, J., concurring) (arguing that students asking for graduation prayer "have no need for the machinery of the State to affirm their beliefs"). Professor Laycock, for example, distinguishes between government-sponsored religious rituals and religious involvement in temporal political debates:

[O]n matters of governmental policy, somebody has to rule. . . . [But i]n the case of religion, no one has to rule. There is no need for the government to make decisions about Christian rituals versus Jewish rituals versus no religious rituals at all. For government to make that choice is simply a gratuitous statement about the kind of people we really are. By making such statements, the government says the real American religion is watered-down Christianity, and everybody else is a little un-American.

Laycock, *supra* note 48, at 379-80. The distinction between religious political activism and religious public rituals can also be defended on more full-blooded theological grounds common to Judaism and Christianity. Again, remember the words of Amos: "I hate, I despise your feasts, and I take no delight in your solemn assemblies. . . . But let justice roll down like waters, and righteousness like an everflowing stream." *Amos* 5:21-24.

263. *Lamb's Chapel v. Center Moriches School Dist.*, 113 S. Ct. 2141, 2147 (1993) (holding that school district may not distinguish religious group among other community groups in denying after-hours access to school premises); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (ruling that university may not single out religious group from among other university student groups for exclusion from school facilities).

264. See, e.g., *Doe v. Small*, 964 F.2d 611, 619 (7th Cir. 1992) (en banc) (holding that private group's display of religious paintings in city park did not violate Establishment Clause); *McCreary v. Stone*, 739 F.2d 716, 730 (2d Cir. 1984) (holding that village violated Free Speech Clause by denying permit to private group to display crèche in park, a public forum), *aff'd without opinion by an equally divided Court sub nom.* *Board of Trustees v. McCreary*, 471 U.S. 83 (1985).

265. A case wrongly decided the other way is *Guidry v. Calascieu Parish Sch. Bd.*, 9 RELIGIOUS FREEDOM REP. 118, 118-19 (E.D. La. 1989), *aff'd per curiam on other grounds sub nom.* *Guidry v. Broussard*, 897 F.2d 181 (5th Cir. 1990).

2. Accommodation of Independent Religious Exercise

The problem of government-fueled secularization, however, remains. As secular government expands into many areas of life, the obligations it imposes threaten to push religion to the margins. While Niebuhrian insights indicate that government-sponsored religious activities are an inappropriate response to this problem, they also indicate that government should, within broad limits, accommodate the independent exercise of religion by groups and individuals: that is, government should "remove[] obstacles to the exercise of . . . religious conviction[s that are] adopted for reasons independent of the government's action."²⁶⁶

This principle involves two currently contested areas of religion clause law: (1) protection for religious groups and believers from general laws or obligations that restrict religious practice; and (2) participation by religious groups and believers in general government programs, where the exclusion of religion would work to discourage religious practice. Niebuhr supported accommodation in both kinds of cases, arguing that "[c]ooperation, entered into freely by the state and church and involving no special privilege to any church and no threat to the religious liberty of any citizen, should be permitted."²⁶⁷

a. Exemptions from Laws Burdening Religious Practice

Currently, the most important legal issue involving accommodation concerns general laws that happen to restrict religious practice: Under what circumstances, if any, is the government constitutionally permitted or compelled to free religious practice from burdensome laws?²⁶⁸ Examples raising this issue range widely, from drug or alcohol laws that would prevent the use of particular substances in religious rituals, to land-use regulations that dictate where a church may locate or how it may configure its building, to draft laws that may result in the conscription of citizens conscientiously opposed to war.

266. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992).

267. Niebuhr, *Editorial Notes*, *supra* note 158, at 34.

268. For academic discussion, see Gey, *supra* note 32, at 180-85 (attacking exemptions); Laycock, *supra* note 153, at 1013-18 (defending exemptions); McConnell, *supra* note 266 (defending exemptions); Mark Tushnet, "Of Church and State and the Supreme Court": *Kurland Revisited*, 1989 SUP. CT. REV. 373, 373 (attacking exemptions).

Present First Amendment law distinguishes sharply between accommodations that are compelled by the Free Exercise Clause and those that are not compelled but are permitted under the Establishment Clause. In *Employment Division v. Smith*,²⁶⁹ the Supreme Court held that the government is almost never constitutionally required to exempt religious conduct from a law that is "neutral and generally applicable."²⁷⁰ Congress, however, soon enacted the Religious Freedom Restoration Act, providing statutory protection for religious exercise even against general laws, except when the government's regulatory interest is "compelling."²⁷¹ Moreover, the Court has made clear that legislative accommodations are constitutionally permissible so long as they do not unduly favor religion over nonreligion, or one religion over others.²⁷²

Arguments for accommodation, whether by constitutional mandate or legislative grace, are bolstered by Niebuhr's insights on religion and politics.²⁷³ Above all, exemptions from general laws are crucial to preserving the constitutional value of free exercise in the face of the secularizing pressure of government against which Niebuhr

269. 494 U.S. 872, 890 (1990) (rejecting free exercise claim of Native Americans who used peyote in religious rituals in violation of anti-drug laws).

270. *Id.* at 877.

271. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (Supp. V 1993)). For discussion, see Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1 (1994); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221.

272. See also *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987) (upholding exemption of churches from laws against religious discrimination in employment); *Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2492 (1994) (striking down creation of special school district to serve religious community on ground that other religions might not be so favored, but reaffirming *Amos*); *Texas Monthly v. Bullock*, 489 U.S. 1, 14-17 (1989) (plurality opinion) (striking down sales tax exemption limited to religious publications, but stating other exemptions are permissible).

273. The arguments here are for accommodations in general, and do not focus on the question (important as it is) whether the text and history of the Free Exercise Clause indicate that accommodations should be constitutionally mandated or merely permitted. I believe that the far better construction of the Free Exercise Clause is the one that requires exemptions in some cases. See Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 *passim*; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 *passim* (1990). But see, e.g., William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 *passim* (1991); Ellis West, *The Case Against A Right to Religion-Based Exemptions*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 591 *passim* (1990) (arguing against religion-based exemptions). Not only do the text and history point to that result, but guaranteeing the free exercise of politically unpopular religions—of which there may be many in a secular-minded world—demands the availability of constitutionally mandated exemptions declared by politically insulated judges.

warned. As Professor Laycock points out, "in the modern regulatory state, most activities and institutions are pervasively regulated"; without exemptions, "churches and the religious conduct of believers will be pervasively regulated too."²⁷⁴ All of the Niebuhrian arguments against a thoroughly secularized public order²⁷⁵ weigh in favor of accommodating religion, where possible, through exemptions from general secular laws. Accommodation is necessary if religious citizens and groups are to pursue their moral visions, contribute those visions to the power-focused world of politics, and stand as a counterbalance to the power of the state.²⁷⁶

These considerations go far toward answering the claim by opponents of accommodation that such measures are improper because they favor religion over other beliefs.²⁷⁷ The Free Exercise Clause, of course, singles out religious exercise for protection. The combination of arguments set forth in part II helps to explain why religious freedom should be vigorously protected. Religion articulates a set of meanings that by their nature stand beyond the strivings of the government and thus emphasize the government's limited nature. As Niebuhr puts it, religion offers a distinctive "vantage point" from which "to judge the self-deification of nations."²⁷⁸ By speaking about ultimate values outside of history, religion emphasizes the

274. Laycock, *supra* note 3, at 848.

275. See *supra* part II.C.2.

276. As Stephen Carter has summarized, in this account of religious freedom, religious groups [serve] as autonomous moral and political forces, intermediate institutions, separate heads of sovereignty vital to preventing majoritarian tyranny. Thus, the reason for accommodation becomes not [just] the protection of individual conscience, but the preservation of the religions as independent power bases that exist in large part in order to resist the state.

CARTER, *supra* note 1, at 134.

277. In most cases, accommodation does not "favor" religion in the stricter sense of actually encouraging religious practice; rather, it merely removes an obstacle to a practice already adopted by a group or individual. Few people are about to become Amish because of the exemption of Amish children from certain education requirements. When an accommodation is likely to encourage religious practice to a much greater degree than it removes an impediment to such practice, current Establishment Clause doctrine rightly implies that it should be struck down. See, e.g., *Texas Monthly v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality opinion) (noting that the public school "release time" program upheld in *Zorach v. Clauson*, 343 U.S. 306 (1952), did not "coerce students who wished to remain behind to alter their religious beliefs"). The specific "release time" program at issue in *Illinois ex rel McCollum v. Board of Educ.*, 333 U.S. 203 (1948), probably violated this standard. By requiring non-participating students to sit idly in study halls during the release time period, it imposed costs on such students and may have encouraged them to attend the religious classes. *McCollum*, 333 U.S. at 227 (opinion of Frankfurter, J.).

278. See *supra* notes 143-44 and accompanying text.

state's inability to realize such ultimates itself. It therefore places a powerful theoretical brake on state authority. The protection of religious groups, as one sort of "intermediate institution," adds a practical limit on the state's power to impose its ideals on all parts of society.²⁷⁹

To many observers, of course, religion's focus on ultimate values is nothing but dangerous; the secular Enlightenment view thus fosters a suspicion not simply of government sponsoring religion, but also of government respecting religious freedom. In the words of Justice Frankfurter (who tussled with his friend Niebuhr over these matters after the *McCollum* decision²⁸⁰), to accommodate a person's behavior because of its religious motivation is objectionable because "[i]t is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong."²⁸¹ Again, however, this ignores the Niebuhrian insight that governments, as well as holders of the secular viewpoints that governments are permitted to reflect, will seek to aggrandize themselves as well.

The Niebuhrian balance of power, I argue, is best preserved when government does not promote or advance religious ideas or practices itself but accommodates the free exercise of religion by individuals and groups unless there is a strong need to prevent the religious practice. This distinction confines government to its proper role of pursuing proximate goals, while leaving the pursuit of ultimate truths to individuals and the groups they form. At the same time, giving respect to free exercise values helps to ensure that the "proximate" focus of politics will not degenerate into a pure cynicism, but will be leavened with perspectives about ultimate truths. Freeing religious conduct from laws that prohibit such conduct where the government lacks a strong interest in regulation allows religious groups to survive and continue to play their role in offering such perspectives.

Opponents of religion-specific accommodations also raise the spectre of "balkanization," with government forced to accede to the varying and possibly conflicting wishes of many religious groups.²⁸² Justice Frankfurter reflected this view: In *McCollum*, he attacked the program for releasing students to attend religious classes, by arguing

279. For parallel discussion, see CARTER, *supra* note 1, at 131-34; McConnell, *supra* note 261, at 151-52; Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 B.Y.U. L. REV. 7, 22-26.

280. See *supra* notes 158-59, 192-94 and accompanying text.

281. Board of Educ. v. Barnette, 319 U.S. 624, 653-54 (1943) (Frankfurter, J., dissenting).

282. See *supra* note 32 and accompanying text (citing commentators).

that in order to ensure "cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects."²⁸³ Professor Suzanna Sherry has suggested the principle—grounded, apparently, in an Enlightenment-based view of church and state—that accommodations for religious freedom may be improper if "the purpose of the religion clauses is to allow a secular government to operate independent of the varied religious beliefs of the citizenry."²⁸⁴

This same concern was central to the dispute in *Board of Education of Kiryas Joel School District v. Grumet*,²⁸⁵ last term's decision striking down a law creating a separate public school district to provide special education to handicapped children in a village of Hasidic Jews. The Hasidic children—who because of their insular religion and culture wore distinctive clothing and hairstyles and spoke primarily Yiddish—had suffered "panic, fear and trauma" from exposure to the larger, "mainstream" public schools where they first attended special education classes; the new district provided them with such education in culturally familiar surroundings, but it was barred from teaching religious tenets.²⁸⁶ One might think that the very purpose of setting up local school districts is to accommodate such distinctive features of local populations, but the Supreme Court struck down the district, holding that carving out a district for a single religious sect violated the Establishment Clause requirement of neutrality toward religion.²⁸⁷ Thus, the kind of accommodation of cultural needs that is made through government actions all the time was barred to a group because of its religious identity. Nevertheless,

283. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 208, 216-17 (1948) (opinion of Frankfurter, J.). The same attitude underlay Justice Frankfurter's refusal to recognize conscientious exemptions from the demands of the law. In declaring the short-lived ruling that Jehovah's Witness children could be compelled to salute the flag in school despite their religious scruples, Frankfurter invoked the need for social cohesion and argued that "[t]he ultimate foundation of a free society is the binding tie of cohesive sentiment." *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 596-98 (1940), *overruled by Barnette*, 319 U.S. 624 (1943). Fifty years later, the Court in *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990), quoted and followed *Gobitis* in holding that the Free Exercise Clause never requires an exception from a general law for sincere religious practice.

284. Sherry, *supra* note 16, at 152.

285. 114 S. Ct. 2481, 2484 (1994). I should disclose that I participated in drafting an amicus brief in the Supreme Court defending the constitutionality of the special district.

286. *Id.* at 2485-86 (quotations omitted).

287. *Id.* at 2491-93. For further discussion, see Berg, *Slouching Toward Secularism*, *supra* note 20.

commentators hailed the decision as preventing religious balkanization.²⁸⁸

Niebuhrian insights suggest that this special concern for religious divisiveness is misplaced. It is unrealistic, Niebuhr would say, to attribute social and political divisiveness solely or especially to religion. Moreover, as Niebuhr wrote to Frankfurter after *McCullum*, we cannot create "community . . . by emptying our culture of all its differences or by pretending that actual differences do not exist."²⁸⁹ Once again, a proximate solution is provided by the distinction between promoting religion and accommodating religious freedom. The concerns of divisiveness from government involvement in religion justify banning government-sponsored religious practices, for such practices are not necessary to free exercise. With respect to permitting voluntary religious practice to go on freely, however, whatever divisiveness concerns exist are outweighed by the need to protect free exercise from an overpowering secular government. Therefore, although accommodation of religion does sometimes require legislatures or courts to make "difficult and controversial judgments about the nature and strength of religious claims,"²⁹⁰ the value of protecting religious difference justifies undertaking that task.²⁹¹ If the Enlightenment notion of "a secular government . . . operat[ing] independent of the varied religious beliefs of the citizenry,"²⁹² is taken to the point of overriding serious claims to the free exercise of religion, that Enlightenment notion is dangerous and should be rejected. Reasonable measures of accommodation—whether in the form of exemptions from general laws, or programs such as the "release time" that Niebuhr defended in the 1940s—are appropriate, so that we can take account of religious differences and, in Niebuhr's words, "come to terms with each other despite our differences."²⁹³

b. Religious Participation in Publicly Funded Programs

The principle of accommodation also suggests that religiously affiliated institutions should not be barred from participation in

288. For typical reactions, see, for example, *Court Says N.Y. School Violates Church/State Rule*, MINN. STAR-TRIB., June 28, 1994, at 6A (noting that civil liberties organizations and some religious groups "cheered" ruling); *The Religious Village*, WASH. POST, June 29, 1994, at A22 ("any other conclusion [would have been] startling").

289. Niebuhr, *Editorial Notes*, *supra* note 158, at 34.

290. McConnell, *supra* note 266, at 689.

291. Laycock, *supra* note 273, at 31-33.

292. Sherry, *supra* note 16, at 152.

293. Niebuhr, *Editorial Notes*, *supra* note 158, at 34.

general publicly funded programs, such as those concerning social services and education. The law in this area remains in substantial confusion. Although in recent years the Supreme Court has upheld numerous forms of aid, especially to individuals rather than directly to religious institutions,²⁹⁴ earlier cases that adopt an almost absolute "no aid" approach remain good law, at least for now.²⁹⁵

Disputes over claims for funding of religiously affiliated schools are not new. Such disputes also flared up immediately after World War II, primarily over aid to Catholic schools, and these disputes contributed to what sociologist Will Herberg called a "marked deterioration of Protestant-Catholic relations."²⁹⁶ In those conflicts, Reinhold Niebuhr stood almost alone among Protestant leaders in arguing for the inclusion of Catholic schools in certain kinds of funding.²⁹⁷ Niebuhr's arguments are still relevant today. His primary concern, as in other instances, was that an absolute separation between religion and the activist, welfare state would "lead[] to the secularization of our culture."²⁹⁸ These fears are well grounded when, as now, government runs a system of subsidized schools that are shielded from religious influences but teach competing ideas ranging from secular moral theories to patriotism to evolution to (in colleges at least) Marxism. The financial pressure on families to choose low-cost public schools over a religiously informed education does work a powerful discrimination against (at least some) religious ideas and in favor of the secular teachings in the schools. Government's financial pressure works in favor of one set of ideas

294. See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2469 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 482 (1986); *Mueller v. Allen*, 463 U.S. 388, 390 (1983); see also *Bowen v. Kendrick*, 487 U.S. 589, 617-18 (1988) (holding that substantial aid to religious social service agencies is not per se violative of the Establishment Clause).

295. *Aguilar v. Felton*, 473 U.S. 402, 413-14 (1985); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 397-98 (1985); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 796-98 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971). For a catalog of inconsistencies in school aid cases, see *Wallace v. Jaffree*, 472 U.S. 38, 112-13 (1985) (Rehnquist, J., dissenting).

296. Will Herberg, *The Sectarian Conflict Over Church and State: A Divisive Threat to Our Democracy?*, 14 COMMENTARY 450, 450 (1952); see also STOKES & PFEFFER, *supra* note 62, at 420-46 (discussing disputes over such aid). One form of aid, the payment of expenses for bus transportation, was upheld by the Supreme Court in *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947).

297. See Niebuhr, *School Issue*, *supra* note 160, at 254; see also Herberg, *supra* note 296, at 453 (noting nearly uniform Protestant opposition to any aid for Catholic schools); MORGAN, *supra* note 148, at 66 (citing Niebuhr and others supporting Catholic inclusion as small in number).

298. Niebuhr, *School Issue*, *supra* note 160, at 255.

and against a genuine pluralism in education. Thus, Niebuhr went so far as to charge opponents of aid to Catholic schools with making "absolute claims in the name of democracy."²⁹⁹

Opponents of public funding for religiously affiliated schools and social services are wrong simply to rely on the historical record of opposition to assessments for religion by, for example, James Madison in Virginia and the Baptists in New England and Virginia.³⁰⁰ Their arguments fail to take practical account of the differences between the eighteenth century and today. The tax assessments that were challenged in the 1780s went solely to support churches, in a context in which government taxed citizens for relatively few other purposes. Today, the disputed aid goes not to churches as such, but to the schools and social services that religious groups operate—services that provide direct benefits to the broader community. Moreover, activist government has now stepped into the arena to provide tax-subsidized alternatives to these religiously affiliated schools and social services. In the modern era, to aid citizens who want such services in a religious setting is equitable; to bar such aid is a form of discrimination.³⁰¹ In writing in support of some aid to Catholic schools, Niebuhr highlighted this change in practical effect that has resulted from the expansion of the government into education. He argued that in order to maintain neutrality, the specific contours of the line between church and state must be "subject to amendment in the light of new developments. . . . [T]he modern state with its wide taxing powers can not so easily be separated from any vital aspect of community concern as the [founding] fathers assumed."³⁰²

The legal debate over aid to religious institutions can also be informed by Niebuhr's insights concerning the difficulties of maintaining a "pure" religion in the public sphere.³⁰³ In cases such as *Aguilar v. Felton*, the Court has maintained that barring government aid to religiously affiliated schools is necessary to prevent the "secularization of a creed" that comes with conditions on the aid.³⁰⁴ This line of argument, however, is probably disappearing from school-

299. *Id.* at 254.

300. The earliest example of such reliance is Justice Rutledge's dissent in *Everson*, 330 U.S. at 34-42.

301. For a similar argument distinguishing the two historical situations, see McConnell, *supra* note 261, at 184-85.

302. Niebuhr, *School Issue*, *supra* note 160, at 255-56.

303. See *supra* notes 200-06 and accompanying text.

304. *Aguilar v. Felton*, 473 U.S. 402, 414 (1985); see also *supra* note 39 and accompanying text.

aid cases,³⁰⁵ and rightfully so. Niebuhr's arguments, for example, remind us that some compromise may well be necessary in order to apply the ideals of religion in public life and culture: "We cannot purge ourselves of the sin and guilt in which we are involved by the moral ambiguities of politics without also disavowing responsibility for the creative possibilities of justice."³⁰⁶ In any event, the decision whether or not to compromise and accept some government regulation as the price of funding should be left up to the church, not to a court. Once again, the best "proximate solution" to these problems is religious freedom—leaving to religious groups themselves the decision whether and to what extent they should accept compromise in the course of the struggle to remain active in society. Using a typology developed by H. Richard Niebuhr, a prominent theologian and Reinhold's brother, legal scholars have cogently argued that religious freedom requires that the state, as much as possible, permit different religious communities to choose different ways of relating to the broader culture, including the response of being highly "acculturated."³⁰⁷ Some religious groups—those that tend to be more acculturated—are able to live within reasonable guidelines that accompany government funding. It makes little sense to invoke their own freedom to overturn an arrangement with which they are comfortable. The decision whether to accept government aid with reasonable strings attached should be left up to the church.³⁰⁸

305. It is rejected or ignored in all of the recent cases cited in note 294.

306. NIEBUHR, *HUMAN DESTINY*, *supra* note 63, at 284.

307. See Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 GEO. WASH. L. REV. 782, 784-95 (1992) (discussing H. RICHARD NIEBUHR, *CHRIST AND CULTURE* (1951)); Michael W. McConnell, *Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence*, 42 DEPAUL L. REV. 191, 220-21 (1992) (same).

308. "An atheist plaintiff asserting a church's right to be left alone even at the cost of losing government aid is the best possible illustration of why there are rules on standing." Douglas Laycock, *The Right to Church Autonomy as Part of the Free Exercise of Religion*, in 2 GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS 28, 38 (D. Kelley ed., 1986).

Of course, government regulations that accompany aid may be so intrusive and unjustified as to constitute an infringement on the religious institution's free exercise. The only point here is that when the religious institution is willing to accept reasonable regulations designed to ensure that aid is used for the prescribed purposes, the institution's decision should not be overturned in the name of helping it to remain "pure."

Moreover, there is an important distinction here between the "corruption" of religion that accompanies government aid and the "corruption" that follows from government-controlled religious exercises. In the former case, unlike the latter, the consequences of the government's action are confined to a particular religious institution, whose leaders have acceded to the aid. Thus the "corrupting" effect of governmental involvement is not a reason to strike down government aid, but it is a reason to strike down government-

3. Religious Pluralism and Accommodation Today

If anything, the arguments above have become more powerful in the years since Niebuhr wrote. Even as late as the early 1960s, Niebuhr could state that in some sense America had a "single culture" defined by mainline Protestantism;³⁰⁹ correspondingly, he could still assert the ultimate primacy of the public school in helping to form that single culture. But the intervening thirty years have seen an even greater explosion of cultural and religious pluralism. Niebuhr could hardly predict, for example, the simultaneous rise in the 1980s of various forms of "multiculturalism" and of aggressive conservative religion—competing forces that strain the single institution of the public school to the breaking point. When, for example, the distribution of condoms in public schools finds a sufficient constituency to be enacted as a policy, yet a large number of conservative families remain implacably opposed, the government simply cannot serve as a "neutral" moral arbiter. This suggests all the more that a purely secular public sphere is not neutral in any meaningful sense. It also suggests, however, that the solution to the problem of government-driven secularization cannot be found by injecting government-selected religious tenets into public institutions. As pluralism increases, such tenets become increasingly "particular"—a step further from, rather than toward, neutrality. Instead, the solution must be found in accommodating independent religious decisions—allowing religious citizens to be exempted from programs that they sincerely oppose, and permitting experimentation, at least, with voucher systems and other forms of privatization in the delivery of education and social services (while maintaining government's role in providing funding and setting general program guidelines).

CONCLUSION

This Article has suggested ways in which Reinhold Niebuhr's insights on ethics, religion, and politics might inform church-state relations and be translated into proximate solutions, that is, specific rules of law. Niebuhr's goal, born of a deep appreciation of both the possibilities and dangers of all systems of thought, was to avoid both an unmitigated secularism and an overreaching, coercive religion. I

controlled religious exercises and displays.

309. Reinhold Niebuhr, *The Crisis in American Protestantism*, 80 THE CHRISTIAN CENTURY 1498, 1498 (1963).

have argued that with respect to religious participation in politics, the Niebuhrian stance welcomes religion as a full participant, but calls on religious activists to express humility by presenting their arguments in terms others can understand. With respect to other church-state questions, the Niebuhrian stance is deeply concerned with the problem of secularization driven by an active secular government. Nevertheless, Niebuhrian insights suggest that government-sponsored religion is an inappropriate means to address the problem. Instead, government should, through various means, accommodate the independent religious activity of individuals and groups.

Nevertheless, the Niebuhrian emphasis on complexity and ambiguity in the relation of religion and politics cannot be entirely captured in specific legal principles. It is here that the "dispositional ethic" that Niebuhr sketched for religious and political activists becomes so important. Niebuhr vividly taught how to combine vigorous advocacy with deep humility. Achieving that balance is not an easy task in law and politics, but it is one that is crucial. It is especially crucial if, as I have argued, one cannot sidestep the dangers of religious zeal in politics by trying to separate religion strictly from public life. We must look to religious views themselves, as well as secular views, to find reasons to be humble and tolerant even as we engage in political conflict. Humility inculcates the willingness to reach proximate solutions, because we realize the potential for truth in our opponents' perspective and the potential for partiality and complacency in our own. And even when vigor demands that we not compromise, humility inculcates a "sense of pity and forgiveness for those who contend against our truth and oppose our action."³¹⁰

The combination of vigor and humility is too often lacking in debate concerning the issues of the current "culture wars," including the issue of how to relate religion and politics. On one hand, citizens who are wary of the certainties proclaimed by activists too often despair of reaching any solutions to intractable social problems. On the other hand, activists on both sides of the culture wars too often display little humility. Both sides need internal voices to do for them what Niebuhr did for his own community of political and religious liberals: to reconstruct their basic commitments while working to purge them of false certainties and utopian illusions. Such views are appearing on both sides of the cultural divide today. Some thinkers on the cultural right, while remaining committed to traditionalist

310. NIEBUHR, *HUMAN DESTINY*, *supra* note 63, at 217.

theology and conservative political perspectives, are producing sophisticated critiques of the assumptions, goals, and tactics of conservative activists.³¹¹ On the other hand, Stephen Carter, operating from a far more liberal political perspective, has written powerfully about the arrogance of secular liberalism and the contributions of religion to public life.³¹² All those involved in political activism on moral issues should pay attention to these writers.

As the debate over church and state rages on, the writings of Reinhold Niebuhr can and should serve as a powerful resource for persons in any camp who see the need for nuance, self-criticism, and a decent respect for the opinions and perspectives of their opponents. Moreover, Niebuhr's religious vision provides a necessary reminder not only of the limits of today's political perspectives, but of the limits of human striving itself:

Nothing that is worth doing can be achieved in our lifetime; therefore we must be saved by hope. Nothing which is true or beautiful or good makes complete sense in any immediate context of history; therefore we must be saved by faith. Nothing we do, however virtuous, can be accomplished alone; therefore we are saved by love. No virtuous act is quite as virtuous from the standpoint of our friend or foe as it is from our standpoint. Therefore we must be saved by the final form of love which is forgiveness.³¹³

311. As examples of such self-critical literature among evangelical Protestants, consider CHARLES COLSON, *KINGDOMS IN CONFLICT* 43-49 (1987) (pointing out distinction between political and spiritual goals); MARK A. NOLL ET AL., *THE SEARCH FOR CHRISTIAN AMERICA* 17 (1983) (criticizing the claim that America has been or should be a "Christian nation"); NO GOD BUT GOD: *BREAKING WITH THE IDOLS OF OUR AGE* (Os Guinness & John Seel eds., 1992) (criticizing evangelicals' faith in material success, political activism, self-help methods, and other "idols").

312. CARTER, *supra* note 1, at 67-101.

313. NIEBUHR, *IRONY OF AMERICAN HISTORY*, *supra* note 81, at 63.

