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Spirited Debate: A Comment on Edward B. Foley's Jurisprudence and Theology

Cover Page Footnote

Professor of Law, Rutgers School of Law, Camden. This Comment is an expanded version, within the page constraints set by the editors of the Fordham Law Review, of the oral response I delivered during the interfaith conference on "The Relevance of Religion to a Lawyer's Work."

**SPIRITED DEBATE:
A COMMENT ON EDWARD B. FOLEY'S
*JURISPRUDENCE AND THEOLOGY***

*Perry Dane**

AT the beginning of his paper, Professor Edward Foley invites us to imagine that the preamble to the Constitution were amended to read: "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

What makes so many of us shudder at that thought? What would make so many of us shudder at even a milder invocation of God? What would make many of us shudder even if those words would not offend us religiously?²

Foley suggests that one reason we would shudder is that such a preamble would invoke a theological basis for law.³ And it is precisely such a theological basis for law that Foley's paper urges us to avoid.

I.

Some of the issues here are hermeneutical. It might matter, for example, precisely how such proposed language would affect the actual legal construction of the role of religion in jurisprudence, state, and society. For instance, the Constitution of Ireland begins:

In the Name of the Most Holy Trinity, from Whom is all authority
and to Whom, as our final end, all actions both of men and States
must be referred,
We, the people of Éire,
Humbly acknowledging all our obligations to our Divine Lord,
Jesus Christ, Who sustained our fathers through centuries of trial
. . . .⁴

* Professor of Law, Rutgers School of Law, Camden. This Comment is an expanded version, within the page constraints set by the editors of the *Fordham Law Review*, of the oral response I delivered during the interfaith conference on "The Relevance of Religion to a Lawyer's Work."

1. Edward B. Foley, *Jurisprudence and Theology*, 66 *Fordham L. Rev.* 1, 1195, 1195 (1998) (citing Anson Phelps Stokes, 3 *Church and State in the United States* 589 (1950)).

2. As a Jew, for example, replacing "Jesus Christ the Savior and King of Nations" with the more religiously congenial "Hashem, our God and the God of our forbears" would only marginally change my reaction to the amendment, and not necessarily for the better.

3. Foley, *supra* note 1, at 1195.

4. Ir. Const. preamble. The preamble continues:
Gratefully remembering their heroic and unremitting struggle to regain the
rightful independence of our Nation,
And seeking to promote the common good, with due observance of Pru-
dence, Justice and Charity, so that the dignity and freedom of the individual

The Irish Constitution also provides that: "The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion."⁵

Yet this same constitution emphasizes that "[f]reedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen,"⁶ that the State may not "endow any religion,"⁷ that the "State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status,"⁸ and so on.⁹

More to the point, in a landmark decision of the Irish Supreme Court, *McGee v. Attorney General*, which invalidated laws prohibiting the sale or import of contraceptives, one of the judges spoke about the relation of theology and law in words strikingly like Foley's own. While acknowledging that, in principle, the personal rights guaranteed by the Irish Constitution had roots in a religious notion of natural law, the opinion emphasized that:

In a pluralist society such as ours, the Courts cannot as a matter of constitutional law be asked to choose between the differing views, where they exist, of experts on the interpretation by the different religious denominations of either the nature or extent of these natural rights as they are to be found in the natural law. . . . In this

may be assured, true social order attained, the unity of our country restored, and concord established with other nations,

Do hereby adopt, enact, and give to ourselves this Constitution.

Id. The language quoted both complements and counterpoints the more restrained words of Article 6 of the Irish Constitution regarding the nature of the state:

1. All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.

2. These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution.

Id. art. 6.

5. *Id.* art. 44.1. The original version of this provision contained two other subsections, which were repealed when Ireland joined the then-European Community:

2. The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens.

3. The State also recognises the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation of this Constitution.

Ir. Const. art. 44.1.2-3 (repealed).

6. *Ir. Const.* art. 44.2.1.

7. *Id.* art. 44.2.2.

8. *Id.* art. 44.2.3.

9. The remainder of Article 44 contains more specific guarantees, including forbidding discrimination in aid to religious schools, requiring that students attending religious schools receiving public money not be compelled to religious instruction in that school, and preserving the right of religious denominations to manage their own affairs. *Id.* art. 44.2.4-6.

country it falls finally upon the judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior or antecedent to positive law or which are imprescriptible or inalienable.¹⁰

Indeed, the bulk of the Irish court saw itself, despite the profound differences between the Irish and United States Constitutions, as nevertheless engaged in a project in the same spirit as the United States Supreme Court's efforts to grapple with similar questions in cases such as *Griswold v. Connecticut*.¹¹

Another, narrower but more pointed, hermeneutic question about Foley's hypothetical change to the preamble is how to read it *in pari materia* with the rest of the preamble. What could it mean, after all, to "recognize the authority and law of Jesus Christ the Savior and King of Nations" while also setting out to "form a more perfect Union, establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty?"¹² Would such a preamble give a theological basis for law, or would it construct a legal discourse that subsumes theology into a political ethic? Consider by way of comparison here not only the Irish Constitution, but also, for example, Israeli law's electrifying but incurably uncertain efforts to call upon "the values of the State of Israel as a Jewish and democratic state"¹³ and "the principles of freedom, justice, equity and peace of [Judaism's] heritage."¹⁴

10. [1974] I.R. 284, 318 (Walsh, J.). One commentator argues specifically that, "[i]n a way, the *McGee* Court was enunciating a Rawlsian concept of political theory, recognizing that where religio-legal consensus does not exist, the law must refrain from acting on religious motives." S.I. Strong, *Christian Constitutions: Do They Protect Internationally Recognized Human Rights and Minimize the Potential for Violence Within A Society? A Comparative Analysis of American and Irish Constitutional Law and Their Religious Elements*, 29 Case W. Res. J. Int'l L. 1, 69 (1997).

I do not mean to argue, from this one case, that the religious language in the Irish constitution is insignificant or benign. Indeed, any serious discussion of Irish constitutional law and theory is well beyond the scope of this Comment. (For one useful account, see Gerard Whyte, *Religion and the Irish Constitution*, 30 J. Marshall L. Rev. 725 (1997)). I am only making the much narrower claim that the particular language of the Irish Constitution, effusive as it is in its apparent religious commitment, does not in itself foreclose the same hermeneutical questions about the place of religion that every legal system from time to time must face.

11. 381 U.S. 479 (1965); see *McGee*, [1974] I.R. at 319 (Walsh, J.); *id.* at 327-29 (Henchy, J.); *id.* at 335-36 (Griffin, J.). Even the dissenting justice engaged the American cases, if only to distinguish them. *Id.* at 303-04 (Fitzgerald, C.J., dissenting).

12. U.S. Const. preamble.

13. Israel Basic Law: Human Dignity and Liberty, translated in *International Constitutional Law* (visited Feb. 20, 1998) <http://www.uni-wuerzburg.de/law/is12000_.html> provides that:

Basic human rights in Israel are based on the recognition of the value of the human being, and the sanctity of his life and his freedom. . . .

The purpose of this Basic Law is to protect human dignity and liberty, in order to anchor in a Basic Law the values of the State of Israel as a Jewish and democratic state.

14. Israel's Foundations of Law Act of 1980 provides that "[w]here the court, faced with a legal question requiring decision, finds no answer to it in statute law or

II.

To be sure, dwelling on these interpretive puzzles is not entirely fair to Foley, for whom the preamble hypothetical is only a hook or teaser for his larger philosophical point. I do have a reason for raising such questions, to which I will return. For now, though, let me get to Foley's real interest, his critique of efforts to give a "theological basis for law."

What, then, precisely, is wrong with a "theological basis for law?" Foley's critical argument is this: "[T]heology 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."¹⁵ Just as important, Foley says, appealing to theological convictions is largely unnecessary. If natural law is what we want, we can get it through overlapping consensus.

This is, of course, well worn philosophical ground. We have heard endless permutations of this very debate, and I am not sure that either Foley or any of the respondents can say much that is new about it, particularly given the length constraints of this symposium.¹⁶ Nevertheless, two categories of response are in order.¹⁷

case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage." *Foundations of Law Act*, 1980, *translated* in 34 L.S.I. 181 (1979-80). The word "Israel" in this context refers to the Jewish people and their tradition, not to the State of Israel.

15. Foley, *supra* note 1, at 1205.

16. A partial list of compulsory citations, on various sides of the debate, might include, for example, Bruce A. Ackerman, *Reconstructing American Law* (1983); Bruce A. Ackerman, *Social Justice in the Liberal State* (1980); Kent Greenawalt, *Private Consciences and Public Reasons* (1995); Kent Greenawalt, *Religious Convictions and Political Choice* (1988); Michael J. Perry, *Love and Power: The Role of Religion and Morality in American Politics* (1991); John Rawls, *Political Liberalism* (1993); David Tracy, *Plurality and Ambiguity: Hermeneutics, Religion, Hope* (1987); Harold J. Berman, *Law and Logos*, 44 DePaul L. Rev. 143 (1994); Stephen L. Carter, *The Religiously Devout Judge*, 64 Notre Dame L. Rev. 932 (1989); Kent Greenawalt, *Religious Convictions and Political Choice: Some Further Thoughts*, 39 DePaul L. Rev. 1019 (1990); Thomas C. Grey, *Freestanding Legal Pragmatism*, 18 Cardozo L. Rev. 21 (1996); Emily Fowler Hartigan, *Multiple Unities in the Law*, 36 S. Tex. L. Rev. 999 (1995); Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 Phil. & Pub. Aff. 215 (1987); Michael J. Perry, *Religious Arguments in Public Political Debate*, 29 Loy. L.A. L. Rev. 1421 (1996); Michael J. Perry, *Religious Morality and Political Choice: Further Thoughts—And Second Thoughts—On Love and Power*, 30 San Diego L. Rev. 703 (1993); R. Randall Rainey, *Law and Religion: Is Reconciliation Still Possible?*, 27 Loy. L.A. L. Rev. 147, 150-51 (1993); John Rawls, *The Idea of an Overlapping Consensus*, 7 Oxford J. Legal Stud. 1 (1987); Joseph Raz, *Facing Diversity: The Case of Epistemic Abstinence*, 19 Phil. & Pub. Aff. 3 (1990); Richard Rorty, *Religion as Conversation-Stopper*, 3 Common Knowledge 1 (1994); Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 San Diego L. Rev. 817 (1993); Michael J. Sandel, *Political Liberalism*, 107 Harv. L. Rev. 1765 (1994) (reviewing John Rawls, *Political Liberalism* (1993)).

17. Foley suggests that he and I "apparently agree" on the fundamental normative proposition that "the Constitution (or judicial opinions) of a society" should not "take

The first of these categories goes to the place of religion in political and moral discourse. Consider, to begin with, that despite Foley's claims, theological arguments are *not* beyond reason.¹⁸ Can an atheist be convinced to believe in God on the basis of reasoned argument? Of course. Can a believer be convinced to abandon belief in God? Of course. Rational arguments about religion have been traded back and forth for centuries. For that matter, tales of reasoned conversion, either away from religious faith or toward it, are a staple of a certain strain of intellectual autobiography. Bertrand Russell¹⁹ and C.S. Lewis,²⁰ respectively, are only two of the most prominent recent eloquent examples.

sides on theological disputes." Foley, *supra* note 1, at 1196 n.5. To be sure, I do embrace, as does Foley, the separationist imperative in American legal and constitutional practice. But my Comment also sets out, among other things, to: (1) dispute Foley's claim that "theological disputes" are different, at least in the way he thinks they are, from other disputes; (2) point out that, given the complex dynamics of theological disputes, "taking sides" in a such disputes might sometimes be more respectful, even to the losing side, than appealing to a thin "overlapping consensus"; (3) suggest some deep hermeneutical and jurisprudential puzzlement about exactly what it would mean for a *legal* discourse to "take sides on theological disputes"; and (4) argue that the American attitude to the role of religious arguments in law is, at least in part, historically and culturally contingent, and itself premised on specific, controversial, theological propositions.

18. I could cite hundreds of volumes in the philosophy of religion. But for a classic and powerful discussion in the legal literature, see Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 Duke L.J. 977.

19. Russell's account is splendidly succinct. Russell had been taught the Unitarian faith at home, and was a believer until the age of fifteen. Then, he reports:

I began a systematic investigation of the supposed rational arguments in favour of fundamental Christian beliefs. . . . I found, however, that the reasons given in favour of these dogmas were very unconvincing. I considered them one at a time with great seriousness. The first to go was freewill. At the age of fifteen, I became convinced that the motions of matter, whether living or dead, proceeded entirely in accordance with the laws of dynamics, and therefore the will can have no influence upon the body. . . . I should have found intellectual satisfaction in becoming a materialist, but on grounds almost identical with those of Descartes (who was unknown to me except as the inventor of Cartesian co-ordinates), I came to the conclusion that consciousness is an undeniable datum, and therefore pure materialism is impossible. This was at the age of fifteen. About two years later, I became convinced that there is no life after death, but I still believed in God, because the "First Cause" argument appeared to be irrefutable. At the age of eighteen, however, shortly before I went to Cambridge, I read Mill's *Autobiography*, where I found a sentence to the effect that his father taught him that the question "Who made me?" cannot be answered, since it immediately suggests the further question "Who made God?" This led me to abandon the "First Cause" argument, and to become an atheist. Throughout the long period of religious doubt, I had been rendered very unhappy by the gradual loss of belief, but when the process was completed, I found to my surprise that I was quite glad to be done with the whole subject.

Bertrand Russell, *The Autobiography of Bertrand Russell* 47-48 (1967).

20. Lewis devotes much of his memoir *Surprised by Joy* to his transition from childish belief to sophisticated atheism to committed Christianity. I can only give

Moreover, to the extent that religion *is* beyond reason, it is not much *more* beyond reason than other beliefs we hold. Can a liberta-

some of the flavor of his reflections on the latter stages of this process, and its powerful synthesis of rational argument and sudden conviction:

In reading Chesterton, as in reading MacDonald, I did not know what I was letting myself in for. A young man who wishes to remain a sound Atheist cannot be too careful of his reading. . . .

. . . .

. . . . I had been trying to defend [philosophical realism] ever since I began reading philosophy. . . . I wanted Nature to be quite independent of our observation; something other, indifferent, self-existing. . . . But now, it seemed to me, I had to give that up. Unless I were to accept an unbelievable alternative, I must admit that mind was no late-come epiphenomenon; that the whole universe was, in the last resort, mental; that our logic was participation in a cosmic *Logos*.

It is astonishing (at this time of day) that I could regard this position as something quite distinct from Theism. . . .

. . . .

. . . . I read in Alexander's *Space Time and Deity* his theory of "Enjoyment" and "Contemplation." . . .

I accepted this distinction at once and have ever since regarded it as an indispensable tool of thought. A moment later its consequences—for me quite catastrophic—began to appear. It seemed to me self-evident that one essential property of love, hate, fear, hope, or desire was attention to their object. . . .

. . . .

. . . I did not yet ask, Who is the desired? only What is it? But this brought me already into the region of awe

That was the second Move; equivalent, perhaps, to the loss of one's last remaining bishop. The third Move . . . consisted merely in linking up this new *éclaircissement* about Joy with my idealistic philosophy. . . .

The fourth Move was more alarming. . . . I was driven back into something like Berkeleyanism; but Berkeleyanism with a few top dressings of my own. I distinguished [the] philosophical "God" very sharply (or so I said) from "the God of popular religion." There was, I explained, no possibility of being in a personal relation with Him. . . .

. . . .

. . . . In the Trinity Term of 1929 I gave in, and admitted that God was God, and knelt and prayed: perhaps, that night, the most dejected and reluctant convert in all England. . . .

. . . [This] conversion . . . was only to Theism . . . not to Christianity. . . .

. . . .

. . . . The God whom I had at last acknowledged was one, and was righteous. . . . Where was [religion] full grown? . . . There were really only two answers possible: either in Hinduism or in Christianity. . . .

Every step I had taken, from the Absolute to "Spirit" and from "Spirit" to "God," had been a step toward the more concrete, the more imminent, the more compulsive. . . . I know very well when, but hardly how, the final step was taken. I was driven to Whipsnade one sunny morning. When we set out I did not believe that Jesus Christ is the Son of God, and when we reached the zoo I did.

C.S. Lewis, *Surprised By Joy: The Shape of My Early Life* 191, 209, 217-18, 221-23, 228-30, 235, 237 (1956).

rian become a democratic socialist on the basis of reasoned argument? It's hard. Can a Westsider become an Eastsider?²¹ Harder yet.

Even if theological premises are beyond argument, and distinctively so, that is still not the end of it. In Foley's model of discourse, interlocutors who hold irreconcilable theological premises can only really hope to be moved by each other's specific policy prescriptions to the extent that each can bracket those premises and rely instead on the common language of an overlapping consensus. But this is a flat, algorithmic, account of human political and legal conversation.²² An atheist, while remaining an atheist, can find a religiously-rooted argument compelling *in* its religiosity, not in spite of it. A believer, while remaining a believer, can find an atheist's argument compelling *in* its atheism. Even when such engagement cannot compel, it can still help define and clarify and hone. The thinking believer will be brave enough to face the atheist's arguments directly. And the thinking secularist will recognize the religious resonance of her own commitments.

Finally, Foley's argument assumes that when any one of us loses a public debate, we would rather lose to arguments rooted in the "overlapping consensus" than to arguments rooted in a contrary theology. But this is not always true. Theological arguments, while often divisive, also sometimes bear a distinctive, and potentially mollifying, stamp of disinterestedness and good faith.²³ Moreover, *depth* itself—whether or not that depth is one's own—has its legitimate appeals, both to our intellect and our psyche.²⁴ Thus, for example, a serious

21. This is an inside joke. See Joseph A. O'Hare, S.J., President of Fordham University, Welcoming Remarks at "The Relevance of Religion to a Lawyer's Work: An Interfaith Conference" (June 1, 1997) (humorously discussing differences between West Side and East Side New Yorkers).

22. Foley looks to the abortion controversy as an obvious test for his prescriptions. Foley, *supra* note 1, at 1210. Like many others, he finds the debate, at some level, intractable, but argues that the least unsatisfactory solution is to bracket theological beliefs and "punt by invoking the existence of an overlapping consensus." *Id.* at 1211. But, tellingly, the ground rules he suggests are not the ones employed by the Common Ground Network for Life and Choice, the most noted real-world effort at engaging pro-life and pro-choice activists in genuine dialogue. Common Ground dialogues do search for points of overlap among antagonists, both as to their respective values and as to specific policy goals. But these dialogues do not require that participants leave their deep commitments at the door. Rather, the organization's ground rules focus on such conversational norms as avoiding cliché and fixed rhetoric and striving for "dialogue" rather than "debate," and such interpersonal norms as mutual respect. See Mary Jacksteit & Adrienne Kaufmann, *Finding Common Ground in the Abortion Conflict: A Manual* (1995).

23. Cf. Religion, *The Missing Dimension of Statecraft* (Douglas Johnston & Cynthia Sampson eds., 1994) (collection of essays discussing the often underestimated role of religion in mediating or resolving ethnic, political, and international disputes).

24. Jeremy Waldron puts it this way:

I mean to draw attention to an experience we all have had at one time or another, of having argued with someone whose world view was quite at odds with our own, and of having come away thinking, "I'm sure he's wrong, and I can't follow much of it, but, still, it makes you think . . ." The prospect of losing that sort of effect in public discourse is, frankly, frightening—terri-

Jew might prefer a "Christian America," in at least some respects, to an uncommitted America.²⁵ And the very search for overlapping consensus can obscure not only irreconcilable difference, which Foley admits,²⁶ but also irreconcilable paradox. Thus, a serious Christian might prefer a manifestly secular America to one that tried to translate the Christian's transcendent, redemptive, categories into their merely "cultural" analogues in the overlapping consensus.²⁷

III.

The real problem with Foley's argument, however, might be elsewhere. Our topic, after all, is not the place of religion in political debate, or in public conversation generally. It is, more narrowly, the place of religion in *the law*. And doing justice to that topic requires taking into account two complementary features of the legal imagination.

First, any legal discourse is peculiarly particular. Foley is hoping to point us to a common normative language. But judges and lawyers do

fyng, even, if we are to imagine it being replaced by a form of "deliberation" that, in the name of "fairness" or "reasonableness" . . . consists of bland appeals to harmless nostrums that are accepted without question on all sides. That is to imagine open-ended public debate reduced to the formal trivia of American television networks.

Waldron, *supra* note 16, at 842.

25. Cf. Elliott Abrams, *Faith or Fear: How Jews Can Survive in a Christian America* (1996) (discussing how the marginalization of religion in society has weakened rather than strengthened Jewish faith). The claim in the text is, to be fair, not exactly Abrams's position, though it comes close. It is, incidentally, emphatically not mine, though I understand it.

J. David Bleich, a prominent rabbi and legal scholar, has offered the following provocative, but nuanced, variation on the theme:

I frankly regard the First Amendment as a failed experiment. Yet, I hasten to add that I would not want to live in a society that does not boast of a First Amendment or a functional equivalent thereof. But the desire for the protection afforded by the First Amendment should not prevent us from recognizing that neither of its clauses always achieved the effect we want.

. . . .

My own reaction to Justice Brewer's declaration [that "this is a Christian nation"] in *Church of the Holy Trinity*, is: "Amen. Would that the United States were indeed a Christian nation!" However, as a Jew who is also a member of a law school faculty, I find it necessary to append an "oral law" interpretation. The interpretation may be found in the last scene of the play *Nathan the Wise* by the German poet Lessing in which Nathan is told: "Nathan, Nathan, indeed you are a Christian." To this Nathan responds by saying, "That which you call a Christian in me, I call a Jew in you." Or, as Justice Douglas put it succinctly in *Zorach v. Clausen*, "We are a religious people whose institutions presuppose a Supreme Being." To be effective in the public square, religion need not, and should not, be sectarian in nature.

J. David Bleich, *Godtalk: Should Religion Inform Public Debate?*, 29 Loy. L.A. L. Rev. 1513, 1517-18 (1996) (footnotes omitted).

26. Foley, *supra* note 1, at 1210-11.

27. The classic discussion of some of these themes can be found in H. Richard Niebuhr, *Christ and Culture* (1951).

not set out to make universal arguments that could potentially convince all members of the community. Instead, they make specific arguments within the context of, and subject to the constraints of, a particular legal tradition. The best judges and lawyers challenge and reconfigure those constraints, but they never forget that every legal system is a situated language, with a specific grammar and vocabulary. Each legal system has its own modes of practice, habits of analysis, and resonant narratives. In this sense, every legal tradition, even leaving religion out of the equation, is contingent and sectarian, and no amount of recourse to overlapping consensus can change that.

Second, legal discourse is relatively autonomous. Earlier, I argued that Foley's hypothetical rewriting of the preamble to the United States Constitution would raise rather than foreclose or answer important hermeneutic questions about the place of religion in the law. The larger point, however, is that to whatever extent religion and religious (or anti-religious) views are inserted, explicitly or implicitly, into the legal conversation, the law will understand them, just as it understands Rawlsianism and Pareto economics and all the other ingredients of our larger normative field, through its own categories and practices.²⁸ I am not arguing, to be sure, that theological commitments expressed in legal sources, or relied on by judges and lawyers, make no difference. But I do propose that, whatever role theology plays in law, it is more complicated, and mediated, than simply providing a "theological basis" for law.²⁹ In one sense, but a deep and important sense, law—as a practice and a hermeneutic—can no more have a theological "basis" than any other "basis".³⁰

IV.

What, then, makes us shudder at Foley's hypothetical, or even a diluted version of it? If the overriding theme of my critique so far has been a plea to recognize contingency and particularity, then the answer or answers to that question must also be contingent and particular.

28. Cf. Dennis Patterson, *Law and Truth* (1996) (arguing that, while the forms of legal argument can be diverse, legal "truth" is a product of the grammar of legal justification, and is not a matter of correspondence to any normative standard external to the practice of legal discourse itself).

29. For my own efforts at suggesting the relative autonomy of even explicitly religious law, see Perry Dane, *The Yoke of Heaven, The Question of Sinai, and the Life of Law*, 44 U. Toronto L.J. 353 (1994); Perry Dane, *The Oral Law and the Jurisprudence of a Textless Text*, S'vara: A Journal of Philosophy, Law, and Judaism, Winter 1991, at 11.

30. Interestingly, Foley's argument that legal discourse can and should proceed on the basis of an "overlapping consensus" unmoored from deeper theological and philosophical commitments is at least an implicit acknowledgment of the relative autonomy of law. But my claim here is that the very nature of legal discourse, as much as any explicit effort to exclude certain forms of argument, serves to insulate law, to some degree at least, from such commitments.

Recall once more that many constitutions *do* invoke God. I am not just speaking of the Irish and Israeli texts I quoted earlier. The Canadian Charter of Rights and Freedoms invokes God,³¹ and Canada—more clearly and resolutely than either Ireland or Israel—still stands as a liberal, democratic, even secular state. Or consider the new Polish constitution, which also invokes God, but in a remarkably interesting, open-ended, aggressively tolerant, way that might well speak better and more honestly of modern Poland than mere silence would.³² Our own Declaration of Independence invoked God,³³ and in 1776 that made sense too.³⁴

31. "Whereas Canada is founded upon the principles that recognize the supremacy of God and the rule of law." Can. Const. (Constitution Act 1982) pt. I (Canadian Charter of Rights and Freedoms), preamble.

32. The 1997 Constitution, a revamped product of post-Communist Poland, begins:

Having regard for the existence and future of our Homeland, Which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate, We, the Polish Nation—all citizens of the Republic, *Both those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources*, Equal in rights and obligations towards the common good—Poland, Beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice, *for our culture rooted in the Christian heritage of the Nation and in universal human values*, Recalling the best traditions of the First and the Second Republic, Obligated to bequeath to future generations all that is valuable from our over one thousand years' heritage, Bound in community with our compatriots dispersed throughout the world, Aware of the need for cooperation with all countries for the good of the Human Family, Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland, Desiring to guarantee the rights of the citizens for all time, and to ensure diligence and efficiency in the work of public bodies, *Recognizing our responsibility before God or our own consciences*, Hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of aiding in the strengthening the powers of citizens and their communities.

Poland Const. preamble, *translated in* International Constitutional Law (visited Feb. 20, 1998) <http://www.uni-wuerzburg.de/law/pl00000_.html#I000_> (emphases added).

Foley lauds this language "as invoking precisely the kind of 'overlapping consensus'" that he advocates. Foley, *supra* note 1, at 1196 n.5. But it is much better understood as an effort, whose success is still uncertain, at compromising a particular ideological rift that has arisen in the specific historical moment of post-Communist Poland. See Anthony Barker, *Constitution Battle Stirs Poles Before Elections*, Reuters World Service, May 21, 1997, available in LEXIS, News Library, Curnws File. It seems to me that if an effort were made to insert similar language in the United States Constitution, its resonance would be quite different.

33. The Declaration of Independence para. 1 (U.S. 1776) ("the Laws of Nature and of Nature's God"); *id.* para. 32 ("Supreme Judge of the world").

34. Consider in this respect E. Gregory Wallace's observation that the Declaration's invocation of divine authority and judgment is consistent with James Madison's theological belief, crucial to his opposition to the establishment of religion, in a "citizen's prepolitical duty to God." E. Gregory Wallace, *When Government Speaks Religiously*, 21 Fla. St. U. L. Rev. 1183, 1240 (1994). Wallace's insight nicely refutes both

So what makes us shudder? First, because in our own time and context, amending the preamble *would not* be an effort to ground principles of natural law in a divine mandate. It would, rather, be a harsh, politically *and* religiously debasing, escalation of a certain form of identity politics.³⁵

Second, putting God in the Constitution or our legal discourse *now* would mark the end of the amazing, distinctively American experiment in nurturing a religious society by way of a secular government.³⁶ That experiment was founded on a set of arguments we can find in James Madison's Remonstrance, and elsewhere.³⁷ Some of these arguments are political and moral. Some are pragmatic. And some are expressly theological—yes, theological.³⁸ Together, they

those who would ignore the references to God in the Declaration and those who would use those reference to counter or downplay the striking and significant lack of references to God in the Constitution.

35. Cf. David H. Bennett, *The Party of Fear: From Nativist Movements to the New Right in American History* (1988) (finding parallels between traditional nativism and contemporary religious conservatism in the American political scene); David Frum, *Dead Right* (1994) (arguing that certain aspects of contemporary conservatism express, in their own way, the same sort of "identity politics" usually associated with modern left-wing politics); David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 Ohio St. L.J. 491, 542 (1994) (arguing that religiously-based opposition to homosexual rights "engages in a politics of identity, based on the paradox of intolerance").

The actual movement to insert language about "the authority and law of Jesus Christ" in the Constitution originally arose in the specific political and theological climate of the second half of the nineteenth century. See Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 Baylor L. Rev. 927, 934-35 n.20 (1996) (discussing and citing extensive historical literature on the "National Reform Association" and its effort to enact the "Christian Amendment"). For discussions of more recent efforts along similar lines, see Mark Silk, *Spiritual Politics: Religion and American Since World War II*, at 99-100 (1988); Anson Shupe, *The Reconstructionist Movement on the New Christian Right*, 106 *Christian Century* 880 (1989).

36. For another view of the nature of that experiment, see Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 *N.W. L. Rev.* 347 (1995).

37. See James Madison, "Memorial and Remonstrance Against Religious Assessments," reprinted in *Everson v. Board of Educ.*, 330 U.S. 1, app. at 63-72 (1947). For my purposes here, I am treating Madison's Remonstrance as a canonical text of our constitutional theory. I do not, of course, claim that it provides a historically or doctrinally sufficient account of the relation of religion to American legal or political discourse.

38. Madison relied, in part, on a theology of religious jurisdiction:

Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalien-

form a rich, thick, ideological soup that has become part of our national identity.

Madison's arguments can be debated, and either accepted or discarded. But one does not have to be a raving relativist to see that, as Americans, we no longer confront those arguments, and the nation they helped form, as neutrals. Our nation's history might have taken a non-Madisonian turn, and might even have worked had it done so. But a certain complicated and inconsistent suspicion of explicitly theo-

able also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.

Id. at 64. He also relied, in part, on a theology of religious anti-instrumentalism: Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhal- lowed perversion of the means of salvation.

Id. at 67. And on a theology of religious self-sufficiency:

[T]he establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them; and not only during the period of miracu- lous aid, but long after it had been left to its own evidence, and the ordinary care of Providence: Nay, it is a contradiction in terms; for a Reli- gion not invented by human policy, must have pre-existed and been sup- ported, before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits.

Id. And on a theology of Christian primitivism:

Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary opera- tion. During almost fifteen centuries, has the legal establishment of Christi- anity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy. Propose a restoration of this primitive state in which its Teachers depended on the voluntary rewards of their flocks; many of them predict its downfall. On which side ought their testimony to have greatest weight, when for or when against their interest?

Id. at 67-68.

logical arguments in law and public debate is now part of American distinctiveness, as much as Trinitarianism is (arguably) part of Irish distinctiveness. The Constitution constitutes us as much as we constitute it. And to abandon Madison's experiment would be, for most of us, not only dangerous but, pun intended, dispiriting.

Notes & Observations