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Associate Professor, The Ohio State University College of Law. An earlier version of this essay was presented at the conference on "The Relevance of Religion to a Lawyer's Work: An Interfaith Conference," at Fordham University School of Law, on June 2, 1997. I thank the conference's participants for their thoughtful comments.

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THE POLITICAL THEORY PERSPECTIVE

JURISPRUDENCE AND THEOLOGY

Edward B. Foley*

Is it ever appropriate in our legal system for a rule or a principle of law to derive from, or to be dependent upon, a religious belief? In other words, is it ever appropriate for the legal system to align itself with a theological point of view? That is the question that I shall address in this essay.

I. Rooting the Constitution in Faith

Throughout our nation's history there have been efforts to amend the preamble to the United States Constitution to insert the following italicized phrase: “We the People of the United States, devoutly recognizing the authority and law of Jesus Christ the Savior and King of Nations, in Order to form a more perfect Union, establish Justice ...”1 Proponents of the proposed amendment argue that it is important for the Constitution to recognize that its ultimate authority comes not from any human act, but instead from its conformity to the will of God. In this sense, the proposed amendment is in keeping with the Declaration of Independence, which in its defense invokes “the Laws of Nature and of Nature's God.”2 To be sure, the references to religion in the Declaration are not specifically Christian, but that does not make them any less alienating to the atheist who believes that the rights to life, liberty, and the pursuit of happiness are not God-given but instead are the product of human will. Thus, the problem would be the same if proposed constitutional amendment had been as follows: “We the People of the United States, recognizing God as the Ultimate Sovereign of the Universe, in order to form a more perfect Union, establish Justice . . . .”

The problem is that the Constitution should not take sides in disputes about the existence of God. But why not? The Constitution takes sides on other issues—for example, whether or not the best procedure for amending the Constitution includes ratification by three-

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1. Anson Phelps Stokes, 3 Church and State in the United States 589 (1950) (emphasis added).

2. The Declaration of Independence, para. 1 (U.S. 1776). The Declaration also invokes “the Protection of Divine Providence” and appeals to “the Supreme Judge of the world.” Id. para. 31.
fourths of the states. Some scholars argue that it would be better if proposed constitutional amendments were submitted directly to the people themselves in national referenda.³ Others disagree, arguing that state legislatures are more deliberative in their consideration of constitutional amendments than the populace at large.⁴ If the Constitution can take sides in this debate, then why cannot the Constitution also take sides on whether there exists a supreme being who is the author of the universe?

The answer is that the Constitution must take sides on what is the best procedure for amending the Constitution. There has to be some procedure for amending the Constitution. Even the decision that the Constitution should be unamendable is, in a sense, a decision about what amendment procedure to adopt (that is, none). Thus, the choice of amendment procedure cannot be avoided, even if the choice may seem somewhat or largely arbitrary.

But the Constitution need not take sides on the debate about the existence of God. The Constitution can operate just as well remaining silent on this theological debate rather than declaring its allegiance with one point of view or the other. Indeed, arguably, the Constitution works best if it remains silent on this debate because that way both theists and atheists can affirm every word in the document, whereas if the Constitution takes a position on whether or not a Supreme Being exists, then either theists or (more likely) atheists must have some reservations about the document’s content.⁵

II. Positivism and Theism

Now, some scholars of jurisprudence may argue that the theological debate cannot be avoided. The Constitution must take a position on whether it, and it alone, is the ultimate source of legal authority in the republic—or else, whether the Constitution may be supplemented (or perhaps even superseded) by some form of higher law. This is the old

³ See Bruce Ackerman, We the People: Foundations 54-55 (1991).
⁴ See Kathleen M. Sullivan, Constitutional Amendmentitis, American Prospect, Fall 1995, at 20, 23.
⁵ I am grateful to Perry Dane for pointing out the example of Poland’s new Constitution, whose preamble invokes both theistic and atheistic justifications for its commitment to justice and other “universal values.” See Perry Dane, Spirited Debate: A Comment on Edward B. Foley’s Jurisprudence and Theology, 66 Fordham Law Rev. 1213, 1222 n.32 (1998). I see this preamble as invoking precisely the kind of “overlapping consensus” that I advocate in Part VI, infra. Just because a Constitution, like Poland’s, mentions theism and atheism does not mean that the Constitution endorses one view or the other. This distinction is crucial. I do not read Professor Dane’s piece as supporting the proposition that the Constitution (or judicial opinions) of a society should take sides on theological disputes. On this normative point, which is the sole subject of my essay, we apparently agree. Insofar as we might disagree on other matters concerning the role of religion in public discourse more generally, they may be further pursued on other occasions.
"positivism" versus "natural law" debate. Is the most authoritative form of law in a society something posited by the act of a legislative body, as the "positivists" maintain, or instead are the acts of legislative bodies authoritative only insofar as they conform to some transcendent principles of law whose validity does not depend on their adoption by any human legislature, as "natural law" advocates assert?

This debate is an ancient one in the field of jurisprudence, and I certainly do not mean to solve it here. For our purposes, the crucial claim to be considered is that it is impossible to take sides in this debate without also taking sides on the theological debate concerning the existence of God. In other words, as this argument goes, the positivist position in jurisprudence is necessarily an atheist position, while the natural law position is necessarily a theist position.

For purposes of rebutting this argument, I will assume that the Constitution (or at least the legal system as a whole) must take sides on the positivism versus natural law debate, although perhaps that assumption is disputable. It may well be that a legal system can function perfectly well, as a practical matter, without having to decide whether its highest form of law is some act of a legislative body or is, instead, some set of transcendent human rights that exist without regard to their enactment by a legislature. In any event, I shall assume otherwise. In other words, I shall take as given that lawyers and judges within a legal system need to know whether they can appeal to a set of transcendent human rights or whether instead they must confine themselves to arguments about the texts of legislative enactments. Even so, it does not follow that by taking sides on this jurisprudential issue a legal system inevitably must take sides on the theological debate concerning the existence of God.

There is no necessary correlation between positivism and atheism, on the one hand, and natural law and theism, on the other. First, it is possible to be a positivist and believe in the existence of God, even to believe that the existence of God's will is knowable to humans. Still, this theist might think that what properly counts as law, and thus what judges may rely upon, are only the enactments of legislative bodies. If these enactments deviate from God's will, then the enactments should be amended or repealed, but it is not the province of a court to declare that the law of land is not what the legislature enacted but instead is what God wills. The theist could base this positivist conception of law on a belief that law, properly understood, is simply the enactments of authoritative legislatures and nothing more. That

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6. For a useful history of this debate, see J.M. Kelly, A Short History of Western Legal Theory (1992).

7. Judge Posner, for one, suggests that a legal system can function perfectly well in practice without resolving this kind of jurisprudential issue. See Richard A. Posner, Law and Legal Theory in England and America 10 (1996).
would be a kind of definitional defense of positivism.\textsuperscript{8} Law just \textit{is} the pronouncements of legislative bodies acknowledged by the people of the land to be authoritative for the purpose of making such pronouncements. These pronouncements may be good or evil. There can be no guarantee of their goodness. To err is human, after all. Evil laws should be abolished, but until they are, no one should make the conceptual mistake of denying that they are the law.

An alternative defense of positivism that a theist might adopt could be called the "role differentiation" defense. This defense stresses the limited role of judges within a legal system. The duties of judges must be limited to identifying the law, as promulgated by the authoritative legislative bodies. Judges are specialists, trained in this skill. They should not confuse themselves with priests, who are also specialists, trained in the very different skill of identifying and interpreting God's will. When the law deviates from God's will, it is the job of the priests to call this fact to the attention of the community, so that the legislature can change the law. It is not the job of the judge to usurp this priestly function, for the judges are unlikely to be as good at it as the priests themselves. Just as you would not have a neurosurgeon perform a heart transplant, so too should you not have a civil magistrate attempt to identify God's will.

Moreover, this idea of role differentiation need not be based so much on specialization in knowledge and skills, as I have suggested thus far, but instead might be based more on the importance of separation of powers. Invoking the old Madisonian idea of checks and balances, one might think it especially dangerous if a single institution in society—the civil judiciary—considers itself capable of interpreting not only the civil law but also God's will. Even if there were a large degree of overlap between these two interpretive enterprises, better to assign them separately to two different social institutions, so that not too much power and prestige is consolidated into too few hands.\textsuperscript{9}

Although this separation-of-powers defense of positivism is undeniably normative—positivism is being defended as a good thing—this does not make positivism internally inconsistent. Indeed, it may well be God's will that positivism is a good thing. But even if God has decreed that a country's legal system should be positivist in conception, this divine decree does not mean that the legal system is ultimately premised on some transcendent natural law. The divine decree is \textit{about} the country's legal system. It does not introduce some nonpositivist element for what counts as law \textit{within} the country's legal


system. Thus, the highest law of the land remains the enactment of an authoritative legislative body, even if the reason for limiting the highest law in this way is the will of God.

Many may not find this theist defense of positivism convincing. No matter. The crucial point is that it is not inherently illogical. It is at least plausible, even if not ultimately convincing, for a theist to believe that the law should be understood as limited to legislative enactments. Because this belief is plausible, it rules out any claim that positivism necessarily entails a commitment to atheism.

III. NATURAL LAW AND ATHEISM

Conversely, one need not be a theist to believe in the existence of transcendent human rights that are a higher form of law than any legislative enactment. An atheist, of course, would not claim that these transcendent human rights are God's will. Instead, the atheist might argue that these transcendent human rights are the essential terms of a social contract to which all reasonable persons would assent. Reasonableness in this context means a willingness to adopt a principle of reciprocity that requires persons to seek mutually agreeable rules for governing their social coexistence. In the effort to seek mutually agreeable rules, the principle of reciprocity requires individuals to imagine themselves trading places with each other, so as to determine what rules they would reject as unacceptable if they were other members of society.

This principle of reciprocity is an alternative to Rawls's idea of a veil of ignorance as a method for generating a fair social contract and its recognition of fundamental transcendent human rights. Rawls would have the parties to the social contract motivated by personal self-interest but ignorant of any facts that distinguish themselves from one another. The principle of reciprocity would allow the parties to the social contract to be knowledgeable of their own personal circumstances but would require them to be motivated by a benevolent willingness to consider the well-being of others to be equally worthy as their own. Perhaps the distinction between the principle of reciprocity and Rawls's veil of ignorance is more semantic than substantive. After all, even in Rawls's account, real people must be motivated to act in accordance with the contract that would be reached by self-interested parties behind the veil of ignorance, and this necessary motivation is not always consistent with pure self-interest, but instead

10. One account of this principle of reciprocity has been developed in Amy Gutmann & Dennis Thompson, Democracy and Disagreement 52-94 (1996). Another discussion of this principle is contained in Brian Barry, Justice as Impartiality 13-19 (1995), although there it is called "impartiality." As Gutmann and Thompson recognize, however, Barry's principle of impartiality is much the same as their concept of reciprocity. Gutmann & Thompson, supra, at 373-74 nn.1-3.

requires some real people to act benevolently toward others.\textsuperscript{12} Similarly, imagining oneself in everyone else’s shoes, as the principle of reciprocity requires, seems equivalent to imagining oneself ignorant of any knowledge of personal identity. Putting yourself in the shoes of each and every other person in society, \textit{seriatim}, and asking yourself whether you would accept the terms of the social contract if you were in that position, seems much the same as asking whether you would sign the social contract if you did not know any particular fact about yourself. Either way, you can only sign the contract if you would be willing to be in the position of any member of society, including those who are the most unfortunate by any objective measure.

In any event, whether or not the principle of reciprocity and the Rawlsian veil of ignorance amount to the same thing, an atheist has at least one method available for deriving the terms of a fair social contract that does not necessarily depend on God’s will. The atheist can say that terms of the fair social contract are purely the product of human thought. Both the principle of reciprocity and the veil of ignorance can be seen as constructs of human reason, affirmed by humans, for humans, solely for the purpose of developing fair terms of social cooperation, and not in any way inherent in the fabric of the universe, or in the design of its Creator. Nonetheless, both these human constructs can be understood to generate, as essential terms of the social contract, transcendent human rights that supersede any contrary legislative enactments. In other words, an atheist can argue that the essential terms of a fair social contract are the highest form of law, binding upon any legislative body, including any assembly convened for purposes of adopting a written constitution for the society. In short, any enacted constitution must conform to the terms of a fair social contract, as determined by the principle of reciprocity or the veil of ignorance. In this way, the atheist can reject positivism without subscribing to any belief about God’s will.

To be sure, it seems incongruous to use the term “natural law” to describe these atheistic beliefs about a social contract. After all, as we

\footnote{\textsuperscript{12} Moreover, in recent work, Rawls has explicitly embraced this idea of reciprocity:}

Citizens are reasonable when, viewing one another as free and equal in a system of social cooperation over generations, they are prepared to offer one another fair terms of cooperation according to what they consider the most reasonable conception of political justice; and when they agree to act on those terms, even at the cost of their own interests in particular situations, provided that other citizens also accept those terms. The criterion of reciprocity requires that when those terms are proposed as the most reasonable terms of fair cooperation, those proposing them must also think it at least reasonable for others to accept them, as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position.

have seen, the atheist views the social contract as an artifice of human reason and not derived from the natural order of things. Nonetheless, as we have also seen, the atheist’s social contract performs exactly the same role in the legal system as did the traditional conception of natural law. The terms of the fair social contract trump contrary legislative enactments, just as did requirements of natural law, according to that view. Moreover, they both trump enacted law in exactly the same way. Judges, when faced with a provision of positive law that contradicts their best understanding of the social contract, are supposed to disregard the positive law in favor of the higher, unenacted law. Thus, there can be no doubt that this use of social contract theory is a rejection of positivism in exactly the same way as traditional natural law jurisprudence has been.

Perhaps, for sake of clarity, we should be careful not to use the term “natural law” to refer to any atheist belief in a social contract that is purely the construct of human reason. Even so, we can refer to both theistic “natural law” beliefs and atheistic “social contract” beliefs as two different forms of “anti-positivism,” understanding “anti-positivism” to mean a belief in a transcendent set of human rights that are the highest form of law in a legal system, superseding any contrary legislative enactments. Perhaps, in order to avoid giving this jurisprudential view a purely negative label, we should call it “legal transcendentalism” or, in appropriate contexts, “transcendentalism” for short. Whatever we call it, however, it is clear that to adopt this view, and thus be an opponent of positivism, one can be either a theist or an atheist.

Again, many people may remain unconvinced that either the principle of reciprocity or the veil of ignorance is capable of generating a set of human rights that everyone must acknowledge as essential terms of a fair social contract. But that is not the point. Rather, the point is that neither social contract theory is inherently illogical or untenable. Indeed, adopting either form of social contract theory is no more implausible than adopting a belief in natural law as the product of God’s will. Thus, legal system that adopts a transcendental conception of law, in opposition to positivism, need not make a commitment either to theism or atheism. In other words, a transcendentalist legal system need not take sides on whether the better view concerning the source of transcendental human rights is a theist conception of natural law or an atheist conception of a fair social contract. Instead, the legal system can simply embrace the idea of legal transcendentalism, leaving to individual citizens to decide for themselves what they think is the best understanding of the provenance of transcendental human rights.

In sum, neither positivism nor its opposite, transcendentalism, requires a legal system to adopt either theism or atheism. A legal system can take a side on the fundamental jurisprudential dispute without similarly taking a side on the fundamental theological dispute.
IV. The Identification of Transcendental Human Rights

At this point, a skeptic might raise the following question: How can a transcendentalist legal system avoid choosing between a natural law and a social contract view of where transcendental human rights come from when it is necessary to decide what are the transcendental human rights? Judges within a transcendentalist legal system, when faced with an argument that they should recognize a certain transcendental human right, as well as a counter-argument that they should not, must write an opinion explaining their reasons for agreeing with one side or the other. Surely, the reasoning in the opinion must reflect whether the judges adopt a natural law or a social contract approach to identifying transcendental human rights.

No. In fact, it is possible to develop a method of reasoning about transcendental human rights that does not reflect a commitment to either the natural law or social contract view. The way to do this is to identify common ground between both the natural law and social contract approaches. After all, even advocates of the natural law view must acknowledge that there needs to be a method by which judges can identify the content of natural law. This method, moreover, must be employed by the human mind. In other words, judges must use their faculties of human reason to identify God's will. Thus, it would not be surprising if there were similarities between the method of reasoning used to identify the content of natural law and the method of reasoning used to identify the content of the social contract. Indeed, many observers have pointed to the prominence of the Golden Rule as a method for identifying the content of natural law, and the similarities between the Golden Rule and the principle of reciprocity are obvious. Thus, it is not too far-fetched that theist believers in natural law and atheist believers in social contract could agree upon a common method of identifying transcendental human rights, to be used by judges without any reference to either theist or atheist underpinnings.

In truth, one could press the point even further. The principle of reciprocity itself is one that both theists and atheists could accept as governing the identification of transcendent human rights, although they would do so for very different reasons. Theists would accept the principle of reciprocity as the means by which humans identify how they should act according to God's will. Acting as how they wish others would act were roles reversed (and they then found themselves in the position of others) is to follow God's commandment. Atheists, conversely, accept the principle of reciprocity as a means by which humans can construct fair terms of social cooperation to govern their mutual relations with each other. They construct these terms not in obedience with God's will. Instead, because they desire that their relations with each other be fair, they need a method for identifying what fairness consists of, and the principle of reciprocity is the best available method. In this way, then, both theists and atheists can con-
verge on the same principle of reciprocity, despite their very different theological beliefs.

Indeed, finding such methodological common ground is a strategy adopted by many moral philosophers who cannot agree upon what is the source of moral obligations. Roughly speaking, moral philosophers fall into one of two camps concerning the derivation of moral obligations. One camp, so-called “moral realists,” believe that moral obligations are an intrinsic feature of the world, just as real and knowable as any proposition of science or mathematics. The other camp, so-called “moral constructivists,” believe that moral obligations are an invention of human will, radically different from propositions of science or math. “[Y]ou can’t derive an ‘ought’ from an ‘is,’” say these moral constructivists in a famous slogan of their position. In essence, the debate between moral realists and moral constructivists tracks the debate between natural law and social contract as the source of transcendental human rights. But, as the debate rages on, adherents in both camps acknowledge that there are some principles of moral reasoning that they both agree upon, even if they cannot agree on why they adopt these principles.

Judges within a legal system can adopt a similar strategy of avoiding second-order disputes about why the principle of reciprocity is valid. They should simply confine their opinions to reasoning about what the principle of reciprocity requires, taking the principle as a given, without attempting to justify its validity. In this way, judges can identify a set of transcendental human rights without ever having to declare those rights as either God-given, or instead, human constructs.

V. THEOLOGICAL JUSTIFICATIONS FOR A LEGAL SYSTEM’S BASIC CHARACTER

But what if it is still unsettled within a given legal system whether the principle of reciprocity should determine the identification of transcendental human rights? Suppose there are advocates of some alternative method of identifying these rights, perhaps the Rawlsian original position or something entirely different. Then, judges might need to explain in their opinions why they favored one method as opposed to another, and this explanation might require them to enter the theological debate about whether moral obligations are imposed

on humanity by God's will or, instead, are self-generated by humanity's desire to secure fair terms for social cooperation.

Moreover, suppose further that the legal system has not yet settled even the basic question whether it adopts a positivist or transcendentalist conception of law. Then, judges must explain in their opinions their reasons for which of these two competing conceptions they favor. These reasons, again, might require the judge to express a view about the ultimate source of moral obligations.

Even so, judges should strive as far as possible not to let their own theological views affect the reasoning of their judicial opinions. But why? Is the intuitive discomfort some of us have with the idea of judges invoking theological beliefs in their opinions nothing more than the prejudice of an anti-religious secularism? No, I don't think so, but I need to explain why not.

Suppose a judge does invoke theological beliefs in a judicial opinion. Imagine, for example, a judge adopting the following defense of the transcendentalist conception of law:

The law does not bind just because it is enacted by some legislative body, for what gives that body the authority to adopt binding legislation? If, for the legislature's authority, you point to the provision of a constitution, I can ask again: what gives the constitution its authority? And if now you say that the constitution was ratified by a constitutional assembly, I will ask again, what gave the constitutional assembly its authority? No matter how much you may try, you cannot justify the authority of the law by pure procedure, because one can always attack the authority of the procedure itself. Instead, the authority of the law, if it is to have any, comes from its conformity to God's will. God alone ordains what is right and just, and thus human law must conform to the authority of God's law. If any enactment of a human legislature is contrary to God's law, it is null and void. Human legislatures only have the authority to do what is consistent with God's law and thus anything they do outside the scope of their authority has no validity. Such transgressions of God's law are void ab initio.

It is God's law that human beings, His children whom He made in his image, have certain fundamental natural rights. Thus, no act of any human legislature may contradict these God-given natural rights. If one does, it is the duty of a judge to declare it void as beyond the scope of the legislature's legitimate authority.

The problem with this defense of legal transcendentalism is that it is inherently unconvincing to someone who is not already a theist. In this respect it is the same as the following defense of positivism by an atheist judge:

Believing in God is like believing in ghosts. It is a superstitious relic of a bygone era. There is no divine soul who created the universe with a plan for humans to exist and to live in accordance with His will for them. Instead, the universe in all likelihood is just the
product of a random occurrence in quantum mechanics and surely the evolution of the human animal on this insignificant planet is a purely random event.

And in the absence of a God, there can be no such thing as objective moral truth. Without a God, who is to say what is right and what is wrong? One view on these matters is just as valid as any other. Morality is purely a matter of taste, exactly the same as choosing a flavor of ice cream. There is no way to say that vanilla is intrinsically or objectively better than chocolate. Similarly, there is no way to say that democracy is intrinsically or objectively better than aristocracy. It is all purely a matter of preferences, in this case, a society’s preferences for one form of government rather than another.

Given that the choice of government is purely a matter of social convention, with no intrinsic or objective validity, it is impossible for judges to declare that any such choice contradicts objective transcendental human rights. A judge might have different preferences, but still cannot claim that the social choice contradicts some objective reality. Therefore, the judge’s job is simply to implement the political choices that society has adopted—or else resign. And if society has chosen to acknowledge a certain legislative body as authoritative, or a certain constitution as the supreme law of the land, there can be no higher legal authority because there can be no objective basis for identifying any such higher law.

This atheist defense of positivism is necessarily unacceptable to anyone who believes in God, just as the theist defense of transcendentalism is unacceptable to any atheist.

The problem is that any appeal to a theological proposition, whether theist or atheist, is inherently unpersuasive to someone who does not already accept that theological proposition. In this respect, theology is different from other matters. One cannot convince an atheist to believe in God on the basis of reasoned argument. Similarly, one cannot convince a theist to abandon her belief in God. In this sense, theological convictions are beyond reason.

A theist will respond to an atheist’s attacks by retorting:

You cannot disprove the existence of God. Whatever claims you make about science, it is still possible that there is a God who is the author of the universe and who knows that it would eventually contain human beings, who are supposed to act according to God’s will.

Likewise, an atheist can always reject a theist’s claims about God’s existence:

You can never prove that God exists. It is always possible that the universe needed no divine creator, especially not one with an omniscient mind that foreshadowed the evolution of humanity.

There is absolutely no way to avoid this impasse, at least not on the basis of reasoned discourse. And given this impasse, there is no way for a judicial defense of either positivism or transcendentalism to be
persuasive if the defense relies upon a theological position. Thus, in
the effort to be persuasive, it is necessary for judges to strive as far as
possible to avoid relying on theological arguments in their judicial
opinions.

VI. THE LIMITS OF SECULAR REASONING

It would be much better if the judicial defense of transcendentalism
went something as follows:

Human beings have the biological capacity for self-conscious
thought and as such are all equal in their intrinsic worth. All laws
within a legal system, to be binding on anyone, must respect this
fundamental egalitarian premise.

To this nontheological argument, a judicial defender of positivism can
respond:

Whether or not this egalitarian premise is true, judges should not
assert an authority to enforce it against contrary legislation because
to do so would be for judges to arrogate too much power to
themselves.

This response, of course, invites the further reply:

By enforcing this egalitarian premise, judges do not assert too
much power for themselves. The egalitarian premise is sufficiently
limited in scope and too important for judges to ignore any legisla-
tive violation of it.

This reply, however, leads to a further rebuttal:

The egalitarian premise is not self-defining, and its implications
are not patently obvious. For judges to be in the business of decid-
ing what counts as a violation of the egalitarian premise is to permit
judges to engage in precisely the sort of policymaking function that
trenches on the appropriate role of the legislature.

It appears from this exchange of arguments that we have reached an-
other impasse. And it may not be possible for either the transcenden-
talist or positivist judge to say much more in defense of his position
without beginning to tread into theological territory. Further argu-
ments about the comprehensibility of the egalitarian premise, and the
ability of judges to enforce it without undue discretion, may start to
become debates about the metaphysical status and character of moral
propositions—the kind of debates that occur between moral realists
and moral constructivists. While such metaphysical debates might not
explicitly concern the existence of God and therefore, strictly speak-

16. My distinction between secular and theological reasoning is essentially
equivalent, at least for present purposes, to Rawls's distinction between public and
private reason. See Rawls, Public Reason, supra note 12, at 772-73. This is especially
ture since I include on the theological side of the line meta-ethical propositions about
the ultimate status of moral claims. See infra note 17 and accompanying text.
ing, might not be exactly theological, this distinction is uncomfortably fine. After all, many people would argue that theology concerns not only questions about the existence of God but also questions about the ultimate nature of reality, including whether moral propositions are as real as quarks and numbers. Moreover, others would argue that the concept of God can be defined broadly enough to encompass Ultimate Reality itself, and therefore any claim about whether moral propositions are ultimately real is a claim about the nature of God. Thus, for our purposes, we should treat any belief about the ultimate status and character of moral propositions as a theological belief, and it appears that the judicial debate over positivism and transcendentalism has gotten to the point where judges have great difficulty in avoiding a theological assertion when defending their jurisprudential view.17

At this point, then, judges confront two unpalatable options. One is that they can remain silent, offering no further defense of their jurisprudential position, even though they know that other judges in the legal system do not share their jurisprudential point of view. The other option is for judges to disclose their theological belief that underlies their own jurisprudential view, even knowing that disclosing this belief will have no persuasive force to someone who does not share that theological belief.

Given the undesirability of both alternatives, there has been an effort in recent years to develop a third option, which draws upon Rawls's idea of an overlapping consensus.18 Rather than either remaining silent or disclosing the judge's own theological position, the judge can claim that his theological belief is not the only one that can support his jurisprudential view. People of opposing theological beliefs can share the same jurisprudential perspective, even though they would justify it in different ways. Therefore, rather than writing an opinion that states her own theological reason for accepting this juris-

17. John Langan rightly argues that a legal system will run into difficulties if it treats the meta-ethical dispute between moral realists and constructivists as equivalent to the theological dispute between theists and atheists. See John Langan, S.J., How Far Can We Separate Theology and Jurisprudence? Comment on Edward B. Foley's Jurisprudence and Theology, 65 Fordham L. Rev. 1233, 1237-39 (1998). But I see no way to avoid these problems. Imagine the preamble of the Constitution saying, "We the People of the United States, believing that moral truth is inherent in the fabric of the universe, in order to form a more perfect Union, establish Justice..." This explicit endorsement of moral realism seems just as objectionable as an explicit endorsement of theism. After all, it is just as reasonable for a thoughtful citizen to disbelieve moral realism as to disbelieve theism. Moreover, given that pantheism holds that God is the totality of all that is real in the universe, it is not too much to say that moral realism has the character of a theistic belief. But whether we call moral realism a proposition of theology or metaphysics, the point is that it is a matter of personal conviction about which the state should remain neutral—even though doing so can become problematic at times.

18. See Rawls, Political Liberalism, supra note 14, at 212-54.
The prudential perspective, the judge will simply observe that it is supportable by an overlapping consensus of different theological beliefs.

The problem with this approach is that it does not satisfy opponents of the judge's jurisprudential view. They have not yet received a reason why they should adopt the judge's jurisprudential view rather than their own. They can also proclaim the existence of an overlapping consensus that supports their opposing jurisprudential view. As we have already seen, both theists and atheists can support both positivism and transcendentalism. Positivist judges, if they are in dissent, still want to know why the majority of judges on the court supported transcendentalism. The converse is true if transcendentalist judges are in dissent. In either case, for the dissenting judges to be told that the majority view is supported by an overlapping consensus of theological beliefs is like being given no reason at all for the majority position. Thus, it is really the same as the original option of silence.

Nonetheless, it still might be better for judges to remain silent rather than to make explicitly theological arguments. As we have seen, theological arguments also offer no reason to persuade other judges to change their minds—unless the judges are already in theological agreement. In addition, theological arguments can have the negative effect of alienating other judges (and citizens) who do not share the same theological beliefs. Thus, on balance, silence may be preferable, even if it is not entirely satisfactory.

To be sure, in private correspondence, judges may give theological explanations for their jurisprudential views to one another. Indeed, these private exchanges might be the most effective way for judges to persuade each other to change their jurisprudential positions. In other words, a theist who is jurisprudentially a transcendentalist might be able to persuade another theist judge that transcendentalism is a better fit with their mutually theistic views than positivism would be. Similarly, an atheist who is a positivist might persuade a fellow atheist judge that positivism is a better fit with atheism than transcendentalism.

But these sorts of private exchanges among judges who share similar theological beliefs should not make their way into the text of public judicial opinions. The reason is that the law is meant for all of us, whether we are theists or atheists. What judges say in their public judicial opinions should be something that all of us might be able to accept regardless of our own private theological beliefs. The judge's own private theological beliefs do not pass this test, if they are contrary to our own, and therefore they should be left out.19

The consequence, again, of leaving these private theological beliefs out of public judicial opinions is that propositions of law adopted by

judges may remain undefended against counterattack. Indeed, we have been dealing with the most fundamental question any legal system can confront—whether it is positivist or transcendentalist in conception. The legal system’s resolution of this most fundamental question may ultimately rest on nothing more than the assertion that it is supportable by an overlapping consensus of different theological positions, even though everyone knows that the opposing jurisprudential position is similarly supportable. Although the refusal of the legal system to provide any further public justification may leave the resolution of this fundamental question seeming arbitrary, and merely an act of judicial fiat, the alternative is for the legal system to align itself with a particular theological creed, which is even worse. By invoking the idea of the overlapping consensus, judges can at least acknowledge that they have their private reasons for supporting their jurisprudential position, but rather than making the public legitimacy of their jurisprudential position depend upon the persuasiveness of their private theological beliefs—a self-defeating approach—they will simply observe that the same jurisprudential approach can be supported by a multiplicity of private theological beliefs. Beyond this, any further defense of this jurisprudential approach must take place in the context of many private conversations about the relationship of theology to jurisprudence.

VII. WORKING WITHIN A LEGAL SYSTEM

Assuming we can get beyond the question whether judges inevitably must invoke theological beliefs when deciding between positivism and transcendentalism, we still need to consider whether it is necessary for judges to invoke theology from within either of these two jurisprudential frameworks. First, let us assume that it is clearly settled that a society’s legal system is positivist. Suppose further that the society’s authoritative legislature relies on a particular religious belief when enacting a particular piece of legislation. For example, the legislature enacted an environmental law that explicitly refers to “protecting those aspects of God’s handiwork that God Himself would want saved from human destruction.”20 In this situation, would not judicial fidelity to the law, as required by positivism, necessitate that judges consider and adopt explicitly theological arguments in an effort to faithfully interpret the statutory command?

The answer, I suppose, is yes, although the more important point is that the statute never should have been enacted in the first place. Although positivism provides no means for invalidating a legislative enactment just because it invokes theological beliefs, positivism also does not preclude criticizing legislative enactments on the ground that

20. This example is derived from Sanford Levinson, Religious Language and the Public Square, 105 Harv. L. Rev. 2061, 2071 (1992).
they contravene sound principles of political morality, one of which is that legislatures should not draft their enactments in explicitly theological terms. Thus, ideally, even in a positivist legal system, legislation never would make reference to theological beliefs and thus courts never would have occasion to invoke theology in the exercise of statutory interpretation.

Now, what about in a transcendentalist legal system? Let us assume, for sake of argument, that the legal system has unequivocally adopted the principle of reciprocity as the basis for identifying transcendental human rights. Thus, there is no need for any theological discussion about whether the principle of reciprocity is the right one to adopt for this purpose. Nonetheless, the argument remains that the principle of reciprocity is not so complete that deliberations about its applicability to particular circumstances can entirely avoid the need to invoke theological beliefs.

Consider abortion as the obvious example. Within this transcendentalist legal system, arguments will be made that the right of a woman to choose an abortion, at least prior to a fetus's viability, is a transcendental human right based on the principle of reciprocity. At the same time, however, contrary arguments will be made that, even prior to viability, fetuses are human beings with a transcendental human right to stay alive. Now, pro-choice advocates may attempt to argue that, prior to viability, fetuses are not persons to whom the principle of reciprocity applies. But pro-life advocates will respond that this argument cannot be derived from the principle of reciprocity itself. Instead, whether pre-viable fetuses are inside or outside the class of entities to whom the principle of reciprocity applies is an inherently theological question that necessitates an inherently theological answer.

There is no denying the force of this argument. It is difficult to see how the status of the pre-viable fetus can be determined without reliance on something akin to a theological position. To be sure, again, there can be an overlapping consensus of different theological positions that support a pro-choice point of view, just as there can be an overlapping consensus of theological positions supporting a pro-life position. But then the best that the legal system can do is to invoke the existence of an overlapping consensus for adopting one view or the other on the status of the fetus, without being able to give a complete argument why the chosen view is the correct one. For reasons discussed before, this situation is less than satisfactory, even if it is the best available alternative.

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22. Linda McClain raises the interesting and important issue of same-sex marriages in her thoughtful and informative comment on this essay. See Linda C. McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66
The more legal issues that a legal system must punt by invoking the existence of an overlapping consensus, the more arbitrary and unsatisfactory the legal system will appear. Indeed, if there are too many such issues in a transcendentalist legal system, they may be enough to persuade people of the merits of a positivist system instead. In any event, a transcendentalist legal system should not try to avoid such arbitrariness by deciding to take a position on theological disputes. That approach would only yield the conclusion that transcendentalism requires a commitment to theological beliefs that not everyone in society can be expected to accept. Thus, when a transcendentalist legal system confronts issues like abortion, which cannot be resolved by the principle of reciprocity alone, the legal system must simply invoke the existence of an overlapping consensus for any additional principles necessary to support the transcendentalist approach.

**Conclusion**

For the reasons we have discussed, judges in a legal system should never rely in their public judicial opinions on a theological belief. And the legislative enactments they enforce, including constitutions, should also never invoke theological beliefs. In this way, the legal system should be seen as entirely secular, even if its secularity must be maintained by invoking an overlapping consensus of various theological beliefs.

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Fordham L. Rev. 1241 (1998). I suspect that she is correct to suggest that this issue, unlike abortion, can be resolved by secular reasoning (which presumably would rely, in part, on the biology of sexual orientation). I fear, however, that she may misunderstand my position insofar as she suggests that I supplement the idea of an overlapping consensus with the idea of public reason. As I explain in Part VI, supra, I invoke the idea of an overlapping consensus only when secular (that is, public) reasoning can go no further to justify a decision the law must make.

To the extent Professor McClain advocates a concept of public reasoning that is broader than secular reasoning, I believe we are using different terms for essentially the same concept. Reasons I call "secular," which are mutually accessible to all regardless of conflicting theological commitments (including "comprehensive" atheistic commitments), would seem largely congruent to what Professor McClain calls "public" reasons.