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Reenchanting the Law: The Religious Dimension of Judicial Decision Making

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REENCHANTING THE LAW: THE RELIGIOUS DIMENSION OF JUDICIAL DECISION MAKING

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I. INTRODUCTION

Unlike earlier theological attempts to ground law in religion or the Divine,[1] participants in the modern debate rarely, if ever, argue for a theological or religious legitimation of law. Religion is viewed as "a special kind of problem for the law" rather than a source of legitimation or justification.[2] For instance, in his dissenting opinion in *Bowers v. Hardwick*,[3] Justice Blackmun suggested that Georgia's anti-sodomy law violated the Establishment Clause of the First Amendment because it lacked a justification "beyond its conformity to religious doctrine."[4] The

1. *See, e.g.*, St. Thomas Aquinas, *Summa Theologica*, I-II, q. 91, art. 2 & q. 95, art. 2, *in* 2 BASIC WRITINGS OF ST. THOMAS AQUINAS 750, 784 (Anton C. Pegis ed., 1945) (arguing that human law is not legitimate unless it meets the dictates of natural law which are "nothing else than the rational creature's participation of the eternal law [Divine Reason]").

2. Steven D. Smith, *Legal Discourse and The De Facto Disestablishment*, 81 MARQ. L. REV. 203, 212-13 (1998) (arguing that "religion is not viewed as a resource or a potentially helpful approach to understanding the day-to-day issues of law" like "economics, for instance, or moral and political philosophy, or feminist or critical race theory, or history, or (more occasionally) literary theory or sociology or psychology" but as "a special kind of problem for the law").

3. 478 U.S. 186 (1986).

4. *Id.* at 211 (Blackmun, J., dissenting). Justice Blackmun noted that the state of Georgia invoked "Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages" in support of the anti-sodomy law. *Id.* By contrast, Chief Justice Burger's concurring opinion maintained that Georgia's anti-sodomy law had a rational basis because it was "firmly rooted in Judaeo-Christian moral and ethical standards." *Id.* at 196 (Burger, J., concurring). Although not explicitly adopting this religious justification, the majority upheld the criminal prohibition of sodomy as applied to homosexuals based on its "ancient roots" in the common law which it found constituted a rational basis for the law. *Id.* at 192-96. The Court further declined to find a fundamental

Supreme Court's recent overruling of *Bowers* in *Lawrence v. Texas*,[5] may have eliminated Justice Blackmun's concerns by holding that the criminal prohibition of homosexual sodomy violates the fundamental right of privacy of consenting homosexual adults.[6] At about the same time, the House of Bishops at the General Convention of The Episcopal Church USA confirmed the election of "the first openly gay bishop of any American church"[7] and "officially recognized the blessing of same-sex unions."[8] If religious convictions both affirm and deny aspects of homosexual relationships, how do we determine whether the judicial interpretations of the concept of liberty in the Due Process Clause of the Fourteenth Amendment were independent of religious convictions? Moreover, the indeterminancy of the U.S. Constitution and other laws raises this issue for other contentious legal issues such as abortion, physician-assisted suicide, the free exercise of religion, and the scope and nature of property rights. Legal indeterminacy thus raises the normative issue of whether all judges' decisions in hard cases may be based on religious or comprehensive convictions.

The current consensus about judicial decision making rejects this possibility because the "Law" is presumed to be autonomous. It allegedly has its own internal rationality which generates a full justification of all judicial decisions without judges resorting to their religious convictions. For some theorists,[9] this presumed autonomy constitutes a legal objection to relying on religious convictions in judicial decision making based on the Establishment Clause of the First Amendment.[10] For example, judges should not cite passages from *Genesis*, *Leviticus*, and St. Thomas Aquinas, like Chief Justice Roy Moore of the Alabama Supreme Court (the "Ten Commandments Judge") has done, to justify "a strong presumption of unfitness" against

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right to engage in homosexual sodomy protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 190-91.

5. 123 S. Ct. 2472 (2003).

6. *Id.* at 2484.

7. Martha Sawyer Allen, *Gay Bishop Approved*, STAR TRIB. (Minneapolis-St. Paul), Aug. 6, 2003, at A2.

8. Alan Cooperman, *Episcopal Church Ratifies Compromise on Gay Unions*, WASH. POST, Aug. 8, 2003, at A1. For those readers who may be curious as to whether my own religious convictions have influenced my arguments in this article, I am an Episcopalian and cherish the open and honest debate about the Christian faith that is part of this tradition.

9. *See, e.g.*, KENT GREENAWALT, LAW AND OBJECTIVITY 222 (1992) (arguing that "[g]iven principles of religious liberty and separation of church and state that guide us, a reason that rests on a theological truth that is not generally accepted should not count as a reason for what the existing law provides").

10. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

homosexual parents for custody of their children.[11] Even Justice Kennedy, who advocates substantial accommodation of religion by the state, has declared that "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not . . . act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[12]

Despite this prohibition, the Supreme Court has rejected claims that the Establishment Clause is violated by "federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."[13] The Court has emphasized that the fact that criminal prohibitions on murder, adultery, polygamy, and theft "agree[ ] with the dictates of the Judaeo-Christian religions while [they] may disagree with others does not invalidate the regulation[s]."[14] By implication, if judges set forth nonreligious justifications in their written opinions, their decisions do not violate the Establishment Clause merely because they are consistent with judges' religious convictions.

For other theorists, the autonomy of law is part of a modern philosophical consensus that the world has been disenchanted.[15] Disenchantment means that the world can no longer be rationally viewed as an integrated meaningful whole under a religious or metaphysical worldview and that the law can no longer be legitimized by its religious or metaphysical foundations.[16] Disenchantment thus constitutes a

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11. *See* Ex Parte H.H., 830 So.2d 21, 26 (Ala. 2002). For a discussion of why Chief Justice Moore is referred to as the "Ten Commandments judge," see *infra* note 31.

12. Lee v. Weisman, 505 U.S. 577, 587 (1992) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

13. McGowan v. Maryland, 366 U.S. 420, 442 (1961) (holding that "a uniform day of rest" was a significant secular purpose for a Sunday closing law).

14. *Id.* at 445. *Cf.* Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL'Y 1, 6 (2002) (arguing that "the case law and doctrines that comprise contemporary Establishment Clause jurisprudence" support his claim "that laws informed by religious moral premises generally do not, by that fact alone, violate the First Amendment"); *see also infra* Part VII.A.

15. *See, e.g.*, JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 26 (William Rehg trans., 1996) [hereinafter HABERMAS, BETWEEN FACTS AND NORMS] (assuming that the modern legitimation of law starts from the dilemma of "how can disenchanted, internally differentiated and pluralized lifeworlds be socially integrated if, at the same time, the risk of dissension is growing, particularly in the spheres of communicative action that have been cut loose from the ties of sacred authorities and released from the bonds of archaic institutions?").

16. *See* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 355 (H. H. Gerth and C. Wright Mills eds. & trans., 1946) (arguing that since the Enlightenment, the increasing rationalization of Western culture has disenchanted the world so that there can no longer be a religious or metaphysical justification for law, politics, morality, etc.).

philosophical objection to relying on religious convictions in judicial decision making.[17]

The rancorous debate over the appointment of U.S. Supreme Court Justices and other judges, however, suggests that average citizens and legislators intuitively understand that judges' decisions about issues involving abortion, euthanasia, and homosexuality depend upon their comprehensive or religious beliefs.[18] This intuition makes sense because it is consistent with the overwhelming consensus among legal theorists that the law is indeterminate. The law is indeterminate because there are hard cases where the apparently relevant statutes, common law, contracts, or constitutional law provisions at issue fail to resolve disputes. Legal indeterminacy raises a crucial, unanswered question: on what normative basis do judges determine which extra-legal norms are valid and which valid norm or norms are controlling in deciding hard cases?

Current legal theory has generally avoided this crucial question. Legal indeterminacy is widely recognized, but the debate has focused on the descriptive questions of whether the law is indeterminate[19] and on the

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17. For a critique of the philosophical objections of Jürgen Habermas, John Rawls, and Kent Greenawalt to relying on religious convictions in judicial decision making, see MARK MODAK-TRURAN, REENCHANTING THE LAW: THE RELIGIOUS DIMENSION OF JUDICIAL DECISION MAKING 42-178 (unpublished Ph.D. Dissertation, University of Chicago, 2002) (on file with author) [hereinafter MODAK-TRURAN, REENCHANTING THE LAW]. *See also* Mark Modak-Truran, *The Religious Dimension of Judicial Decision Making and The* De Facto *Disestablishment*, 81 MARQ. L. REV. 255, 266-71 (1998) [hereinafter Modak-Truran, *De Facto Disestablishment*] (arguing that Rawls's idea of public reason fails to provide a solution to legal indeterminancy because public reason is indeterminate and because no religious person (no matter how reasonable) could accept his "'political not metaphysical' ordering of political values" because it requires them to deny their comprehensive convictions and accept Rawls's comprehensive conviction); Mark Modak-Truran, *Habermas's Discourse Theory of Law and the Relationship Between Law and Religion*, 26 CAP. U. L. REV. 461, 461-64, 477-78 (1997) (arguing that Habermas's discourse theory of law is circular and fails to explain how intersubjective agreement can validate the law independently of religious convictions).

18. *See* Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1048 (1990) (discussing the contentious public discourse surrounding the appointment and confirmation of Catholic Justices to the United States Supreme Court); Howard J. Vogel, *The Judicial Oath and the American Creed: Comments on Sanford Levinson's* The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices, 39 DEPAUL L. REV. 1107, 1109 (1990) (exploring the hypothetical confirmation of a Quaker and a secular moralist and the problematic role of a civil religious creed which has been embodied in senators' questions in the confirmation process).

19. On the one hand, extreme-radical deconstructionists such as Anthony D'Amato have argued that even the U.S. constitutional requirement that the President be thirty-five years of age is not an easy case (i.e., indeterminate). Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U. L. REV. 250 (1989) [hereinafter D'Amato, *Aspects of Deconstruction*]. On the other hand, Ronald Dworkin maintains that his interpretative theory of law provides an understanding of law

degree of legal indeterminacy[20] rather than on the normative justification of judicial decision making under the conditions of legal indeterminancy. Contrary to the current consensus, religious convictions are central to understanding judicial decision making under these conditions. Religious convictions are the most comprehensive normative convictions that humans hold, and all humans who act with reflective self-understanding (even if they do not believe in God) are religious. Some people observe traditional religions like Christianity, Judaism, Islam, Hinduism, and Buddhism while others follow nontraditional religions like humanism, communism, and other so-called secular comprehensive perspectives. In either case, religious convictions provide answers to questions about when meaningful human life begins and ends and what sexual orientations are genuinely human. As a result, a full justification of the extra-legal norms judges rely on in hard cases and the choice among them *requires* judges to rely on religious convictions.

At the same time, the Establishment Clause prohibits the text of the law from including a religious justification. Without a religious justification in the law, judges cannot fully justify their decisions in hard cases from within the law. The law must be indeterminate because the Establishment Clause proscribes this full justification. This does not mean that the Establishment Clause prohibits judges from fully justifying their decisions during their deliberations about hard cases. It only prohibits judges from including that full justification in their written opinions. Deliberation and explanation are separate stages of judicial decision making that should be kept distinct. Given this distinction, my thesis is that judges should fully justify their decisions in hard cases by relying on their religious or comprehensive convictions in their

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that is quite determinate so that the law provides "right answers" even in hard cases based on the criteria of "fit" with prior precedent and "justification" according to the principles of political morality underlying the law. *See* RONALD DWORKIN, LAW'S EMPIRE 225, 255 (1986). With respect to fit, he argues that "in a modern, developed, and complex [legal] system" a tie with respect to fit would be "so rare as to be exotic." RONALD DWORKIN, A MATTER OF PRINCIPLE 143 (1985). The principles of political morality can further determine a right answer when the criteria of fit fails so that "[i]f there is no right answer in a hard case, this must be in virtue of some more problematic type of indeterminacy or incommensurability in moral theory." *Id.* at 144.

20. For example, Ken Kress notes that:

> [V]ersions of indeterminacy differ according to whether they claim that the court has complete discretion to achieve any outcome at all (execute the plaintiff who brings suit to quiet title to his cabin and surrounding property in the Rocky Mountains) or rather has a limited choice among a few options (hold for defendant or plaintiff within a limited range of monetary damages or other remedies), or some position in between.

Ken Kress, *Legal Indeterminacy and Legitimacy*, in LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 200, 201 (Gregory Leyh ed. 1992).

deliberation (religionist deliberation) but that judges' religious convictions should only implicitly inform the legal explanation of their decision in their written opinions (separationist explanation). I refer to this as the religionist-separationist model of judicial decision making which maintains that religious convictions are the "silent prologue" to any full justification of the law.[21]

Recognizing religious convictions as a silent prologue does not presume that all religious convictions are a legitimate basis for fully justifying judges' decisions. The religionist-separationist model further requires that judges critically validate their religious convictions based on reason and common human experience before relying on those convictions. Promoting self-critical religious reflection by judges acknowledges that religious truth is never a finished product but a continuous process of reflection and debate. As a consequence, the religionist-separatinist model not only recognizes the centrality of religious convictions for judicial deliberation in hard cases but also prevents stifling religious pluralism by prohibiting judges from dogmatically establishing an official religious conviction in their written opinions. Given that the United States has become "the world's most religiously diverse nation,"[22] the religionist-separationist model results in a legitimate plurality of religious convictions implicitly informing the law and thereby *reenchanting of the law*.

In light of the current consensus about the autonomy of law, advocating the religionist-separationist model of judicial decision making and the reenchantment of the law is no small matter. In this article, I focus mainly on arguments for the religionist-separationist model and on the likely objections to it. Before setting forth my constructive argument, Part II clarifies the issues I will address and charts the logically possible models for the relationship between law and religion in judicial decision making, while Part III sets forth my assumptions about the nature of religion and legal indeterminacy. Part IV then presents a general

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21. *Cf.* DWORKIN, LAW'S EMPIRE, *supra* note 19, at 90. Dworkin argues that:

> Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others. So any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law.

Id.

22. *See generally* DIANA L. ECK, A NEW RELIGIOUS AMERICA: HOW A "CHRISTIAN COUNTRY" HAS NOW BECOME THE WORLD'S MOST RELIGIOUSLY DIVERSE NATION (2001) (chronicling the increasing diversity of American religious practice and proposing a pluralistic vision for a new America).

account of the role of religious convictions in fully justifying extra-legal norms and the choice among them in the process of deliberating about hard cases. To practically demonstrate this account, Part V analyzes the *en banc* Ninth Circuit Court of Appeals and Supreme Court opinions in *Washington v. Glucksberg*[23] and attempts to show that the judges had to rely on comprehensive convictions to provide a full justification of their decisions about whether the Fourteenth Amendment protects a fundamental right to die. Part VI examines another hard case, *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[24] to establish the necessity of relying on comprehensive convictions for fully justifying judges' decisions even when societal consensus on extra-legal property norms is present. Subsequently, Part VII addresses both philosophical and legal versions of the Secular Purpose Objection and argues that relying on religious convictions in judicial deliberation about hard cases does not present Establishment Clause problems. Part VIII, however, contends that the Establishment Clause prohibits writing religious justifications into judicial opinions, and Part IX maintains that the Establishment Clause provides a normative justification of legal indeterminancy. Part X further shows that religious convictions may be rationally justified and that a proper understanding of religious pluralism also provides a normative justification of legal indeterminacy. Finally, Part XI specifies some of the consequences of reenchanting the law for legal theory.

II. CLARIFYING THE ISSUES AND MODELS

My analysis of whether judges ought to rely on comprehensive or religious convictions will not start from assumptions about what role judges should play in a democratic political system. Rather, the normative issue will be approached from the perspective of asking what kinds of convictions or claims judges must rely on to provide a full justification for their decisions in hard cases. However, this analysis will not involve an empirical inquiry to determine what particular claims actual judges rely on in hard cases[25] but will be an attempt to determine *in principle* what kinds of claims must be relied upon by judges in resolving hard cases.

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23. 521 U.S. 702 (1997).

24. 485 U.S. 439 (1988).

25. *See, e.g.*, Thomas C. Berg & William G. Ross, *Some Religiously Devout Justices: Historical Notes and Comments*, 81 MARQ. L. REV. 383 (1998) (exploring how "the religious beliefs and activities" of U.S. Supreme Court Justices may have been related to their judicial decision making); Scott C. Idleman, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433, 473-78 (1993) (analyzing the role of religious values in judicial decision making from four perspectives, including the historical-constitutional, political-philosophical, utilitarian, and empirical perspectives).

This analysis will proceed from the basic assumption that many decisions made by judges in deliberating about cases are left unarticulated in their opinions or only partially articulated. For example, judges rarely give explicit accounts of: 1) why certain facts are included in the statement of facts and others are not; 2) why the issue is framed the way it is; 3) why a particular social policy is normative; or 4) what method of legal interpretation is the best one.[26] In other words, judicial reasoning cannot be reduced to the arguments articulated in judicial opinions. In order to take this into account, I will treat the process of judicial decision making as including two stages: deliberation and explanation. The process of deliberation is the more complete stage because it includes all the reasons for a judge's decision whether or not those reasons are articulated in the explanation of the judge's decision in a written opinion. The processes of deliberation and explanation thus do not completely mirror one another. Nevertheless, most normative accounts of law addressing the issue of the role of religious beliefs in judicial decision making have failed to differentiate these stages of judicial decision making. Consequently, the religious dimension of judicial decision making has remained hidden or concealed from view, in part, because of this failure.

Given that judicial decision making involves both deliberation and explanation, the question about the role of religious beliefs in judicial decision making should be more precisely analyzed into two separate issues: 1) Is it proper for a judge to rely on religious convictions in deliberating about a case, and if so, under what circumstances and in which cases?; and 2) Is it proper for a judge to announce a religious basis for a decision in a judicial opinion, and if so, under what circumstances and in which cases? The first issue concerns what is entailed in the process of legal reasoning as such (the deliberative process), while the second issue concerns what types of reasons judges should be allowed to rely on in written judicial opinions (the process of explanation) in a pluralistic democratic society.

By keeping these issues distinct, there are four possible models of judicial decision making:

MODELS OF JUDICIAL DECISION MAKING[27]

26. *Cf.* DWORKIN, LAW'S EMPIRE, *supra* note 19, at 90.

27. For an earlier version of these models and my version of the religionist-separationist model, see Modak-Truran, *De Facto Disestablishment*, *supra* note 17, at 259. It should be noted that allowing judges to rely on religious beliefs or convictions in judicial deliberation or explanation could take the form of a permissive use of these beliefs (can) or a required use of these beliefs (should) while a prohibition against relying on religious beliefs or convictions in judicial decision making only takes the form of a requirement not

	Deliberation	**Explanation**	**Model of Judicial Decision Making**
Religious Beliefs	no	no	separationist
Can or Should Be	yes	yes	religionist
Relied on in Judicial	no	yes	separationist-religionist
Decision Making	yes	no	religionist-separationist

From this chart, one can develop four different models of judicial decision making. I will refer to the first possibility as the separationist model of judicial decision making. This model maintains that religious beliefs or convictions should not be relied on either in deliberation or explanation. Given the predominance and often unexamined or blind acceptance of this model, the conclusion is usually that religion should have nothing to do with judicial decision making. As discussed in Part VII, the models of judicial decision making offered by John Rawls and Jürgen Habermas represent two versions of the separationist model that are part of this consensus. This consensus is so widespread that the other three models are usually not given a second thought. The separationist model blinds us from fully appreciating these other models.

One reason for this pervasive blindness is that the second model, which maintains that religious convictions can or should be relied on in judicial deliberation and explanation (the religionist model), is usually considered the only alternative to the separationist model. In fact, if deliberation and explanation are not differentiated, this is the only alternative to the separationist model. Within certain constraints, the religionist model was vigorously embraced by judges in the nineteenth century. For example, in *Vidal v. Girard's Executors*,[28] Justice Story made his famous claims that the United States was a "Christian country" and that "the Christian religion is a part of the common law of Pennsylvania."[29]

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to rely on these beliefs. For an alternative matrix of models for the role of religion in judicial decision making, see Daniel O. Conkle, *Religiously Devout Judges: Issues of Personal Integrity and Public Benefit*, 81 MARQ. L. REV. 523 (1998).

28. 43 U.S. 127 (1844).

29. *Id.* at 198; *see also* Joseph Story, *Christianity a Part of the Common Law*, 9 AM. JURIST 346 (1833); CUSHING STROUT, THE NEW HEAVENS AND NEW EARTH: POLITICAL RELIGION IN AMERICA 99 (1974) (noting that many early state court decisions "assumed that Christianity was itself part of the common law inherited from England"); Harold Berman, *The Interaction of Law and Religion*, 31 MERCER L. REV. 405, 407 (1980) (noting that courts in the nineteenth century "declared very often that the Christian

Currently, this position does not receive much support,[30] but there are some exceptions such as the "Ten Commandments Judge," former Chief Justice Roy Moore of the Alabama Supreme Court.[31] He recently wrote a startling concurring opinion that provided a religious justification of his claim that there should be "a strong presumption of unfitness" against homosexual parents for custody of their children.[32] To support his argument, Chief Justice Moore cited passages from *Genesis, Leviticus*, and St. Thomas Aquinas and concluded that "[h]omosexuality is strongly condemned in the common law because it violates both natural and

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religion is the law of the land, that Christianity is part of the common law, and that the Constitution on its face shows that the Christian religion was the religion of the framers").

30. *See* KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 142 (1995) [hereinafter GREENAWALT, PRIVATE CONSCIENCES] (arguing that judges recognize "that people in this country have variant religious views . . . . no particular religious view is seen to be embedded in the legal materials themselves or to be part of some common understanding or technique of reason that stretches beyond the legal materials but can be a source of guidance"). *But cf.* Wendell L. Griffen, *The Case for Religious Values in Judicial Decision-Making*, 81 MARQ. L. REV. 513, 518 (1998) (arguing that judges "have the right to include religious sources when [they] justify the decisions [they] reach" even though "religious values are not universally shared by all persons, or even all judges for that matter"). Michael Perry has also made some statements that suggest support for this model in certain circumstances. *See* MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 103-04 (1997) [hereinafter PERRY, RELIGION IN POLITICS]. Perry argues that "[i]f a plausible secular premise *does* support [a political] choice . . . government, including the judicial branch, may rely on a religious premise." *Id.* at 103. Perry subsequently questions whether a legal decision can be "'reasoned and available to the public' if in its opinion a court conceals one of the premises on which it has consciously relied" and thus implies that the court should disclose its reliance on a religious premise in its opinion. *Id.* at 104.

31. Former Chief Justice Moore was named the "Ten Commandments Judge" when, as a circuit court judge in Alabama, he refused to remove a plaque of the Ten Commandments that he had placed behind his bench. Two high-profile cases were brought regarding this practice but both were dismissed as non-justiciable. *See* Ala. Freethought Ass'n v. Moore, 893 F. Supp. 1522, 1544 (N.D. Ala. 1995) (finding plaintiffs lacked standing to bring Establishment Clause challenge to Moore's Ten Commandments); Alabama ex rel. James v. ACLU, 711 So.2d 952, 954 (Ala. 1998) (dismissing action by State of Alabama seeking declaratory judgment that Judge Moore's practices were consistent with Establishment Clause). When elected to the Alabama Supreme Court, Chief Justice Moore "installed a two-and-one-half ton monument to the Ten Commandments as the centerpiece of the rotunda in the Alabama State Judicial Building. He did so in order to remind all Alabama citizens of, among other things, his belief in the sovereignty of the Judeo-Christian God over both the state and the church." Glassroth v. Moore, 335 F.3d 1282, 1284 (11th Cir. 2003). The court noted that Moore claimed, like "southern governors who attempted to defy federal orders during an earlier era," he was not subject to any federal court order below the U.S. Supreme Court. *Id.* at 1302. The Eleventh Circuit, however, affirmed the district courts' holding that the monument violated the Establishment Clause and their order to remove the monument. *Id.* at 1284.

32. Ex Parte H.H., 830 So.2d 21, 26 (Ala. 2002).

revealed law."[33] For reasons specified in Part VIII, this opinion and the religionist model violate the Establishment Clause of the First Amendment by favoring one or more religions or religious teachings and in effect discriminating against others.[34] Furthermore, this article analyzes the interminable practical problems that arise from Chief Justice Moore's opinion.[35] Given these arguments, this article will not consider the religionist model as a viable alternative to the separationist model.

In addition, these reasons and others would also eliminate the third model, which holds that religion should not be relied on in deliberation but can or should be relied on in explanation (separationist-religionist model). If a judge accepts the distinction between "legal reasons" and "religious reasons" with respect to deliberation, it is hard to think of a reason why she would give up on this distinction with respect to the process of explanation. Unless the judge was part of a society that was explicitly ruled by religious law (e.g., an Islamic country), it is hard to see this model as viable. Consequently, because this is not the case in the United States, this does not appear to be a viable model worthy of further consideration.

However, despite the strong likelihood that explicit religious references in judicial opinions (the process of explanation) violate the Establishment Clause, this does not necessarily mean that religion can or should be eliminated from judicial deliberation. The fourth model (religionist-separationist model) maintains that judges can or should rely on religious convictions in their deliberation about certain cases (the process of deliberation) but should not rely on religious convictions in their written opinions (the process of explanation). The religionist-separationist model was first identified by Kent Greenawalt[36] and, soon thereafter, embraced by Stephen Carter[37] and Michael Perry.[38] As I

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33. *Id.* at 33.

34. *See* Part VIII.A; *see also* MODAK-TRURAN, REENCHANTING THE LAW, *supra* note 17, at 257-75.

35. *See* Part VIII.B.

36. *See* KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 239-41 (1988); KENT GREENAWALT, PRIVATE CONSCIENCES, *supra* note 30, at 142-50.

37. Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 943 (1989) (arguing that "if religious conviction plays a role at all, it would enter into the deliberative process, but not the process of justification").

38. PERRY, RELIGION IN POLITICS, *supra* note 30, at 6 (emphasis added). Michael Perry has recently changed his interpretation of the nonestablishment norm, and he now argues that the "best answer to the question of whether political reliance on religiously grounded morality violates the nonestablishment norm" does not require that judges and other government officials always have a "plausible, independent secular grounding" for their political choices. Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663, 670

argue in Part VII and elsewhere,[39] however, their formulations of the religionist-separationist model suggest, like the separationist model, that religious or comprehensive beliefs can or should be kept out of judicial decision making in most cases and provide incoherent accounts of judicial decision making. Conversely, I will propose a much more distinctive version of the religionist-separationist model. This version maintains that judges ought to rely on religious convictions about authentic human existence in all (not just some) hard cases in order to justify their decisions fully. My version of the religionist-separationist model thus provides distinctive contribution to the debate about the role of religious beliefs in judicial decision making.

III. DEFINING RELIGION AND LAW

A. A Formal Definition of Religion

Martin Marty has observed that:

> Everyone "knows" what religion is. Many members of publics simply define it in terms of what is normative or privileged in their culture or sub-culture. Religion, for instance, is what goes on in religious institutions. Yet the modern situation shows that much religious activity and reflection occurs outside such institutions. Or, religion has to do with God. Yet many religions manifestly do not.[40]

Although everyone claims to "know" what religion is, there appears to be little agreement about what it is. In addition, there are various methods of analyzing religion such that "[r]eligion is one thing to the anthropologist, another to the sociologist, another to the psychologist," another to the theologian, and another to the philosopher.[41] This results, in part, from the different purposes of the many types of inquiries that

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(2001). *See generally* Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Is Not Illegitimate in a Liberal Democracy*, 36 WAKE FOREST L. REV. 217 (2001); Michael J. Perry, *Christians, the Bible, and Same-Sex Unions: An Argument for Political Self-Restraint*, 36 WAKE FOREST L. REV. 449 (2001); Michael J. Perry, *Catholics, the Magisterium, and Moral Controversy: An Argument for Independent Judgment (With Particular Reference to Catholic Law Schools)*, 26 U. DAYTON L. REV. 293 (2001). Perry's most recent book on religion and politics collects these essays into a more integrated and comprehensive argument. *See* MICHAEL J. PERRY, UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY (2003). Despite Perry's modification of his position, his prior position still represents a distinctive alternative version of the religionist-separationist model of judicial decision making and warrants consideration in this article.

39. *See* Part VII.B; *see also* MODAK-TRURAN, REENCHANTING THE LAW, *supra* note 17, at 136-78.

40. MARTIN E. MARTY, WHAT IS MODERN ABOUT THE MODERN STUDY OF RELIGION? 5 (1985).

41. JOHN HICK, PHILOSOPHY OF RELIGION 3 (2d ed. 1973).

analyze the nature of religion including the anthropology of religion,[42] sociology of religion,[43] psychology of religion,[44] history of religions,[45] theology,[46] and philosophy of religion. For example, sociology of religion

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42. *See, e.g.*, CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 87-141 (1973). Geertz defines a religion as "(1) a system of symbols which acts to (2) establish powerful, pervasive, and long-lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic." *Id.* at 90.

43. *See, e.g.*, EMILE DURKHEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE (Joseph Ward Swain trans., 1915). Durkheim comments that "religion is something eminently social. Religious representations are collective representations which express collective realities." *Id.* at 22. More specifically, he proposes a famous definition of religion as:

> *[A] unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden—beliefs and practices which unite into one single moral community called a Church, all those who adhere to them.* The second element, which thus finds a place in our definition, is no less essential than the first; for by showing that the idea of religion is inseparable from that of the Church, it makes it clear that religion should be an eminently collective thing.

Id. at 62-63; *see also* PETER L. BERGER, THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION (1967).

44. *See, e.g.*, WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE (1982) (Martin E. Marty ed.). James states that religion "shall mean for us *the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine.*" *Id.* at 31; *see also* Don Browning, *Can Psychology Escape Religion? Should It?*, 7 INT'L J. PSYCHOL. RELIGION 1, 3 (1997). Browning defines religion as "a narrative or metaphorical representation of the ultimate context of reality and its associated worldview, rituals, and ethics . . . Furthermore, the concept of religion assumes that the narratives, worldviews, rituals, and ethics are held and celebrated by some identifiable community." *Id.*

45. *See, e.g.*, MIRCEA ELIADE, THE SACRED & THE PROFANE: THE NATURE OF RELIGION (Willard R. Task trans., Harcourt Brace Jovanovich & World, Inc. 1959). Eliade argues "that *sacred* and *profane* are two modes of being in the world, two existential situations assumed by man in the course of his history" and notes that his chief concern is "to show in what ways religious man attempts to remain as long as possible in a sacred universe, and hence what his total experience of life proves to be in comparison with the experience of the man without religious feeling, of the man who lives, or wishes to live, in a desacralized world." *Id.* at 13, 14. He further emphasizes that "the *completely* profane world, the wholly desacralized cosmos, is a recent discovery in the history of the human spirit." *Id.* at 13.

46. *See, e.g.*, PAUL TILLICH, 1 SYSTEMATIC THEOLOGY (1951). Paul Tillich defines religion in terms of the concept of ultimate concern. *Id.* at 11-12. He states:

> The religious concern is ultimate; it excludes all other concerns from ultimate significance; it makes them preliminary. The ultimate concern is unconditional, independent of any conditions of character, desire, or circumstance. The unconditional concern is total: no part of ourselves or of our world is excluded from it; there is no 'place' to flee from it. The total concern is infinite: no moment of relaxation and rest is possible in the face of a religious concern which is ultimate, unconditional, total, and infinite.

views religion "in terms of social interaction" and studies religion "with reference to the general concepts of sociology, including leadership, stratification, and socialization."[47] Accordingly, no generally accepted definition of religion exists and probably never will exist.[48]

For the purposes of this article, however, the central concern is to understand the role of religious convictions or claims in legal reasoning. The primary concern is with the kind of claims religion makes and how religious claims are related to other types of claims such as legal and moral claims. In contrast to the other approaches to understanding religion, the philosophy of religion has typically focused on these questions. Therefore, I will take a philosophy of religion approach and define religion in such a way as to outline the relationship between religious claims and legal and moral claims.

Regarding the definition of religion, I will adopt Schubert Ogden's definition of religion as "the primary form of culture in terms of which we human beings *explicitly* ask and answer the existential question of the meaning of ultimate reality for us."[49] According to this account, religion *explicitly* asks what is "authentic human existence" or "how we are to understand ourselves and others in relation to the whole."[50] The existential question, the question of meaning, is the question which is

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Id. See also DAVID TRACY, PLURALITY AND AMBIGUITY: HERMENEUTICS, RELIGION, HOPE 84 (1987). For Tracy, "religions are exercises in resistance. Whether seen as Utopian visions or believed in as revelations of Ultimate Reality, the religions reveal various possibilities for human freedom that are not intended for that curious distancing act that has become second nature to our aesthetic sensibilities." *Id.* He further claims that religious questions are "limit questions" which "must be logically odd questions, since they are questions about the most fundamental presuppositions, the most basic beliefs, of all our knowing, willing, and acting." *Id.* at 86, 87.

47. GEORGE A. THEODORSON & ACHILLES G. THEODORSON, A MODERN DICTIONARY OF SOCIOLOGY 406 (1969).

48. *Cf.* Winnifred Fallers Sullivan, *Judging Religion*, 81 MARQ. L. REV. 441, 454 (1998) (pointing out the difficulties of defining religion and identifying that "the goal of religious studies in the academic, legal, and political context, as well as in a scholarly setting, is to develop a common discourse about religion and religious difference").

49. SCHUBERT M. OGDEN, IS THERE ONLY ONE TRUE RELIGION OR ARE THERE MANY? 5 (1992) (emphasis added) [hereinafter OGDEN, IS THERE ONLY ONE].

50. *Id.* at 6. In more technical terms, the existential or religious question involves a metaphysical aspect and an ethical aspect that are closely related. In its metaphysical aspect, "it asks about the ultimate reality of our own existence in relation to others and the whole." *Id.* at 17. Unlike metaphysics proper, which determines the structure of ultimate reality itself, the metaphysical aspect of religion tells us the meaning of ultimate reality for us. In addition, in its ethical aspect, religion "asks about our authentic self-understanding." *Id.* at 18. Here again, there is a difference between ethics proper, which asks how we are to act, and the ethical aspect of religion, which tells us how we are to understand ourselves. Moreover, each specific religion answers both the metaphysical and ethical aspects of the existential question.

presupposed by all other questions.[51] It is the "comprehensive question" concerning "what is the valid comprehensive self-understanding" or "comprehensive human purpose."[52] Religion *explicitly* answers the existential or comprehensive question by providing the "concepts and symbols whose express function is to mediate authentic self-understanding."[53] In other words, religion includes a comprehensive evaluation of human activity in terms of the nature of existence to determine "how human activity as such ought to make a difference to the larger reality of which it is a part."[54]

If the existential or comprehensive question is presupposed by all other questions, does that mean that answering any question (such as which party should win a law suit) presupposes an answer to the existential question? Yes and no. Ogden argues that "everything that we think, say, or do, insofar, at least, as it makes or implies a claim to validity, necessarily presupposes that ultimate reality is such as to authorize some understanding of ourselves as authentic and that, conversely, some understanding of our existence is authentic because it is authorized by ultimate reality."[55] In this sense, answering any question implies an understanding of what constitutes authentic human existence or an answer to the comprehensive or existential question. Franklin Gamwell clarifies that this does not mean that all human activity is religious but that "the character of human activity as such implies the *possibility* of religion, in the sense that it implies the comprehensive question and, therefore, the possibility that this question is asked and answered explicitly."[56] Human activity is thus religious only to the extent that the existential or comprehensive question has been *explicitly* asked and answered.

To differentiate between explicitly answering and implicitly "answering" the comprehensive question, Ogden refers to the former as religion and the latter as a "basic faith (or confidence) in the meaning of

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51. FRANKLIN I. GAMWELL, THE MEANING OF RELIGIOUS FREEDOM: MODERN POLITICS AND THE DEMOCRATIC RESOLUTION 22-23 (1995) ("[E]very human activity asks and answers, at least implicitly, the comprehensive question, namely, what is the valid comprehensive self-understanding? . . . [W]hat is the comprehensive human purpose?").

52. *Id.* Gamwell further recognizes that his "definition and discussion of religion is nothing other than an attempt to appropriate [Ogden's] formulations for the purpose of the present inquiry." *Id.* at 15 n.1; *cf.* Smith, *supra* note 2, at 216 (claiming that "what we call 'religion' typically amounts to a comprehensive way of perceiving and understanding life and the world; it affects *everything*").

53. OGDEN, IS THERE ONLY ONE, *supra* note 49, at 8.

54. GAMWELL, *supra* note 51, at 25.

55. OGDEN, IS THERE ONLY ONE, *supra* note 49, at 7.

56. GAMWELL, *supra* note 51, at 23 n.5.

life."[57] Ogden argues that this basic faith is presupposed by all human activity.[58] It involves "accepting the larger setting of one's life and adjusting oneself to it."[59] It implicitly answers the existential or comprehensive question because it involves a self-conscious adjustment to these conditions.[60] Unlike other animals, human animals not only "live by faith" but "seek understanding."[61] Humans are "instinct poor;" "[n]ot only the details of our lives but even their overall pattern as authentically human remain undecided by our membership in the human species and are left to our own freedom and responsibility to decide."[62] In other words, humans do not live by merely accepting their setting and adjusting to it (basic faith); they seek a reflective self-understanding of reality (the whole) and their place in it (authentic human existence). Religion provides the concepts and symbols for human reflective self-understanding; it attempts to make sense "of our basic faith in the meaning of life, given the facts of life as we actually experience it."[63] To the extent that humans act with reflective self-understanding or have an explicit comprehensive understanding of authentic human existence, they are religious. Consequently, for the purposes of this discussion, "religion" will be equated with an explicit "comprehensive claim or conviction about human authenticity."

Accordingly, religion not only includes the recognized world religions of Christianity, Judaism, Islam, Hinduism, and Buddhism, but it also includes humanism, capitalism (when proposed as a normative rather than as a positive theory),[64] communism, and other so-called secular

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57. OGDEN, IS THERE ONLY ONE, *supra* note 49, at 7.

58. SCHUBERT M. OGDEN, ON THEOLOGY 70 (1986) (arguing that "[t]o exist in the characteristically human way is to exist by faith").

59. *Id.*

60. For clarity, it should be noted that Ogden argues that both basic faith and religion involve understanding and faith. *See id.* at 71. However, basic faith is not reflective while religion is reflective. *See id.* In terms slightly different to those used here, he distinguishes between "the *existential* understanding or faith [basic faith] that is constitutive of human existence as such and the *reflective* understanding or faith [religion] whereby what is presented existentially can be re-presented in an express, thematic, and conceptually precise way." *Id.* at 71.

61. *Id.* at 106.

62. OGDEN, IS THERE ONLY ONE, *supra* note 49, at 6.

63. *Id.* at 18.

64. *See* David R. Loy, *The Religion of the Market*, 65 J. AM. ACAD. RELIGION 275, 275 (1997). After adopting a functionalist view of religion "as what grounds us by teaching us what the world *is*, and what our *rôle* in the world is," Loy argues that:

> [O]ur present economic system should also be understood as our religion, because it has come to fulfill a religious function for us. The discipline of economics is less a science than the theology of that religion, and its god, the Market, has become a vicious circle of ever-increasing production and consumption by pretending to offer a secular salvation. The collapse of

answers to the existential question. This means that there is and always has been a plurality of religions or comprehensive self-understandings. Moreover, all human activity (including legal interpretation) is either explicitly informed by a plurality of religious convictions or implicitly informed by a basic faith in the meaningfulness of existence.

As more fully specified below, the distinction between religion and basic faith is very important because to the extent judges attempt to give a full justification for their decision, they have to rely on religious convictions. A "full justification" means that any extra-legal norm relied upon by judges must be justified. Judges may cite analogous legal precedent, historical precedent, or policy positions as justifications for their decisions. Despite their apparent authority, these intermediate level norms must be justified. For example, why should the policy of certainty in the commercial law context trump doing what is fair under the particular circumstances of each case? Religious or explicit comprehensive convictions provide this full justification because a religious conviction "purports to identify the necessary and sufficient moral condition or comprehensive condition of all valid moral claims."[65] They are the normative framework for all of life. Accordingly, Part III attempts to demonstrate how justifying any extra-legal norm requires that judges finally rely on a religious conviction about authentic human existence.

In addition, although definitions are not something that can be said to be definitively true or right, Ogden's formal definition of religion serves the purpose of putting on equal footing all "extra-legal" claims about "authentic human existence."[66] As a practical matter, this is very helpful because it treats all of these normative claims as similar for purposes of considering the legitimacy of legal decision making under conditions of legal indeterminacy. By calling all these claims religious, we signal both that they are typically considered "extra-legal" and that they are

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> communism—best understood as a capitalist 'heresy'—makes it more apparent that the Market is becoming the first truly world religion, binding all corners of the globe more and more tightly into a worldview and set of values whose religious role we overlook only because we insist on seeing them as 'secular.'

Id.

65. GAMWELL, *supra* note 51, at 70-71.

66. *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT (2nd ed. 1999). Commenting on the definition of law, Bix claims that:

> [O]ne might not be able to say that a particular conceptual analysis was 'right' or 'true,' at least not in the sense that there would be only one unique 'right' or 'true' theory for all conceptual questions, but I do not see this as a significant loss. It should be sufficient that one can affirm (or deny) that an analysis is good, or better than an alternative, for a particular purpose.

Id. at 27.

considered to be normative claims about authentic human existence. In other words, this formal definition of religion identifies that these claims have an equivalence in terms of both their type ("extra-legal") and their logical function (normative claims about "authentic human existence"). It does not put any material limitation on what kinds of claims about authentic human existence are to be considered religious. For example, a theistic definition of religion would include the material requirement that claims about authentic human existence are religious only if they are *theistic* claims about authentic human existence.[67] This would presumptively treat theistic and non-theistic claims about authentic human existence differently even though they serve the same logical function. Not surprisingly, this distinction is often used arbitrarily to presume that theistic claims about authentic human existence must be excluded from judicial decision making but that non-theistic claims should not. This formal definition of religion does not prejudge this issue. It helps make explicit all the "extra-legal" normative claims about authentic human existence that may be informing legal decision making. Once the role of extra-legal claims about human authenticity in judicial decision making is made explicit, the normative determination of whether some of them ought to be excluded can then be approached without presupposing that some beliefs (non-theistic extra-legal claims about human authenticity) are presumptively more justifiable than others (theistic extra-legal claims about human authenticity).

Finally, Ogden's definition of religion further supports an account of how judges can validate or justify their religious or comprehensive convictions through theological and philosophical reflection. As discussed more thoroughly in Part X, Ogden maintains that reason plays an essential role in the articulation and evaluation of religious convictions.[68] He argues that religious convictions are different in the sense that they are comprehensive but that does not mean they are

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67. For an example of how assuming (without argument) that religious convictions are necessarily theistic leads to confused thinking about what is "religious" and what is "secular," see KAI NIELSEN, ETHICS WITHOUT GOD (rev. ed. 1990). Nielsen argues that "[t]he sense in which any morality is and must be independent of religion is this: that from the recognition and consequent statement that there is a being that some call 'God' no moral statements whatsoever follow." *Id.* at 109. Even if Nielsen is right about the latter claim (which he is, in a trivial way, but is not in an important sense), he fails to provide a justification for his assertion that all religious morality depends on a conception of God. *See id.* In other words, if religion is defined broad as Ogden defines it, ethical convictions about authentic human existence are still religious convictions even though they do not include a conception of God. For example, humanism, capitalism (when proposed as a normative rather than as a positive theory), communism, and other so-called secular answers to the existential question are religious convictions just like Christianity, Judaism, Islam and Hinduism.

68. *See infra* Part X.B.

beyond critical or rational validation. In fact, he maintains that "it is the very nature of a religion to make or imply the claim to formal religious truth."[69] Assuming that Ogden's arguments succeed, this means that judges and other officials should validate their religious convictions before relying on them for fully justifying their interpretation of law.

B. Moderate Legal Indeterminancy

My essential descriptive assumption about the nature of law in general is that the law is indeterminate such that hard cases arise where the apparently relevant statutes, common law, contracts, or constitutional law provisions at issue do not clearly resolve the dispute. Many theorists now refer to this broadly as legal indeterminacy.[70] There appears to be an overwhelming consensus that the law is indeterminate but little consensus about what that means.[71] For example, extreme-radical deconstructionists such as Anthony D'Amato have argued that even the U.S. constitutional requirement that the President be thirty-five years of age is not an easy case (i.e., indeterminate).[72] However, even contemporary legal formalists, such as Ernest Weinrib, claim that "[n]othing about formalism precludes indeterminacy."[73] He argues that "formalism does not rely on the antecedent determinacy for particular cases of the concepts entrenched in positive law," but that "the organ of positive law has the function of determining an antecedently indeterminate controversy."[74] Consequently, in its weaker forms, the indeterminacy thesis merely signals the almost universal rejection of strong legal formalism.

Both the Legal Realists and Critical Legal Studies Movement ("CLS") have forcefully undermined the feasibility of strong legal formalism. In fact, the origin of the consensus about the indeterminacy of the law can be traced back to the Legal Realists critique of Langdell and other strong legal formalists.[75] For example, Karl Llewellyn rejects deductive legal

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69. OGDEN, IS THERE ONLY ONE, *supra* note 49, at 13.

70. *See, e.g.*, Kress, *supra* note 20, at 200-15.

71. *See supra* note 19.

72. D'Amato, *Aspects of Deconstruction*, *supra* note 19, at 250. D'Amato notes that "[d]econstructionists say that all interpretation depends on context. Radical deconstructionists add that, because contexts can change, there can be no such thing as a single interpretation of any text that is absolute and unchanging for all time." *Id.* at 252; *see also* Anthony D'Amato, *Aspects of Deconstruction: The Failure of the Word "Bird"*, 84 NW. L. REV. 536 (1990).

73. Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L. REV. 949, 1008 (1988).

74. *Id.*

75. Christopher Columbus Langdell is often considered the archetype of strong legal formalism. *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 42-43 (1977). He

certainty and argues that "legal rules do not lay down any *limits within* which a judge moves."[76] Rather, Llewellyn argues:

> [A] legal rule functions not as a closed space within which one remains, but rather as a bough whose branches are growing; in short, as a guideline and not as a starting premise; not as inflexible iron armor which constrains or even forbids growth, but as a skeleton which supports and conditions growth, and even promotes and in some particulars liberates it.[77]

For legal realists, this understanding of legal rules entails a rule scepticism that recognizes the indeterminacy of law.

CLS is also well known for its claim about the radical indeterminacy of the law. However, it rejects not only strong legal formalism but also any attempt to find a rational principle that can resolve legal indeterminacy. For instance, Mark Kelman argues that there is a CLS version of legal indeterminacy that:

> is quite distinct from the Realist one. This stronger CLS claim is that the legal system is invariably simultaneously *philosophically committed* to mirror-image contradictory norms, each of which dictates the opposite result in any case (no matter how "easy" the case first appears). While settled *practice* is not unattainable, the CLS claim is that settled *justificatory schemes* are in fact unattainable.[78]

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considered law a science and claimed that "all the available materials of that science are contained in printed books." ARTHUR E. SUTHERLAND, THE LAW AT HARVARD 175 (1967). For further discussion of the dominance of strong legal formalism from the Civil War to World War I, see GILMORE, *supra*, at 41-67. Supporters of Langdell argued that common law cases could be reduced to a formal system and that the judge, like a technician, could determine the right decision as a matter of deductive logic by pigeonholing cases into the formal system. *See id.* at 43-44. In other words, strong legal formalism maintains that legal decision making is essentially a deductive process whereby the application of legal rules results in determinative outcomes from the constraints imposed by the language of the law. *Cf.* MICHEL ROSENFELD, JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS 33 (1998) (discussing the "new" versus the "old" legal formalism); *see also* David A. Strauss, *The Role of a Bill of Rights*, 59 U. CHI. L. REV. 539 (1992). In discussing the conception of the Bill of Rights as a Code, Strauss defines formalism as including "three things: a heavy reliance on the precise language of the text; a pretense that the text resolves more issues than it actually does; and an effort to shift responsibility for a decision away from the actual decisionmaker and to some other party, such as the Framers." Strauss, *supra*, at 544.

76. KARL LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA, sec. 56, at 80 (Michael Ansaldi, trans., Paul Gewirtz, ed., 1989)

77. *Id.*

78. MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 13 (1987). David Kairys similarly argues that:

> The lack of required, legally correct rules, methodologies, or results is in part a function of the limits of language and interpretation, which are subjective and value laden. More importantly, indeterminacy stems from the reality that the

In *The Concept of Law*, the prominent legal positivist H.L. A. Hart further provides a helpful account of legal indeterminacy with his idea of the "open texture of the law." Hart advocates a middle path between formalism and rule scepticism such that the indeterminacy of the law allows for "varied types of reasoning which courts characteristically use in exercising the creative function left to them by the open texture of law in statute or precedent."[79] Hart helps make clear that this open texture or indeterminacy concerns not only "particular legal rules," but also "the ultimate criteria of validity," which he refers to as "the rule of recognition."[80] With respect to the rule of recognition, this results in a paradoxical situation where courts are determining the ultimate criteria of legal validity in the process of deciding whether a particular law is valid.[81] Hart claims that "the law in such cases is fundamentally *incomplete*: it provides *no* answer to the questions at issue in such cases" and that courts must exercise the restricted law-making function which he refers to as discretion.[82] As a result, in hard cases, the judge "is entitled to follow standards or reasons for decision which are not dictated by the law and may differ from those followed by other judges faced with similar hard cases."[83]

For the purposes of this article, the larger question raised by the indeterminacy thesis is whether legal interpretation can be rationally justified or legitimated under the conditions of legal indeterminacy. Ken Kress has noted that "[t]he indeterminacy thesis asserts that law does not constrain judges sufficiently, raising the specter that judicial decision making is often or always illegitimate."[84] Is judicial decision making

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> law usually embraces and legitimizes many or all of the conflicting values and interests involved in controversial issues and a wide and conflicting array of "logical" or "reasoned" arguments and strategies of argumentation, without providing any legally required hierarchy of values or arguments or any required method for determining which is most important in a particular context. Judges then make choices, and those choices are most fundamentally value based, or political.

David Kairys, *Introduction*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 4 (David Kairys ed., 3d ed. 1998).

79. H. L. A. HART, THE CONCEPT OF LAW 144 (2d ed. 1994). Hart notes that the rule of recognition can be partly, but never completely, indeterminate. *Id.* at 148. For example, in the United States, the United States Constitution could be indeterminate in some sense, but the rule of recognition conferring authority (jurisdiction) on the court to exercise its creative powers to settle the ultimate criteria of validity raises no doubts even though the precise scope of that power may raise some doubts. *See id.* at 152.

80. *Id.* at 148.

81. *Id.* at 152.

82. *Id.* at 252 (emphasis in original).

83. *Id.* at 273.

84. Kress, *supra* note 20, at 203.

merely the arbitrary exercise of political power?[85] Or is it just the product of the particular life experience of the judge?[86] The indeterminacy thesis thus puts into question the notion of the "Rule of Law." Lawrence Solum claims that

> if the indeterminacy thesis is true, then legal justice will fall short of the ideal of the rule of law in at least three ways: (1) judges will rule by arbitrary decision, because radically indeterminate law cannot constrain judicial decision; (2) the laws will not be public, in the sense that the indeterminate law that is publicized could not be the real basis for judicial decision; and (3) there will be no basis for concluding that like cases are treated alike, because the very ideal of legal regularity is empty if law is radically indeterminate.[87]

Moreover, in a democratic society, this means that judges are allegedly subverting democratic rule by creating the law outside of the legislative process and that judicial decision making is illegitimate.

The indeterminacy debate, however, has been referred to as "the key issue in legal scholarship today,"[88] and a fuller treatment of this issue is beyond the scope of this article. Rather than resolve this debate, my intention is to adopt the widespread assumption that the law is indeterminate in at least a moderate sense. By assuming only a moderate level of indeterminacy, I hope to achieve two things. First, I want to present a descriptive account of law that at least partially reflects most theorists' conclusions about the determinacy of the sources of law. Second, I want to bracket the question about the breadth or depth of legal indeterminacy and its implications for the legitimacy of the law. In

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85. For example, CLS rejects the claims that law and morality can be based on an apolitical method or procedure of justification and that the legal system can be objectively defended as embodying an intelligible moral order. *See generally* Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983). The legal order is merely the outcome of power struggles or practical compromises. *See id.* at 565. Thus, they advocate "the purely instrumental use of legal practice and legal doctrine to advance leftist aims." *Id.* at 567.

86. Jerome Frank is well known for his claim that judicial decisions can, in principle, be explained by a psychoanalysis of a judge's life experiences. *See generally* JEROME FRANK, LAW AND THE MODERN MIND (Peter Smith 1970) (1930). He comments that:

> What we may hope some day to get from our judges are detailed autobiographies containing the sort of material that is recounted in the autobiographical novel; or opinions annotated, by the judge who writes them, with elaborate explorations of the background factors in his personal experience which swayed him in reaching his conclusions. For in the last push, a judge's decisions are the outcome of his entire life-history.

Id. at 123-24.

87. Lawrence B. Solum, *Indeterminacy*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 489 (Dennis Patterson ed., 1996).

88. Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV., 148 (1990).

other words, I do not want controversy over my starting assumptions to sabotage the central focus of the article. My central focus is on whether, in hard cases involving a modicum of legal indeterminacy that most theorists would recognize, judges should rely on religious or comprehensive convictions for resolving disputes.

IV. THE NECESSITY OF RELIGIOUS OR COMPREHENSIVE CONVICTIONS FOR FULLY JUSTIFYING JUDGES' DECISIONS IN HARD CASES

Given this descriptive account of legal indeterminacy, a normative account of law (i.e., a rational justification or legitimation of law) must specify what "standards or reasons for decision[s] which are not dictated by the law,"[89] a judge should rely on in hard cases. In this respect, I will elaborate a normative account of law only to the extent required to determine whether religious convictions ought to play a role in judicial decision making. Assuming that the law is determinate in some sense (i.e., some cases are easy) and that judges have a duty to apply the law, judicial decision making is independent of comprehensive convictions in easy cases. The central question then is whether judicial decision making should be independent of religious or comprehensive convictions in all cases or only in easy cases. Either all judicial decision making is justified independently of comprehensive convictions (even in hard cases) (separationist model) or judicial decision making is independent of comprehensive convictions in easy cases but not in hard cases (religionist-separationist model). To address these issues, this Part will discuss the nature of full justification, a caveat with respect to full justification, and whether full justification requires judges to become theologians.

A. Full Justification

In hard cases, judges must rely on extra-legal norms because hard cases are, by definition, those cases in which the relevant legal norms do not provide a determinate outcome to the dispute in question. For example, the law may be indeterminate because it includes an abstract norm such as the concept of liberty under the Fourteenth Amendment, or it may include conflicting legal norms such as property rights and free exercise of religion rights, or it may involve conflicting public policy considerations such as fairness and certainty. Given that judges deciding hard cases must rely on extra-legal norms such as political, historical, societal, and moral norms, they must determine which of these extra-legal norms are appropriate. Why is one political norm decisive and not another? Why is a historical norm, rather than a societal norm, decisive?

89. *See* HART, *supra* note 79, at 273.

Why are any of these norms appropriate? In other words, if judges fully justified their decisions, they would also justify these extra-legal norms and provide reasons why one norm is the most appropriate norm for deciding these hard cases.

To provide this full justification, my religionist-separationist model maintains that judges ought to rely on religious convictions in their deliberations about hard cases to justify the extra-legal norms required to decide those cases. If the political, historical, societal, and moral norms in question are noncomprehensive extra-legal norms, they will not fully justify judges' decisions. A full justification of judges' decisions in hard cases requires judges to rely on a particular type of extra-legal norm—a religious conviction about authentic human existence. Religious convictions are explicit comprehensive convictions which provide the comprehensive condition of validity for all normative thinking.

Religious convictions should thus inform judicial deliberations in hard cases in several ways. First, any noncomprehensive extra-legal norm relied on must be justified by a religious conviction. Justifying extra-legal norms requires judges to determine that the norms in question would positively contribute to authentic human existence in the context of the case at issue. Second, the choice among extra-legal norms should also be justified by determining which norm or norms best contributes to authentic human existence. In addition, judges should rely on the religious conviction that they have determined, based on critical reflection, to be true. Consequently, in deliberating about hard cases, judges should fully justify their decisions by relying on their religious convictions to justify all noncomprehensive extra-legal norms and the choice among them.

Although he has a much different conception of what fully justifying judicial decisions in hard cases entails, Dworkin makes a similar point when he argues that:

> Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others. So any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law.[90]

In my terms, any practical legal argument in a hard case presupposes a comprehensive conviction about authentic human existence. A judge's choice among extra-legal norms is either fully justified based on an

90. DWORKIN, LAW'S EMPIRE, *supra* note 19, at 90.

explicit comprehensive conviction (i.e., a religious conviction about authentic human existence) or blindly based on an implicit comprehensive conviction. Comprehensive convictions are the "hidden" and "silent prologue" to any judicial decision in a hard case.

Ironically, the separationist model of judicial decision making prevents judges from fully justifying their decisions in hard cases. This model requires judges to choose extra-legal norms to decide hard cases without fully justifying those norms or the choice among them. Although this choice implies a comprehensive conviction, judges are prohibited from deliberating on how this choice is explicitly related to that comprehensive conviction. Judges should "deliberate" as if comprehensive convictions about authentic human existence are not involved in the process. They are further prohibited from reflecting on the validity of the implied comprehensive convictions; they must merely believe that these comprehensive convictions are true. Accordingly, under this model, judges must rely on a blind belief in the validity of their decisions without fully justifying them.

B. Caveat: The Role of Fully Justified Noncomprehensive Norms

My argument that a full justification of judicial decisions in hard cases requires judges to rely on comprehensive or religious convictions, however, requires a *caveat* because this claim is not as demanding as it may initially seem. I am not arguing that in deliberating about every hard case, judges must specify a full justification of their decisions. My claim is more modest than this. What responsible judicial decision making requires is that judges have, at some point, fully justified all the extra-legal norms they rely on to decide hard cases. For example, in a hard case dealing with conflicting precedent, the judge must choose which line of precedent to follow. The law does not tell the judge which direction to go or which path to take. The judge must rely on extra-legal norms to determine which precedent to follow. If the extra-legal norms are noncomprehensive, then the judge will have to justify these noncomprehensive extra-legal norms in accordance with her comprehensive conviction. The judge can do this either *during, prior to, or alongside of* the process of deliberating about this hard case. In other words, even if the judge does not fully justify these noncomprehensive extra-legal norms *during* her deliberation about the case, she can rely on these norms if they have been fully justified *prior to or alongside of* her deliberation in that case.

This raises the question of the origin of these noncomprehensive norms and how judges fully justify them prior to and alongside of their judicial decision making. Specifying noncomprehensive norms is part of determining the nature of authentic human existence. Religious or

comprehensive convictions attempt to order and organize all of life around a comprehensive purpose. This includes the moral, political, social, economic, and legal dimensions of life, and it requires relating that comprehensive purpose to the particular circumstances of each individual's life. Noncomprehensive norms such as "obey your parents," "do not lie," "promote democratic government," and "pursue justice" are part of the specification of authentic human existence which depend upon a religious or comprehensive conviction. These noncomprehensive norms are essential for organizing and leading a self-reflective life because they allow us to make decisions without ascending to the comprehensive level of reflection in every decision we make. They also allow us to focus on the particular circumstances of a normative issue. Most practical normative deliberation focuses on getting the facts straight and deciding what to do based on the most appropriate noncomprehensive norm. Most of our normative thinking occurs at this level and ascends to the comprehensive order of reflection only in hard cases where the noncomprehensive norms are indeterminate.

One of the major functions that religious traditions have performed for their followers is to specify the noncomprehensive norms that promote living life authentically and to provide the comprehensive or religious justification for these noncomprehensive norms. In the Christian tradition, one of the main tasks of practical and moral theology consists of specifying for believers what noncomprehensive norms are essential for living the "Christian life" in a historically appropriate manner.[91] For

91. In discussing the nature of theology in general and Christian theology as a particular example of theological reflection, Schubert Ogden argues that "*[a]lthough theology is a single movement of reflection, it has three distinct moments which allow for its differentiation into the interrelated disciplines of historical, systematic, and practical theology.*" OGDEN, ON THEOLOGY, *supra* note 58, at 7. Practical theology, in its Christian form, can be broadly understood "as reflective understanding of the responsibilities of Christian witness as such in the present situation." *Id.* at 13-14. He further claims that practical theology can also be more narrowly understood as focusing on the "explicit witness of faith" in the specific religious forms and practices of the representative Christian church. *Id.* at 98-101. By contrast, moral theology focuses on the "*implicit* witness of faith" constituted by the actions of each individual Christian and formulates general principles to inform all Christian praxis. *Id.; see also* DON S. BROWNING, A FUNDAMENTAL PRACTICAL THEOLOGY: DESCRIPTIVE AND STRATEGIC PROPOSALS 10 (1991) (arguing that religious communities "can and often do constitute powerful embodiments of practical rationality" and demonstrating this argument with case studies of three Christian communities); DAVID TRACY, BLESSED RAGE FOR ORDER: THE NEW PLURALISM IN THEOLOGY 240 (1975) (arguing that the "practical theologians task . . . is to project the *future* possibilities of meaning and truth on the basis of present constructive and past historical theological resources"). For an example of how the wisdom of the Lutheran tradition could provide rhetorical and analogical insight for judges (especially Chief Justice Rehnquist), see Marie A. Failinger, *The Justice Who*

instance, the Papal Encyclicals have addressed matters of moral theology such as abortion, artificial conception, economic exploitation, and euthanasia.[92] The World Council of Churches has likewise addressed issues such as racism, sexism, and defining a "'just, participatory, and sustainable society.'"[93] In the Jewish tradition, the classic example of the specification of noncomprehensive norms is the Jewish Talmud. The Talmud is a great compendium of Jewish law and includes commentary on the Jewish law by esteemed Babylonian and Palestinian rabbis.[94] These laws contain very particular directives pertaining to daily life such as "LOVE WORK, HATE LORDSHIP, AND SEEK NO INTIMACY WITH THE RULING POWERS."[95] Furthermore, given that all explicit comprehensive convictions are religious convictions, any tradition of comprehensive reflection, such as comprehensive liberalism, could serve the function of a religious tradition by specifying and fully justifying noncomprehensive norms.[96] Religious traditions thus provide valuable assistance to their followers in specifying and fully justifying noncomprehensive norms to help them deal with important moral, political, social, and legal issues.

With respect to judicial decision making, two things should be emphasized. First, the noncomrehensive extra-legal norms judges rely on in hard cases do not just magically appear during the process of judging. We all inherit a plethora of noncomprehensive norms from our culture, including the religious traditions which are part of that culture.[97] In the

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Wouldn't Be Lutheran: Toward Borrowing the Wisdom of Faith Traditions, 46 CLEV. ST. L. REV. 643, 702 (1998).

92. *See, e.g.*, Pope John Paul II, *Veritatis Splendor* (1993), *in* READINGS IN CHRISTIAN ETHICS: A HISTORICAL SOURCEBOOK 307-11 (J. Philip Wogaman & Douglas M. Strong, eds. 1996).

93. World Council of Churches, *in* READINGS IN CHRISTIAN ETHICS: A HISTORICAL SOURCEBOOK 315-40 (J. Philip Wogaman & Douglas M. Strong, eds. 1996) (includes excerpts from Official Reports from Periodic Assemblies in Amsterdam (1948), Evanston (1954), New Dehli (1961), Vancouver (1983), and Canberra (1991)).

94. *See, e.g.*, THE LIVING TALMUD: THE WISDOM OF THE FATHERS AND ITS CLASSICAL COMMENTARIES (Judah Goldin ed. & trans. 1957).

95. *Id.* at 62.

96. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE (1971). In *Political Liberalism*, Rawls acknowledges that "although the distinction between a political conception of justice and a comprehensive philosophical doctrine is not discussed in *Theory*, once the question is raised, it is clear, I think, that the text regards justice as fairness and utilitarianism as comprehensive, or partially comprehensive, doctrines." JOHN RAWLS, POLITICAL LIBERALISM xviii (paperback ed. 1996) [hereinafter RAWLS, POLITICAL LIBERALISM].

97. The work on "social norms" in law and society and law and economics has been helpful in identifying that the obligations generated by social norms determine behavior in addition to, or instead of, the law. *See* Richard H. McAdams, *Comment: Accounting for Norms*, 1997 WIS. L. REV. 625, 632; Robert C. Ellickson, *Law and Economics Discovers*

process of maturation, self-reflective individuals reflect on these inherited noncomprehensive norms and come to terms with them. Religious traditions provide assistance in this process both by specifying noncomprehensive norms which aid adherents in living life authentically and by fully justifying these noncomprehensive norms. However, individuals must finally determine for themselves which religious or comprehensive conviction about authentic human existence is valid and which noncomprehensive norms can be fully justified by their comprehensive conviction. In addition, this is a life-long task. Self-reflective individuals continually reexamine both whether their noncomprehensive norms can be fully justified by their comprehensive or religious convictions and whether their comprehensive convictions are authentic or valid. To the extent judges have been self-reflective, they come to the bench with a body of noncomprehensive extra-legal norms that have been fully justified ahead of time, and they continue to reflect on these noncomprehensive convictions alongside of, or outside of, their role as judges. Certain hard cases may cause or prompt further reflection about the noncomprehensive extra-legal norms they thought were fully justified, but in most cases, the full justification of these noncomprehensive extra-legal norms has occurred prior to, and continues to occur alongside of, judicial decision making.

Second, once a judge has determined that certain noncomprehensive, extra-legal norms are fully justified by her comprehensive conviction, she can rely on these noncomprehensive extra-legal norms in subsequent hard cases for fully justifying her decisions without explicitly ascending to her comprehensive conviction. Future ascent may be unusual or rare. Unless something about a subsequent case calls their validity into question, these previously justified noncomprehensive extra-legal norms

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Social Norms, 27 J. LEGAL STUD. 537 (1998) (arguing that the "founders of classical law and economics . . . exaggerate[] the role of the law in the overall system of social control and, conversely, underestimated the importance of socialization and the informal enforcement of social norms). However, the discussion of "social norms" in legal theory and especially in the economic analysis of law has tended to focus on a descriptive analysis of the role of social norms in regulating behavior along with law, the market, and "architecture." *See, e.g.*, Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662-64 (1998) (arguing that "behavior is regulated by four types of constraint," including law and social norms). Social norms are taken as a given (like preferences) and used to explain behavior in addition to legal norms, as an alternative to an explanation based on legal norms, and as a response to legal norms. *Id.* at 662. By contrast, I am focusing on the normative question of how extra-legal norms, whatever their source, should be justified. The inquiry is not an empirical or descriptive account of how extra-legal norms influence judicial decision making in hard cases but a normative account of how extra-legal norms that are inherited from our culture should be justified or legitimatized. The question is what validates or justifies the extra-legal norms that are required for judges to decide hard cases.

will suffice for deciding subsequent hard cases. The occasional nature of the ascent to comprehensive convictions may be one of the reasons that this ascent is absent from most accounts of judicial decision making. Once judges have fully justified noncomprehensive extra-legal norms about politics, morality, economics, etc., they may not consciously link this process of justification with the process of judicial deliberation in hard cases. In addition, judges continue to justify extra-legal norms alongside of and during judicial decision making in hard cases. If judges do so *during* judicial deliberation, they are self-aware that they are relying on noncomprehensive extra-legal norms that must be fully justified. If judges do so *along side of* their judicial deliberation, they may be fully justifying noncomprehensive extra-legal norms without connecting this process to the full justification of their decisions during judicial deliberation. Ideally, judges would recognize that both of these processes are essential to a full justification of their decisions in hard cases. Nevertheless, their decisions would still be fully justified even if judges perform these processes separately and do not recognize that they are connected. As a result, although requiring judges to justify their decisions fully, my religionist-separationist model of judicial decision making does not require that judges fully justify the noncomprehensive extra-legal norms they rely on *during* their deliberations about each hard case.

C. Judges as Theologians?

Does this mean that judges must become theologians? Yes and no. On the one hand, all people should critically reflect on their religious or comprehensive convictions. The process of full justification requires critically reflecting on comprehensive convictions in a manner similar to "theological" reflection and "theological" reflection is an integral part of living authentically for all people.[98] In this sense, judges, like all other self-reflective persons, are theologians.

On the other hand, with respect to judicial decision making proper, the process of fully justifying noncomprehensive extra-legal norms does not have to proceed like theological inquiry. According to Schubert Ogden, theology consists of "critical reflection on the validity claims of some specific religion."[99] In answering the existential question, religion makes claims about the nature of ultimate reality and about the nature of

98. Because religion has been defined broadly as a "comprehensive convictions about authentic human existence," the analogy between judges and theologians does not intend to suggest that only comprehensive convictions that are theistic are religious. Rather it is to meet and refute the possible objection that judges would have to employ a method of practical reasoning similar to a systematic theologian or a philosopher of religion.

99. OGDEN, IS THERE ONLY ONE, *supra* note 49, at 34.

authentic human existence. Theology is thus critical reflection on these claims. In this process of critical reflection, theologians attempt to articulate and validate a systematic formulation of the nature of ultimate reality and the nature of authentic human existence.[100] This reflective understanding of authentic human existence is then intended to inform all subsequent human activity in order to assist followers in living authentically. In this respect, Ogden argues that:

> [i]n short, the scope of theology's practical discipline is as broad as the whole of human culture, and it properly considers every form of human activity as potentially bearing the contemporary witness of faith. This is the reason its natural *Gesprächspartner* are all the human sciences and the various arts, including law, medicine, business, government, education, etc., that in any way have to do with the realization of human good.[101]

Although sometimes drawing on this comprehensive reflection provided by theologians, I am assuming that the practical deliberation of ordinary people, lawyers, and judges does not usually proceed like this. Rather than proceeding in a systematic fashion, ordinary people, lawyers, and judges usually proceed in an ad hoc manner. They validate their comprehensive convictions and noncomprehensive norms as part of an on-going process or as needed to face the dilemmas and crises that confront them in the course of their lives. They do not usually attempt to formulate and validate a comprehensive understanding of ultimate reality and authentic existence systematically ahead of time and then apply this understanding when political, moral, social, and legal issues arise.

In response to criticisms of his philosopher-judge Hercules, Dworkin makes a helpful distinction between Hercules, reasoning "outside-in," and ordinary people, lawyers, and judges, reasoning "inside-out."[102] Before deciding any cases, Hercules builds "a gigantic, 'over-arching' theory good for all seasons" including decisions about "metaphysics, epistemology and ethics, and also of morality, including political morality."[103] "When a new case arises," he works from the "outside" or from his over-arching theory

> towards the problem at hand: finding the best available justifications for law in general, for American legal and constitutional practice as a species of law, for constitutional interpretation, for tort, and then finally, for the poor woman

100. *Id.* at 10.

101. *Id.* at 14.

102. Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 358 (1997).

103. *Id.*

> who took too many pills and the angry man who burned his flag.[104]

By contrast, Dworkin claims that ordinary people, lawyers, and judges may only rarely ascend to this theoretical level of thinking. Dworkin argues that as ordinary people, "[w]e reason from the inside-out: we begin with discrete problems forced upon us by occupation or responsibility or chance, and the scope of our inquiry is severely limited, not only by the time we have available, but by the arguments we happen actually to encounter or imagine."[105] These approaches are not inconsistent because sometimes even ordinary people, lawyers, and judges must ascend to the kind of higher justification developed by Hercules ahead of time. As Dworkin writes, "justificatory ascent is always, as it were, on the cards: we cannot rule it out a priori because we never know when a legal claim that seemed pedestrian and even indisputable may suddenly be challenged by a new and potentially revolutionary attack from a higher level."[106]

With respect to the religionist-separationist model of judicial decision, Dworkin's descriptive distinction between reasoning outside-in and inside-out is helpful in one sense and misleading in another. It is helpful in distinguishing judicial and theological reflection, but it is somewhat misleading with respect to the question of whether judges rely on their comprehensive convictions in deciding hard cases. As indicated above, I assume that self-reflective or religious judges usually fully justify noncomprehensive extra-legal norms *prior to and alongside of* their decision making. In this sense, judges are ascending to their comprehensive convictions for fully justifying noncomprehensive extra-legal norms in a manner not acknowledged by Dworkin. However, this is an ad hoc process rather than a systematic inquiry. Theologians systematically develop a comprehensive account of the nature of ultimate reality and authentic human existence ahead of time and then proceed to determine answers to practical dilemmas. Unlike theologians, I am assuming that most judges fully justify noncomprehensive extra-legal norms in a piecemeal fashion. In the course of their lives, prior to and alongside of judicial decision making, they encounter practical dilemmas that require normative decisions. By appealing to their comprehensive conviction in these dilemmas, they justify noncomprehensive norms that will later aid them in making legal decisions. They also receive assistance from religious traditions in this process. In many hard cases, judges thus draw on noncomprehensive extra-legal norms that have already been

104. *Id.*
105. *Id.*
106. *Id.* at 357-58.

fully justified in this ad hoc process. Judges focus on the particular facts of the case at hand and try to determine which previously justified noncomprehensive extra-legal norm is the most appropriate to resolve the dispute. In addition, judges do not usually affiliate their ad hoc process of fully justifying extra-legal norms prior to and alongside of their judicial decision making with the process of judicial deliberation as such. Unlike theologians who fit practical decisions into their comprehensive schemes, judges take these noncomprehensive extra-legal norms as a given and rely on them in hard cases.

Only in exceptionally hard cases, like *Washington v. Glucksberg*,[107] do judges encounter disputes that may put these previously justified norms into question. Like Dworkin, I argue that these cases require ascent *during* judicial decision making. It is especially important in these cases that judges know what is at stake. My religionist-separationist model attempts to specify what has always been required for a full justification of their decisions but which has been occurring only piecemeal *prior to and alongside of* their judicial decision making. Once previously justified noncomprehensive extra-legal norms have been put into question, judges become more aware that the process of justifying their decision requires justifying the extra-legal norms they rely on to decide these cases. Exceptionally hard cases rupture the normal process of judicial decision making and make ascent to comprehensive convictions *during* judicial decision making imperative. These cases then present an opportunity for judges to understand what is happening in all hard cases but which often goes undetected.[108]

V. THE FULL JUSTIFICATION OF *WASHINGTON V. GLUCKSBERG*

Washington v. Glucksberg[109] is one of the exceptionally hard cases where the necessity of relying on comprehensive convictions for fully

107. 521 U.S. 702 (1997).

108. Benjamin Cardozo seems to have been aware of something like the religionist-separationist model of judicial decision making. He embraces William James's claim that:

> [E]very one of us has in truth an underlying *philosophy of life*, even those of us to whom the names and notions of philosophy are unknown or anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. *Judges cannot escape that current any more than other mortals.* All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense of James's phrase of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, *must determine where choice shall fall.*

BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 12 (1921) (emphasis added).

109. 521 U.S. 702 (1997).

justifying judges' decisions becomes more evident.[110] The indeterminacy of the relevant legal norms is quite evident in this case, and the judicial reliance on extra-legal norms is more pronounced. This kind of case thus presents a unique challenge to the ideal of legal autonomy and lends support to the religionist-separationist model of judicial decision making. To support this argument, I will first argue that the issue in this case—whether citizens have a right to determine the time and manner of their death with the aid of a physician[111]—is precisely the kind of issue whose resolution inherently depends on a religious or comprehensive conviction about authentic human existence. Subsequently, I will analyze the Ninth Circuit *en banc* and Supreme Court opinions in this case to show that both opinions fail to provide a full justification of the decisions reached by these courts. I will then explain that a full justification would require relying on religious or explicit comprehensive convictions. Thus, this Part attempts to demonstrate that the autonomy of law fails in practice, as it does in theory, and to explain how judges can fully justify their decisions in hard cases.

A. The Right to Die: An Inherently Religious Question

Washington v. Glucksberg[112] involved a Washington state criminal statute that makes promoting a suicide attempt a felony. The Washington statute provides that "'[a] person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.'"[113] The central issue before the court was whether Washington's ban on assisted suicide violated the Due Process Clause of the Fourteenth Amendment.[114] The district court held that "a competent, terminally ill adult has a constitutionally guaranteed right under the Fourteenth Amendment to commit physician-assisted suicide."[115]

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110. Note that this is not a descriptive argument, but a normative argument that in principle, a full justification of judges' decisions in hard cases requires them to rely on comprehensive convictions. The judges in question may have based their decisions on a blind belief in the validity of an implicit comprehensive conviction, but they should have relied on the religious convictions that they consider true to justify their decisions fully.

111. *Glucksberg*, 521 U.S. at 705-06.

112. 521 U.S. 702 (1997).

113. *Id.* at 707 (quoting WASH. REV. CODE 9A.36.060(1) (1994)).

114. *Id.* at 705-06. The Fourteenth Amendment of the United States Constitution provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

115. Compassion in Dying v. Washington, 850 F. Supp. 1454, 1462 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *aff'd en banc*, 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom.* Washington v. Glucksberg, 521 U.S. 702 (1997). The plaintiffs included four Washington physicians who would assist certain of their terminally ill patients end their lives but for the statute banning assisted suicide, three gravely ill patients of these doctors who died

Furthermore, the district court held that Washington's ban on assisted suicide violated the Due Process Clause because it placed an undue burden on this "constitutionally protected liberty interest" and that it violated the Equal Protection Clause.[116] The Ninth Circuit initially reversed, but on rehearing *en banc*, the Ninth Circuit affirmed the district court's decision on Due Process Clause grounds.[117] Sitting *en banc*, the Ninth Circuit held that "there is a liberty interest [under the Fourteenth Amendment's Due Process Clause] in choosing the time and manner of one's death" (i.e., there is a right to die) and that "the Washington statute banning assisted suicide, as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors, violates the Due Process Clause."[118] Subsequently, the Supreme Court reversed this decision.[119] The Court held that there was not a fundamental right to, or liberty interest in, assistance in suicide protected by the Due Process Clause and that the Washington state ban on assisted suicide did "not violate the Fourteenth Amendment, either on its face or 'as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors.'"[120]

Although both courts claimed to resolve the right to die issue based on the "law," the right to die is inherently a religious question. On the one hand, the right to die question is a comprehensive question like any other normative question. Answering this question implies a comprehensive conviction or an answer to the comprehensive or existential question. Comprehensive convictions are the comprehensive condition of all valid normative claims. So in this sense, all normative questions are, at least implicitly, comprehensive questions.

On the other hand, it is precisely in addressing questions such as the right to die, abortion, and homosexual marriage that the comprehensive question becomes most apparent. Any sophisticated discussion of these issues usually involves an explicit recognition of the competing religious convictions about authentic human existence that dictate disparate answers. In this sense, these questions are "inherently religious." Even someone like Ronald Dworkin, who argues that issues of justice, including legal justice, can be decided independently of religious or

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after the case began, and a non-profit organization ("Compassion in Dying") that counsels people contemplating physician-assisted suicide. Compassion in Dying v. Washington, 49 F.3d 586, 589 (9th Cir. 1995).

116. *Compassion in Dying*, 850 F. Supp. at 1465, 1467.

117. Compassion in Dying v. Washington, 79 F.3d 790, 798 (9th Cir. 1996).

118. *Id.* at 838.

119. *Glucksberg*, 521 U.S. at 735-36.

120. *Id.* at 735 (quoting *Compassion in Dying*, 79 F.3d at 838).

comprehensive convictions (i.e., the priority of the right over the good), acknowledges the essentially religious nature of these issues. He remarks that:

> Our convictions about how and why human life has intrinsic importance, from which we draw our views about abortion, are much more fundamental to our overall moral personality than the other convictions about inherent value I mentioned. They are decisive in forming our opinions about all life-and-death matters, including not only abortion but also suicide, euthanasia, the death penalty, and conscientious objection to war. Their power is even greater than this suggests, moreover, because our opinions about how and why our own lives have intrinsic value crucially influence every major choice we make about how we should live.[121]

He further notes that these essentially religious beliefs "surface, for almost everyone, at exactly the same critical moments in life—in decisions about reproduction and death and war" and that "[s]omeone who is an atheist, because he does not believe in a personal god, nevertheless has convictions or at least instincts about the value of human life in an infinite and cold universe, and these convictions are just as pervasive, just as foundational to moral personality, as the convictions of a Catholic or a Moslem."[122]

Similarly, the rhetoric and methodology of the Ninth Circuit *en banc* opinion recognize the inherently religious nature of the right to die question. The Ninth Circuit noted that the right to die and abortion cases present issues of "profound spiritual importance" and that "both arouse similar religious and moral concerns."[123] In beginning its consideration of whether there was a liberty interest in the right to die, the Ninth Circuit also reiterated a "few fundamental precepts" that guided them.[124] One of these precepts was a "cautionary note" from *Roe v. Wade*:[125]

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the . . . controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly *absolute convictions* that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, *one's religious training, one's attitudes*

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121. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 99 (1996) [hereinafter DWORKIN, FREEDOM'S LAW].

122. *Id.* at 99-100.

123. *Compassion in Dying*, 79 F.3d at 800-01.

124. *Id.* at 799.

125. *Id.*

> *toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions.*[126]

In determining the scope of liberty, the Ninth Circuit also employed the same methodology used by Justice Blackmun in his majority opinion in *Roe v. Wade*, and it surveyed "historical attitudes" and "current societal attitudes" about suicide.[127] The court's survey of historical attitudes included Christian, English, Greek, Stoic, and Roman attitudes toward suicide.[128] The court's discussion of these attitudes even often identified the comprehensive notion of authentic human existence that legitimated or prohibited the act of suicide. For instance, the court noted that "'the more powerfully the Church instilled in believers the idea that this world was a vale of tears and sin and temptation, where they waited uneasily until death released them into eternal glory, the more irresistible the temptation to suicide became.'"[129]

These comments and the inherently religious nature of the right to die issue might suggest that the court could not have avoided relying on an explicit comprehensive or religious conviction in its deliberation. However, the Ninth Circuit's rhetoric and methodology suggest at least two main interpretations. The first, and most likely, interpretation is that the court was recognizing the inherently religious nature of the right to die issue to support its conclusion that individuals have a fundamental liberty interest under the Fourteenth Amendment protecting their right to decide such important issues. In this respect, the court emphasized its "endeavor to conduct an objective analysis" and explicitly claimed that the notion of liberty (a noncomprehensive principle) recognized by prior Supreme Court cases interpreting the Fourteenth Amendment, supported its decision.[130] In addition, the Ninth Circuit's consideration of this wide range of attitudes about suicide resulted from its adoption of

126. *Id.* at 800 (quoting Roe v. Wade, 410 U.S. 113, 116 (1973)) (emphasis added).

127. *Compassion in Dying*, 79 F.3d at 806-12; see also *Roe*, 410 U.S. at 160-62; Peter G. Daniels, Comment, *An Illinois Physician-Assisted Suicide Act: A Merciful End to a Terminally Ill Criminal Tradition*, 28 LOY. U. CHI. L.J. 763, 765 n.24 (1997) (claiming the origin of laws against suicide is found in Judeo-Christian values).

128. *Compassion in Dying*, 79 F.3d at 806-09. Like the formal definition of religion proposed above, the parallel treatment of these different historical attitudes and contemporary societal attitudes by the courts in both *Compassion in Dying* and *Roe* treats all of these attitudes as religious or comprehensive claims about authentic human existence. This treatment suggests that these attitudes perform the same logical function in justifying norms for resolving these hard cases.

129. *Compassion in Dying*, 79 F.3d at 808 (quoting Thomas J. Marzen, et al., *Suicide: A Constitutional Right*, 24 DUQ. L. REV. 1, 25 (1985)).

130. *Id.* at 800.

the broad method of Due Process Clause analysis.[131] This method focuses on preventing a premature limitation of the scope of liberty.[132] The goal is to treat liberty as "'a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.'"[133] The broad method avoids prejudging the issue based on previous wisdom and previous cases by ascertaining this "rational continuum" "in light of the existing circumstances as well as our historic traditions."[134] The review of historical and current societal views thus serves to challenge judges to rethink their presuppositions about liberty (i.e., how the scope of liberty is determined by their comprehensive convictions) and to ensure that the court is not missing an important restriction on liberty. Consequently, the court's rhetoric and methodology could have been based on its Due Process method and its interpretation of the notion of liberty protected by the Fourteenth Amendment.

Alternatively, the Ninth Circuit could have been following the religionist-separationist model of judicial decision making. On this reading, the court's explicit recognition of a noncomprehensive principle, the principle of liberty, in their opinion would prevent Establishment Clause problems arising from an explicit recognition of a religious conviction. The process of explanation would be properly separationist. In the process of deliberation, the judges may have explicitly relied on a religious conviction to decide the scope of liberty. The process of deliberation would then have been properly religionist. Below I argue

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131. The Ninth Circuit's broad method of Due Process analysis proceeded in two steps. In the first step, the court considered "whether there is a liberty interest in choosing the time and manner of one's death . . . . Is there a right to die?" *Id.* at 798-99. In the second step, the court considered "whether prohibiting physicians from prescribing life-ending medication for use by terminally ill patients who wish to die violates the patients' due process rights." *Id.* at 799. The second step involved applying a balancing test under which the court 'weigh[ed] the individual's liberty interests against the relevant state interests." *Id.* As a result of this method, the Ninth Circuit held that:

> [A] liberty interest exists in the choice of how and when one dies, and that the provision of the Washington statute banning assisted suicide, as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors, violates the Due Process Clause.

Id. at 838.

132. In this respect, the court emphasized that "'[t]he full scope of liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property, the freedom of speech, press, and religion . . . .'" *Id.* (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)). This discussion of the scope of liberty guaranteed by the Due Process Clause clearly indicates that the term liberty is indeterminate and that this is a hard case.

133. *Id.*

134. *Id.* at 803.

that determining the scope of liberty necessarily requires judges to rely, at least implicitly, on a comprehensive conviction. Here, I am merely suggesting that the court could have been following the religionist-separationist model of judicial decision making and that their separationist opinion would not have clearly identified their adoption of the religionist-separationist model. I suggest this not merely because this could be the case, which is true of both the Supreme Court or the Ninth Circuit, but because the Ninth Circuit's rhetoric and methodology explicitly recognize the inherently religious nature of the right to die issue.

From the standpoint of the religionist-separationist model, the Ninth Circuit's opinion is attractive because its rhetoric and survey of religious attitudes about suicide minimizes the concealment of the inherently religious nature of the right to die issue. On this reading, the opinion further suggests that resolving the issue of whether liberty ought to include the right to terminate one's own life requires deciding whether authentic human existence requires liberty to have such a scope. The effect of the Ninth Circuit's adoption of the broad method of Due Process analysis would then prompt the court to explore alternative comprehensive evaluations of suicide and disclose the necessity of relying on comprehensive convictions to determine whether individuals ought to have the liberty to terminate their lives under certain circumstances. The opinion thus does what a good judge following the religionist-separationist model would do. The judge would minimize the concealment of the religious dimension of judicial decision making in hard cases (i.e., the religionist nature of fully justifying judicial deliberation in hard cases) but stop short of explicitly adopting a particular religious convictions in her written opinion. This approach allows for the possibility of a plurality of comprehensive convictions to support the same conclusion and prevents the establishment of one comprehensive conviction as the basis for determining the scope of liberty.

Obviously, the Ninth Circuit's rhetoric and methodology do not establish the necessity of relying on comprehensive convictions for fully justifying a decision in this case. However, when considered in relation to the other aspects of this opinion and the Supreme Court's opinion, these statements have the cumulative effect of reinforcing the other ways in which these opinions support the religionist-separationist model. In this respect, the following discussion attempts to demonstrate that both the Supreme Court and Ninth Circuit opinions fail to provide a full justification of their decisions and that a full justification of their decisions entails relying on religious or explicit comprehensive convictions.

B. Washington v. Glucksberg

In contrast to the Ninth Circuit, the Supreme Court used a restrained method of Due Process Clause analysis and attempted to justify its decision based on this method and on the Court's interpretation of legal history. The Supreme Court's method of Due Process analysis had two primary features: 1) the fundamental right or liberty must be "objectively, 'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty'"; and 2) there must be "a 'careful description' of the asserted fundamental liberty interest."[135] As is evident from the Supreme Court's "careful description of the asserted fundamental liberty interest" in defining the issue, the second feature determines what history is relevant. The Supreme Court defined the issue as: "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so."[136] This framing of the issue combined the question of the existence of a fundamental liberty interest (right to die) with a means of implementing that right (assistance) so that the issue becomes whether there is "an interest in implementing that general liberty interest by a particular means."[137] Because the issue was framed as "assisted suicide" rather than "suicide," the Court could cite a substantially uniform legal prohibition of assisted suicide to support its claim that there was no historically recognized fundamental right. The Court found that "[t]he history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it."[138] As a result, the Court held that the right to assisted suicide is not a fundamental liberty interest (i.e., not "objectively, deeply rooted in this Nation's history and tradition") and that Washington's ban on assisted suicide did "not violate the Fourteenth Amendment."[139]

On the other hand, if the court instead focused on whether the right to die or commit suicide was a fundamental right, their historical analysis would have resembled the Ninth Circuit's analysis. The Ninth Circuit focused its historical inquiry this way because they defined the issue in two parts. The first part concerned "whether there is a liberty interest in

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135. *Glucksberg*, 521 U.S. at 720-21. *See* Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 681 (arguing that "the Court's traditionalist approach to adjudication of unenumerated rights claims announced in *Glucksberg* is wise, workable, and firmly grounded in principles of American constitutionalism").

136. *Glucksberg*, 521 U.S. at 723.

137. *Compassion in Dying*, 79 F.3d at 801.

138. *Glucksberg*, 521 U.S. at 728.

139. *Id.* at 735 (quoting *Compassion in Dying*, 79 F.3d at 838).

choosing the time and manner of one's death" (i.e., "[i]s there a right to die?"), and if so, the second part concerned "whether prohibiting physicians from prescribing life-ending medication for use by terminally ill patients who wish to die violates the patients' due process rights."[140] The right (right to die) and the means of exercising that right (medical assistance) were kept separate. Consequently, the relevant history considered by the Ninth Circuit was the historical and current societal attitudes on suicide, not on assisting suicide. Contrary to the Supreme Court's finding of a pervasive prohibition on assisting suicide, the Ninth Circuit found that "[t]oday, no state has a statute prohibiting suicide or attempted suicide; nor has any state had such a statute for at least 10 years."[141] Thus, the effect of the Supreme Court's restrained method was to conceal as much as possible their reliance on a comprehensive conviction by framing the issue in such a way that the historical materials appeared to lead to one result.

The Supreme Court "justified" its restrained Due Process method on the grounds that it "tends to rein in the *subjective elements* that are necessarily present in due process judicial review" and "avoids the need for complex balancing of competing interests in every case."[142] In other words, this method could be reformulated as a claim that Due Process Clause analysis must refer to some public values ("objectively, 'deeply rooted in this Nation's history and tradition'") rather than some "subjective element" (e.g., comprehensive or religious conviction). We could call this the "Public Values Objection" to the religionist-separationist model because it prohibits judges from relying on comprehensive or religious convictions to determine the scope of liberty found in the Due Process Clause. Accordingly, the Supreme Court cited the history of regulating assisted suicide but did not consider the history of comprehensive or religious thinking on that issue or on the issue of suicide. In this respect, the Supreme Court's restrained Due Process method appears to embrace the separationist model of judicial decision making so that "historical attitudes" and "current societal attitudes" (i.e., comprehensive convictions) are treated as subjective and irrelevant to the determination of the scope of liberty. Conversely, history "objectively" determines the scope of the political value of liberty by identifying which notion of liberty is "objectively, 'deeply rooted in this Nations' history and tradition.'"

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140. *Compassion in Dying*, 79 F.3d at 798-99.

141. *Id.* at 810. Although the Ninth Circuit recognized that a majority of states still have laws against assisting suicide, it further found that "[b]y the time the Fourteenth Amendment was adopted in 1868, suicide was generally not punishable, and in only nine of the 37 states is it clear that there were statutes prohibiting assisting suicide." *Id.* at 809.

142. *Glucksberg*, 521 U.S. at 722 (emphasis added).

The religionist-separationist model, however, could respond to the Political Values Objection as the Ninth Circuit did in *Compassion in Dying*. The Ninth Circuit found that "historical evidence alone is not a sufficient basis for rejecting a claimed liberty interest" because history is not the sole guide for deciding whether a liberty interest exists.[143] In other words, the indeterminancy of the scope of the Due Process Clause notion of liberty cannot be "solved" by referring to history. History is indeterminate and must also be interpreted.[144] It must first be evaluated to determine which aspect of it is the "relevant" history. In addition, the positions expressed in the relevant history must be evaluated to determine which position is authoritative or normative. Consequently, both the Ninth Circuit and the Supreme Court had to rely on an extra-legal norm to determine which aspect of history was relevant and then which position expressed in the relevant history was authoritative.

Rather than indicating what these extra-legal norms might be, the Supreme Court focused on the historical pattern of enacted laws to support its decision. The Court reviewed not only U.S. legal history but also English legal history and stressed that "[i]n almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide."[145] The Court further underscored that "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide."[146] The Court's opinion was more of a tabulation of historical data than an argument. The Ninth Circuit poignantly emphasized that "[w]ere history our sole guide, the Virginia anti-miscegenation statute . . . would still be in force because anti-miscegenation laws were commonplace both when the United States was founded and when the Fourteenth Amendment was adopted."[147] The Ninth Circuit implicitly asked why history should be normative with

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143. *Compassion in Dying*, 79 F.3d at 805 (9th Cir. 1996) (citing Loving v. Virginia, 388 U.S. 1 (1967)). Note that this argument about the necessary reliance on a comprehensive norm to evaluate history would also apply to claims that judges should rely on "community morality" in hard cases. In this respect, the Ninth Circuit's comments were referring to their own historical survey of comprehensive evaluations (community moralities) of suicide.

144. *See, e.g.*, MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 54-69 (1994) (arguing that originalists' attempts to determine the original meaning of the U.S. Constitution fail to resolve the indeterminacy of constitutional history and that they usually resolve this indeterminacy based on their conception of the proper judicial role); Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437, 437 (1996) (arguing that "history is indeterminate" based on the contradictions demonstrated by legal historical research).

145. *Glucksberg*, 521 U.S. at 710.

146. *Id.* at 711.

147. *Compassion in Dying*, 79 F.3d at 805 (citing Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817 (1967)).

respect to the prohibition on physician-assisted suicide but not with respect to anti-miscegenation laws. The Supreme Court failed to explain why things are different here.

Because history is indeterminate, the Court had to rely on an extra-legal norm to determine why this history was relevant and authoritative. Further, this extra-legal norm and its priority over other norms must be justified. Justifying this norm and its priority would require relying on a comprehensive conviction. Thus, even though the Court suggested that the historical record determined whether there was a fundamental right to physician-assisted suicide, the Court would have to rely on a comprehensive or religious conviction to fully justify this normative interpretation of history.

Similarly, the Ninth Circuit also looked at history to ascertain what this indeterminate notion of liberty required. Unlike the Supreme Court, the Ninth Circuit examined the historical and current comprehensive evaluations of suicide rather than tallying the history of legal prohibitions or surveying conceptual analyses of the concept of liberty.[148] This historical analysis showed that history supports both sides of the suicide issue. To choose which history is relevant and authoritative, the court had to rely on an extra-legal norm or norms. Even though the Ninth Circuit did not identify what more than history (i.e., what extra-legal norm) informed their determination of the scope of liberty, their historical analysis suggests that they were cognizant that they had to rely on an extra-legal norm to make this determination. As indicated above, one reading of this survey of historical and current comprehensive convictions about suicide suggests that the Ninth Circuit was cognizant that they had to rely on a particular type of extra-legal norm—a comprehensive conviction—to ascertain whether there was a fundamental right to die. Even if this is not the case, fully justifying these extra-legal norms would require judges to rely on their comprehensive convictions, at least implicitly.

The Supreme Court might further respond that its restrained method of Due Process analysis, not an extra-legal norm, determined which history was relevant and authoritative. This response merely raises another question: how do judges choose between the restrained and the broad methods of Due Process analysis? The Supreme Court followed the restrained method, and the Ninth Circuit followed the broad method. The Supreme Court precedent on the Fourteenth Amendment also supports both methods.[149] This means that judges must justify the choice

148. *Id.* at 806-12.

149. *Id.* at 801 (noting that "[t]he broader approach we employ in defining the liberty interest is identical to the approach used by the Supreme Court in the abortion cases").

between these two methods of Due Process analysis. An extra-legal norm is required to make this decision. The judge may respond that the legislature ought to decide these issues when the U.S. Constitution is not clear. The reply is: Why ought the legislature decide or why ought not the judge decide? The U.S. Constitution does not adopt a specific theory of constitutional interpretation, such as judicial minimalism[150] or originalism,[151] that requires that the legislature decide these issues. By citing a position on constitutional interpretation to "justify" her methodological choice, the judge does not provide a sufficient reason for this choice that would eliminate the necessity of relying on an extra-legal norm. It may signal that the judge's choice depends on a series of extra-legal norms. The judge might then attempt to justify her theory of constitutional interpretation by claiming that letting the legislature decide is consistent with the best understanding of democracy. It is the best form of democracy, the argument might go, because it allows for a fuller participation of citizens in self-ruling, and it promotes majority rule. Why is self-rule a good thing? Why is majority rule relevant to a question of individual rights? More extra-legal norms are required because a theory of democracy or a determination of how it is best understood is not itself a part of the law.

While looking elsewhere to justify democracy as the highest form of government, the judge may finally adopt Aristotle's position. Aristotle maintained that humans are uniquely suited for living in states, and that the state, which exists for the sake of "the good life,"[152] is uniquely suited

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150. Cass Sunstein notes that "[n]ot only has the [Supreme] Court as a whole refused to choose among the four positions [of constitutional interpretation he identifies as originalism, rule of clear mistake, independent interpretive judgments, and democracy-reinforcement] or to sort out their relations, but many of the current justices have refused to do so in their individual capacities." CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 9 (1999). Sunstein then argues that five current justices of the Supreme Court, Ruth Bader Ginsburg, David Souter, Sandra Day O'Connor, Stephen Breyer, and Anthony Kennedy, are minimalists. *Id.* Sunstein advocates judicial minimalism because "certain forms of minimalism can be democracy-promoting, not only in the sense that they leave issues open for democratic deliberation, but also and more fundamentally in the sense that they promote reason-giving and ensure that certain important decisions are made by democratically accountable actors." *Id.* at 5.

151. Michael Perry argues that "originalism does not entail minimalism, either interpretive minimalism or normative minimalism." MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 9-10 (1994). He further emphasizes that "normative minimalism holds that the [Supreme] Court ought to assume, not the primary responsibility for specifying indeterminate constitutional norms, but only a secondary responsibility, deferring to any 'reasonable' specification implicit in the governmental action under review." *Id.* at 10.

152. ARISTOTLE, NICOMACHEAN ETHICS 1280a:33 (W. D. Ross trans. & rev.'d J. O. Urmson) *in* 2 THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed., rev. Oxford trans. 1984).

to enable individuals to achieve their highest end—happiness (*eudaimonia*).[153] In other words, to live authentically, humans must live in a state which assists them in attaining happiness or the good life, the highest good or end for humans, by participation in democratic self-ruling. The point here is that the judge may continue to cite noncomprehensive extra-legal norms, but eventually, she must justify those norms with a comprehensive or religious conviction about authentic human existence. A full justification of a judge's decision in a hard case cannot avoid this final step. Judges must rely on a comprehensive conviction because comprehensive convictions are the comprehensive condition of all normative judgments and cannot be avoided. Judges must rely either explicitly or implicitly on comprehensive convictions. In the former case, judges can fully justify the extra-legal norm or norms they rely on and the choice among extra-legal norms based on their explicit comprehensive or religious convictions. In the later case, judges must blindly believe in the validity of those extra-legal norms and the comprehensive convictions they imply.

C. *Compassion in Dying v. Washington*

Alternatively, one may respond that a full justification of the Supreme Court's denial of the right at issue required reliance on an understanding of authentic human existence but that the Ninth Circuit merely left the decision of suicide up to the individual.[154] For example, in *Compassion in*

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153. Of course, "the best and most perfect" life is the philosophical life of contemplation, but the political life is the perfect life of action. *See* RICHARD KRAUT, ARISTOTLE ON THE HUMAN GOOD 237-44 (1989); *see also* Mark C. Modak-Truran, *Corrective Justice and the Revival of Judicial Virtue*, 12 YALE J.L. HUMAN. 249, 263-70 (2000). In addition, Jean Bethke Elshtain notes that Aristotle excluded certain categories of persons (*e.g.*, women, slaves, mechanics, and laborers) from politics because he did not think they had the rational capacity required for ruling or citizenship. JEAN BETHKE ELSHTAIN, PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT 47 (2d ed. 1993). For example, "Aristotle's women were *idiots* in the Greek sense of the word, persons who either could not or did not participate in the *polis* or the 'good' of public life, individuals without a public voice, condemned to silence as their appointed sphere and condition." *Id.* at 47. Although she rejects Aristotle's particular evaluations of the nature of these categories of persons, she argues that we can still adopt Aristotle's notion of politics as a form of action and his claims about the relationship between the individual good and the good of the state. *Id.* at 53.

154. *See, e.g.*, Ronald Dworkin et al., *Assisted Suicide: The Philosophers' Brief*, N.Y. Rev. Books, Mar. 27, 1997, at 41, 47 (arguing that "any paternalistic justification for an absolute prohibition of assistance to such patients would of necessity appeal to a widely contested religious or ethical conviction many of them, including the patient-plaintiffs, reject"). *But cf.* John H. Garvey, *Control Freaks*, 47 DRAKE L. REV. 1, 8 (1998) (characterizing the notion of freedom offered by the philosophers' brief as "a right to make choices" and arguing that freedoms are better understood as "rights to go in some

Dying, the court quoted *Planned Parenthood v. Casey* for the proposition that "'[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.'"[155] Further, the court claimed that "*Casey* and *Cruzan* provide persuasive evidence that the Constitution encompasses a due process liberty interest in controlling the time and manner of one's death—that there is, in short, a constitutionally recognized 'right to die.'"[156] In its conclusion, the Ninth Circuit also emphasized that

> Those who believe strongly that death must come without physician assistance are free to follow that creed, be they doctors or patients. They are not free, however, to force their views, *their religious convictions*, or their philosophies on all the other members of a democratic society, and to compel those whose values differ with theirs to die painful, protracted, and agonizing deaths.[157]

From these comments, one may infer that the Ninth Circuit did not rely on comprehensive convictions but merely decided that the liberty interests stipulated in the Due Process Clause provide a legal noncomprehensive norm supporting the autonomy of individuals to decide these matters.

However, the court declared that *Planned Parenthood v. Casey*[158] and *Cruzan v. Director, Missouri Department of Health*[159] provide "evidence" for their conclusion rather than stating they logically entail this conclusion.[160] Neither case addressed the question of whether citizens possess a right to have a physician assist in a patient's death or suicide (i.e., active euthanasia). *Casey* reaffirmed the "essential holding of *Roe v. Wade*" that abortion cannot be legally prohibited in the first trimester.[161] *Cruzan* held that competent patients (including incompetent patients who have expressed a clear and convincing intent against unwanted medical treatment before becoming incompetent) have a liberty interest in refusing unwanted medical treatment and that this

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ways and not others," protecting "childbirth but not abortion, religion but not atheism, life but not death").

155. *Compassion in Dying*, 79 F.3d at 813 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851(1992)).

156. *Id.* at 816.

157. *Id.* at 839 (emphasis added).

158. 505 U.S. 833 (1992).

159. 497 U.S. 261 (1990).

160. *Compassion in Dying*, 79 F.3d at 816.

161. *Casey*, 505 U.S. at 846.

includes patients who would otherwise die from withholding medical treatment (i.e., passive rather than active euthanasia).[162] The scope of liberty circumscribed by those cases does not yet reach the right to die with the assistance of a physician. Consequently, extending the rational continuum of liberty from *Casey* and *Cruzan* to support a right to die requires that the court determine that it should be extended.

In other words, the Ninth Circuit had to rely on an extra-legal norm to determine that the protection of liberty in *Casey* and *Cruzan* ought to be extended to include the right to die, and the Supreme Court had to rely on an extra-legal norm to reach the opposite conclusion. The right to die issue has to do with whether individuals ought to be able to determine the time and manner of their own deaths. Bracketing the question of whether the government has any interests that may limit this right, whether an individual ought to be able to make that decision depends on whether one thinks that decision is essential for an individual to live authentically. It requires judges to rely on a particular kind of extra-legal norm—a comprehensive or religious conviction about authentic human existence. Here, a judge cannot even pretend that some noncomprehensive extra-legal norm fully justifies her decisions.

By contrast, assuming this is a case where the law and public reason are indeterminate, Lawrence Solum has argued that the only choice is not to allow judges to rely on "nonpublic grounds, including religious grounds."[163] He proposes the alternative solution that in such cases "[w]e could adopt a principle that a judge may not decide to impose civil or criminal liability on the basis of nonpublic reasons, including religious reasons."[164] However, positing an extra-legal conception of liberty would not fully justify this decision. That conception of liberty would have to be based on comprehensive liberalism[165] or some other comprehensive conviction.

Furthermore, some comprehensive convictions would support granting individuals this liberty, and others would not. For example, two judges holding theistic comprehensive convictions could come to opposite conclusions even though they both view authentic human existence as entailing a proper relationship with God. One judge may maintain that God has the power and the wisdom to determine the best time and manner of our death and that individuals should not have a right to die because God is better able than humans to decide when "it is our

162. 497 U.S. at 277-82.

163. Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083, 1101 (1990).

164. *Id.*

165. *See supra* note 96.

time."[166] For this judge, allowing physician-assisted suicide is akin to legalizing murder. Responding to this judge by claiming that individuals should decide if "murder" is justified, is not a valid response. His rebuttal is that murder is murder, and it is prohibited by law. In other words, positing a notion of liberty as a solution to this case requires justifying that notion of liberty by a different comprehensive conviction. A second judge may answer that God does not have the power to determine the time and manner of our death and that individuals should have the right to die because humans (hopefully with divine guidance) must determine when life has become meaningless (e.g., permanent vegetative state) and death is warranted. Similarly, a third judge could believe that there is no apparent divine influence in the universe (i.e., agnostic or atheistic) and that humans alone (without divine guidance) must determine when life has become meaningless and death is warranted. In all of these cases, the judges had to rely on their religious convictions to determine whether the scope of liberty ought to be extended to include the right to die. No neutral conception of liberty is available. The judges had to decide whether authentic human existence necessitated humans having that right. Thus, the question of what equal liberties citizens ought to have cannot be decided independent of a comprehensive conviction about authentic human existence. The concept of liberty does not float unattached to a comprehensive conviction.[167]

Moreover, the juxtaposition of the these opinions on the same fundamental liberties question helps disclose the necessity of relying on comprehensive convictions for a full justification of the judges' decisions in this case. All the relevant legal norms—the concept of liberty, precedent, legal history, and the method of due process analysis—were indeterminate. To make a decision, the judges had to rely on extra-legal norms to decide which due process method to use, which history was relevant and authoritative, whether prior precedent should be extended to include a right to die or limited to prohibit a right to die, and finally, whether the concept of liberty includes a right to die. In fact, the definition of the legal issue itself depended on extra-legal norms. With respect to the due process method, history, and precedent, the extra-legal norms were noncomprehensive extra-legal norms which in turn required

166. This view is an example of a comprehensive conviction that would have supported the Supreme Court's view of the scope of liberty in *Washington v. Glucksberg*.

167. This is not to deny that people with differing comprehensive convictions might agree on a particular conception of liberty, each believing that her or his comprehensive conception justifies it. As indicated here, both a theistic and atheistic position could support recognizing a right to die. In Sunstein's terms, there could be an "incompletely theorized agreement" on this conception of liberty by different comprehensive convictions. *See infra* note 385 and accompanying text.

justification by a comprehensive or religious conviction. With respect to the concept of liberty, the extra-legal norm required was a comprehensive or religious conviction about authentic human existence. No noncomprehensive extra-legal norms were required. The indeterminacy of the concept of liberty went directly to bedrock comprehensive or religious convictions. The juxtaposition of these opinions also makes evident the reenchantment of the law both for courts that may embrace the religionist-separationist model (the Ninth Circuit) and for those that adopt the separationist model (the Supreme Court). As a result, these opinions graphically corroborate the religionist-separationist model by revealing the logical necessity of relying on comprehensive or religious claims about authentic human existence for fully justifying judges' decisions, at least in this hard case.

VI. FULLY JUSTIFYING *LYNG V. NORTHWEST INDIAN CEMETERY PROTECTIVE ASS'N*

One may concede that an exceptionally hard case about the right to die requires judges to rely on comprehensive or religious convictions but deny that this is also true of other hard cases. Some may argue that there is substantial consensus about certain noncomprehensive extra-legal norms and that judges can rely on this consensus to avoid fully justifying these norms in terms of their own comprehensive or religious convictions. To address this possible objection to the religionist-separationist model of judicial decision making, I will briefly consider the role of noncomprehensive extra-legal norms in *Lyng v. Northwest Indian Cemetery Protective Ass'n*[168] and demonstrate that fully justifying these extra-legal norms requires judges to rely on religious convictions.

In *Lyng*, the Supreme Court characterized the central issue as "whether the First Amendment's Free Exercise Clause prohibits the Government from permitting timber harvesting in, or constructing a road through, a portion of a National Forest that has traditionally been used for religious purposes by members of three American Indian tribes in northwestern California."[169] The district court and the Ninth Circuit held that this use of public land would violate the Native Americans' free exercise of religion, and the Supreme Court reversed.[170] The Court held that "[w]hatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all, *its* land."[171] Writing for the majority, Justice O'Connor found that

168. 485 U.S. 439 (1988).
169. *Id.* at 441-42.
170. *Id.* at 443-44.
171. *Id.* at 453.

this road and timber harvesting may have an "extremely grave" impact on the efficacy of these religious rituals, which are site specific, and may even "'virtually destroy . . . the Indians' ability to practice their religion.'"[172] Despite this finding, Justice O'Connor held that the incidental effects, no matter how severe, on the Native American religious practices did not support a free exercise claim requiring the government to demonstrate a compelling governmental interest in completing the road and engaging in timber harvesting.[173] In other words, Justice O'Connor maintained that the Free Exercise Clause does not mean an individual's religious practices are protected from incidental impact by governmental activity.[174] Rather, it only protects individuals from governmental activity that directly prohibits the free exercise of religion by coercing "individuals into acting contrary to their religious beliefs" or from governmental activity which results in "indirect coercion or penalties."[175] For example, Justice O'Connor noted that "a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions."[176] Consequently, because it did not prohibit the Native Americans from visiting that area, the Government did not violate the Native Americans' free exercise rights, and the Government had the right to use its land for its own purposes despite the negative impact on Native American religious practices.[177]

Conversely, Justice Brennan's dissent maintains that "[i]n the final analysis, the Court's refusal to recognize the constitutional dimension of respondents' injuries stems from its concern that acceptance of respondents' claim could potentially strip the Government of its ability to manage and use vast tracks of federal property."[178] For instance, Justice O'Connor emphasizes that if the Native Americans' free exercise claim was recognized, they could try to "exclude all human activity but their own from sacred areas of the public lands" and "that such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property."[179] In other words, the Court's decision is best understood as an attempt to protect the Government's right to use and enjoy its property in whatever manner it desires rather than as a endeavor to attenuate the Native Americans' free exercise

172. *Id.* at 451.
173. *Id.* at 450-51.
174. *Id.*
175. *Id.*
176. *Id.* at 453.
177. *Id.* at 450-53.
178. *Id.* at 473 (Brennan, J., dissenting).
179. *Id.* at 452-53.

rights. The priority of the Government's property rights over the Native Americans' free exercise rights thus derives more from Justice O'Connor's conception of property rights than from her interpretation of the Free Exercise Clause.

Justice O'Connor's opinion suggests that property law cannot accommodate the Native Americans' use of Chimney Rock for religious rituals without leading to an erosion of the government's property rights. Rather than reflecting the flexibility of the law of property, Justice O'Connor's opinion posits an absolute notion of property rights. To the contrary, property law recognizes many limitations on and interferences with the use of land. For example, nuisance law prohibits operating a cattle feeding operation near a city because this interferes with other's use and enjoyment of their property.[180] In addition, easements constitute "[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose."[181] For instance, an access easement provides a right to ingress and egress across the property of another to access a street appurtenant to that property.[182] As indicated by these examples, the legal definition of property rights does not provide property owners with an absolute right to use their land without regard for the rights of others. In some cases, property owners must allow others to use their land, but this use does not eradicate their right to use their land for other purposes. In this respect, Justice Brennan recognizes that "the competing claims that both the Government and Native Americans assert in federal land are fundamentally incompatible."[183] He argues that the Court should have adopted a balancing approach to adjudicate the competition between the government's ability to manage federal land and the Native Americans' site-specific religious practices.[184] He also notes that prior to this case, this balancing approach was followed by several U.S. Circuit Courts of Appeal and that it supported recognition of the free exercise rights of Native Americans to use public land for religious rituals if the public land

180. *See, e.g.*, Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972) (en banc) (enjoining cattle feeding operation that interfered with the use and enjoyment of retirement community property owners).

181. BLACK'S LAW DICTIONARY 527 (7th ed. 1999).

182. *Id.* With respect to *Lyng*, Chip Lupu has argued that "[t]he undisputed facts and the government's own investigation in Lyng strongly support the conclusion that the Indian tribes and their members would have had a strong easement claim against a private landowner. . . ." Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 973 (1989).

183. *Lyng*, 485 U.S. at 474 (Brennan, J., dissenting).

184. *Id.* at 475.

was shown to be "'central' or 'indispensable' to their religious practices."[185]

These conflicting interpretations of the nature and priority of the government's property rights and the Native Americans' free exercise rights indicate that neither the law governing real property nor the law concerning the free exercise of religion provided a clear resolution to this case. Because the law was indeterminate, the Justices had to rely on extra-legal norms to determine whose rights had priority. Consequently, Justice O'Connor relied on an extra-legal norm or norms to justify her absolute notion of property rights and the resulting priority of the government's property rights over the Native Americans' free exercise rights. The categorical nature of her statement of these property rights suggests that she thinks there is substantial social consensus about the extra-legal norms supporting these property rights and their position of priority.

To the contrary, Justice Brennan's dissent clearly demonstrates in two ways that this posited consensus does not exist and that the Justices had to rely on comprehensive convictions to justify the priority of the government's property rights over the Native Americans' free exercise rights. First, Justice Brennan maintains that "the Court's concern that the claims of Native Americans will place 'religious servitudes' upon vast tracts of federal property cannot justify its refusal to recognize the constitutional injury respondents will suffer here."[186] He rejects the majority's narrow reading of the Free Exercise Clause and argues that "religious freedom is threatened no less by governmental action that makes the practice of one's chosen faith impossible than by governmental programs that pressure one to engage in conduct inconsistent with religious beliefs."[187] Justice Brennan then declares that building a road of "marginal and speculative utility," is not a compelling governmental purpose justifying the infringement on Native Americans' free exercise rights.[188] He concludes that the Native Americans' free exercise rights support a superior claim on the Chimney Rock area of the public land than the government's property rights.[189] Contrary to the majority's perceived consensus, Justice Brennan and the lower courts reject the extra-legal property right norms relied on by the majority, and they argue for the priority of the Native Americans' free exercise rights over the government's property rights.[190]

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185. *Id.* at 473.
186. *Id.* at 476.
187. *Id.* at 468.
188. *Id.* at 476.
189. *Id.*
190. *Id.* at 477.

In addition, Justice Brennan notes that "this case . . . represents yet another stress point in the longstanding conflict between two disparate cultures—the dominant Western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred."[191] Normally, the noncomprehensive extra-legal property norms embraced by the consensus in the "dominant Western culture" would carry the day. Their general acceptance would make it appear that they were "fully justified" independently of comprehensive convictions. Despite this appearance, the "conflict of cultures" reveals that the extra-legal property norms depend on substantially different comprehensive convictions. Justice Brennan's other comments help clarify the dramatic difference that these comprehensive convictions make:

> As the Forest Service's commissioned study, the Theodoratus Report, explains, for Native Americans religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life "is in reality an exercise which forces Indian concepts into non-Indian categories." Thus, for most Native Americans, "[t]he area of worship cannot be delineated from social, political, cultur[al], and other areas o[f] Indian lifestyle." A pervasive feature of this lifestyle is the individual's relationship with the natural world; this relationship, which can accurately though somewhat incompletely be characterized as one of stewardship, forms the core of what might be called, for want of a better nomenclature, the Indian religious experience. While traditional Western religions view creation as the work of a deity "who institutes natural laws which then govern the operation of physical nature," tribal religions regard creation as an on-going process in which they are morally and religiously obligated to participate. Native Americans fulfill this duty through ceremonies and rituals designed to preserve and stabilize the earth and to protect humankind from disease and other catastrophes. Failure to conduct these ceremonies in the manner and place specified, adherents believe, will result in great harm to the earth and to the people whose welfare depends upon it. . . . *Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land.* The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being. Rituals are performed in prescribed

191. *Id.* at 473.

> locations not merely as a matter of traditional orthodoxy, but because land, like all other living things, is unique, and specific sites possess different spiritual properties and significance. Within this belief system, therefore, land is not fungible; indeed, at the time of the Spanish colonization of the American Southwest, "all . . . Indians held in some form a belief in a sacred and indissoluble bond between themselves and the land in which their settlements were located."[192]

Without getting into the specifics of the variance among "traditional Western religions" and "Native American faiths," Justice Brennan's observations bring to light that this "conflict between two cultures" signals that the judges had to rely on a particular type of extra-legal norm—a comprehensive or religious conviction about authentic human existence—to justify their decisions fully.[193]

Although a full account of this dispute would consider both the judicial justification of property rights and the free exercise rights,[194] I will only

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192. *Id.* at 459-61 (emphasis added) (citations omitted).

193. Howard Vogel has characterized the kind of disputes found in *Lyng* as "*cultural conflicts* between communities, arising from a *clash between master stories*, which inform the identity and understanding of the peoples who are the parties to these disputes, rather than simply as disputes involving conflict between individual rights and government power." Howard J. Vogel, *The Clash of Stories at Chimney Rock*, 41 SANTA CLARA L. REV. 757, 759 (2001).

194. A full analysis would further show that the judges' interpretations of the Establishment Clause of the First Amendment also depend on their religious or comprehensive convictions. For example, Winnifred Fallers Sullivan has argued that Chief Justice Burger's and Justices O'Connor's and Brennan's religious beliefs were central to their interpretations of whether the crèche in *Lynch v. Donelly*, 465 U.S. 668 (1984), was sacred or secular. WINNIFRED FALLERS SULLIVAN, PAYING THE WORDS EXTRA: RELIGIOUS DISCOURSE IN THE SUPREME COURT OF THE UNITED STATES 80, 121, 135 (1994). According to Sullivan, "[r]eligion, is for Burger, a Norman Rockwell-Hallmark card kind of sentiment; therefore, acknowledging and accommodating are very much the same thing and are equally harmless. The American religion Burger wishes to accommodate seems to lack all depth, danger, and particularity. He cannot see the crèche as more than another form of tinsel." *Id.* at 87. Burger accommodates "a religion with no difference, no otherness. In doing so, he attempts to collapse the sacred and the secular into one category." *Id.* at 89. Sullivan further maintains that "O'Connor is concerned about discriminatory activity on the part of government, not about religion." *Id.* at 122. Sullivan argues that "O'Connor, like Black, thinks that the only religion the Supreme Court should be protecting is the religion of the Constitution . . . . For her, it seems, religion *as* religion is irrelevant in the political community . . . . Whereas Burger's opinion tends to trivialize religious symbols, O'Connor's simply ignores them, as religion." *Id.* at 126. On the other hand, Sullivan argues that "Justice Brennan's reading of the crèche is . . . analogical and characteristically Catholic, and therefore necessarily in sharp contrast to that of the Protestant justices." *Id.* at 147. Moreover, she claims that "Burger, a Protestant, defends the cultural domination of Protestantism while Brennan, a Catholic, lines up with Jefferson and the eighteenth-century Baptists in support of religion being a private matter and in support of the separation of church and state." *Id.* at 156.

focus on how a full justification of the judges' extra-legal beliefs about property rights and their priority over the Native Americans' free exercise rights requires them to rely on comprehensive convictions. For example, the Native American conception of property as a unique living thing that is "sacred" would not support a view of property rights based on possession and individual ownership. If land has sacred significance for rituals that "preserve and stabilize the earth and protect humankind from disease and other catastrophes,"[195] granting ownership to someone would put the well-being of humankind at the whim of this individual. Without access to this land, the earth and all humankind could suffer greatly because of one person's careless, malicious, or foolish actions. In this case, granting individual ownership of this land and granting priority of that ownership over the use of the land for Native American religious rituals would be inconceivable.

Likewise, the claim that property rights are independent of religious or comprehensive convictions even in hard cases relies on a comprehensive conviction. For instance, the judge could claim that property law is a rational determination of rights and must be separate from all comprehensive convictions because they are nonrational. This claim depends on comprehensive evaluation of all comprehensive convictions as nonrational, which is equivalent to a comprehensive conviction. This position is incoherent because it relies on a comprehensive conviction while at the same time denying that rational comprehensive reflection is possible.[196]

Alternatively, the judge could rely on a more traditional religious or comprehensive conviction like those found in the Christian tradition. In the Christian tradition, individual ownership of property is generally recognized as legitimate. For example, St. Thomas Aquinas contends that "man has a natural dominion over external things, because, by his reason and will, he is able to use them for his own profit, as they were made on his account" by God.[197] He further maintains that "it is lawful for man to possess property" and that "there is a division of possessions, not according to the natural law, but rather according to human agreement, which belongs to positive law. Hence, the ownership of possessions is not contrary to the natural law but an addition thereto

195. *See Lyng*, 485 U.S. at 460.

196. For a more complete argument supporting this conclusion, see my critique of the claims that the law can be rationally justified independently of religious convictions in hard cases made by Habermas, Rawls, Greenawalt, and Perry. *See infra* Part VII.B; *see also* MODAK-TURAN, REENCHANTING THE LAW, *supra* note 17, at 42-178.

197. St. Thomas Aquinas, *Summa Theologica*, II-II, q. 66, a. 1, *in* SAINT THOMAS AQUINAS, ON LAW, MORALITY AND POLITICS 177 (William P. Baumgarth & Richard J. Regan, S.J. eds., 1988).

devised by human reason."[198] In addition, real property is part of God's good creation over which humans have dominion, and it is not typically considered sacred in the sense of being the location of the divine.[199] Because property is not viewed as sacred, allowing individuals to possess and own land would not likely prohibit or interfere with any sacred functions that are considered central to authentic human existence. Consequently, based on a Christian religious conviction, individual property right disputes could likely be adjudicated independently of religious or comprehensive convictions.

However, this proves my point because it explicitly depends on a religious conviction about authentic human existence. The conflict between the government's property rights and the Native American's free exercise rights makes this a hard case. This conflict puts the scope of property rights and free exercise rights into question. This conflict could only be eliminated by relying on extra-legal norms regarding the scope of these rights. Fully justifying those extra-legal norms and choosing among them requires relying on a religious conviction. Mere reliance on a perceived social consensus about extra-legal property right norms would mean that the judge *merely believed or had faith* that those norms and the priority they determined were fully justified. Further, the perceived social consensus may be illusory or wrong like the so-called social consensus supporting slavery. The extra-legal property right norms in question may not be fully justified. They could be based on an unwarranted social custom that cannot be fully justified or that implies a false comprehensive conviction. To ensure that these extra-legal property rights norms were fully justified, judges must rely on their religious convictions to fully justify those norms for themselves. This is the only way they will know that the extra-legal norms are fully justified, that they warrant priority, and that they are based on what the judge has determined to be a true religious conviction. A so-called social consensus will not do; it merely begs the question of justification.

Justice Brennan's opinion thus helps reveal how these different comprehensive or religious convictions justified very different extra-legal norms relating to property rights and a different determination of

198. St. Thomas Aquinas, *Summa Theologica*, II-II, q. 66, a. 2, *in id.* at 179. Aquinas argues that the "natural law is nothing else than the rational creature's participation of the eternal law." St. Thomas Aquinas, *Summa Theologica*, I-II, q. 91, a. 2, *in supra* note 1, at 750. Through natural law (right reason), human's have an objective link to the eternal law (the mind of God). Because God is the Supreme ruler of the universe, natural law thus acts as a check on the human laws promulgated in a particular state; it is the standard for determining their validity.

199. Further, if this view of religion is taken as normative for an interpretation of the Free Exercise Clause, the judge may find it harder to recognize the legitimacy of the Native American claim that land is sacred.

whether those property rights outweighed the Native Americans' free exercise rights. Contrary to the majority's reliance on a perceived consensus, this case was a hard case. The posited social consensus on extra-legal norms about property rights was not sufficient for fully justifying the majority's decision in this case. The "conflict between two cultures" helped disclose that judges must always rely on explicit comprehensive or religious convictions in deliberating about hard cases to fully justify their decisions.

VII. THE SECULAR PURPOSE OBJECTION

Another likely objection to relying on religious convictions for fully justifying judges' decisions in hard cases is that this practice seems contrary to the widely-shared assumption in pluralist democratic countries, like the United States, that the law should have a secular justification or purpose. I will refer to this objection as the "Secular Purpose Objection" and show that it actually constitutes two possible objections that are often confused. If taken more generally, the Secular Purpose Objection maintains that the law should have a rational justification even in hard cases. Because religion is presumed by many to be nonrational, a rational justification of law must be "secular" or independent of comprehensive convictions. This presents a philosophical objection to the religionist-separationist model of judicial decision making because it asserts the rational autonomy of law.

Alternatively, the Secular Purpose Objection constitutes a legal objection that the Establishment Clause of the First Amendment prohibits judges from relying on religious convictions to justify their decisions in hard cases. The Supreme Court has required that laws have a secular purpose to withstand an Establishment Clause challenge. The following discussion, however, shows that the Supreme Court Establishment Clause jurisprudence fails to support the legal objection so that the Secular Purpose Objection is primarily a philosophical, rather than a legal, objection. I will address both of these forms of the Secular Purpose Objection in turn.

A. The Legal Objection

In *Lemon v. Kurtzman*,[200] the Supreme Court specified three tests (collectively referred to as the *Lemon* test) that all must be met for a statute to pass an Establishment Clause challenge: "First, the statue must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, [and] finally, the statue must not foster 'an excessive government entanglement with

200. 403 U.S. 602 (1971).

religion.'"[201] Although the Court has not formally repudiated the *Lemon* test, "[a] majority of the justices sitting in 2003 have criticized it, and it has not been relied on by a majority to invalidate any practice since 1985."[202] For instance, both Chief Justice Rehnquist and Justice Scalia have advocated abandoning the *Lemon* test and, in particular, have severely criticized the secular purpose prong.[203]

In place of the *Lemon* test, many of the Justices have embraced the "endorsement test," which was originally proposed by Justice O'Connor in her concurring opinion in *Lynch v. Donnelly*.[204] The endorsement test has two prongs: 1) the "purpose prong . . . asks whether government's actual purpose is to endorse or disapprove of religion;" and 2) "[t]he effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or

201. *Id.* at 612-13.

202. GEOFFREY R. STONE, ET AL., THE FIRST AMENDMENT 541 (2d ed. 2003).

203. *See* Wallace v. Jaffree, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting) (criticizing the *Lemon* test and arguing that "[t]he secular purpose prong has proven mercurial in application because it has never been fully defined, and we have never fully stated how the test is to operate"). In his dissenting opinion in *Edwards v. Aguillard*, Justice Scalia contended that the secular purpose prong should be abandoned and argued that "discerning the subjective motivation of those enacting the statue is to be honest, almost always an impossible task." Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting). Scalia further maintained that there was "relatively little information upon which to judge the motives of those who supported the Act," and that it was not clear what source of the legislators intent should be controlling. *Id.* at 619, 637-38. He also declared that it is not clear "how *many* of them must have the invalidating intent" and suggested that an invalid intent by the bill's sponsor may be enough. *Id.* at 638. Moreover, he argued that "[t]o look for *the sole purpose* of even a single legislator is probably to look for something that does not exist." *Id.* at 637. Scalia noted that a legislator in that case may have voted for several reasons such as fostering religion or education, providing "jobs for his district," responding to "a flood of constituent mail," or "accidentally voted 'yes' instead of 'no,' or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations." *Id. But see* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 143 (1992) (arguing that "it would be unprincipled to abandon the purpose prong of the *Lemon* test on these grounds if the Court intends to inquire into legislative purpose in other contexts").

204. 465 U.S. 668 (1984). Just five years later, a majority of the Justices applied the endorsement test in their analysis of whether a crèche in the county courthouse and a menorah in front of a city-county building constituted an establishment of religion. County of Allegheny v. ACLU, 492 U.S. 573, 579 (1989) (holding that the crèche violated the Establishment Clause but that the menorah did not). Most recently, all the members of the Court have explicitly applied the endorsement test or joined in opinions applying the test. *See* Mitchell v. Helms, 530 U.S. 793, 801 (2000) (holding that lending educational materials and equipment to public and private schools (including parochial school) does not violate the Establishment Clause).

disapproval."[205] With respect to the purpose prong, Justice O'Connor has argued that "the secular purpose requirement alone may rarely be determinative in striking down a statute" but that "[i]t reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share."[206] Consequently, under both the *Lemon* test and the endorsement test, a likely legal objection to the religionist-separationist model of judicial decision making is that judges fail to have a secular purpose for their decisions if they fully justify them by relying on religious convictions.

Based solely on the text of the Establishment Clause, an argument could be made that it only applies to Congress and not the Judicial and Executive Branches. The text of the First Amendment provides that "Congress shall make no law respecting an establishment of religion."[207] If the Establishment Clause only applies to Congress, then there is no legal issue regarding judges' reliance on religious convictions in hard cases. No secular purpose would be required. Michael Perry has argued to the contrary that the Establishment Clause is considered "constitutional bedrock," which means it is hard to imagine that it would not apply to all branches of the federal and state governments.[208] Also, the Fourth Circuit has held that a state judge's practice of beginning court sessions with a prayer violated the Establishment Clause.[209] For my purposes, I will assume that the Establishment Clause will apply to federal and state court judges and demonstrate how the secular purpose requirement fails to prohibit judges from relying on religious convictions in their deliberations about hard cases.

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205. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (arguing that "[t]he endorsement test is useful because of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect).

206. *Wallace*, 472 U.S. at 75-76 (O'Connor, J., concurring).

207. U.S. Const. amend I.

208. PERRY, RELIGION IN POLITICS, *supra* note 30, at 12. Also, some may argue that the First Amendment only applies to the Federal government and that state judges will not be affected even if it applies to federal judges. To the contrary, the Supreme Court has incorporated and applied the First Amendment to the action of states through the Due Process Clause of the Fourteenth Amendment. Everson v. Bd. of Educ., 330 U.S. 1 (1947) (applying the Establishment Clause of the First Amendment to a New Jersey law authorizing local school boards to repay parents for the cost of their children's bus transportation to private schools). Although some scholarly debate still occurs on this issue, the Supreme Court is unlikely to overrule the years of precedent applying the Establishment Clause to the states. *See* PERRY, RELIGION IN POLITICS, *supra* note 30, at 12.

209. N.C. Civil Liberties Union Legal Found. v. Constangy, 947 F.2d 1145 (4th Cir. 1991); *see also* Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003). The Eleventh Circuit held that "religion clauses of the First Amendment apply to all laws, not just those enacted by Congress," including actions taken by judges such as displaying a two-and-one-half ton monument of the Ten Commandments. *Id.* at 1284, 1293.

There are several reasons for this conclusion. First, in the application of the Establishment Clause to legislative enactments, only four Supreme Court cases have based their decisions on the grounds that the statute in question was invalid because it lacked a secular purpose.[210] None of these cases suggests that the Court would find a problem with judicial reliance on religious convictions in their deliberations about hard cases. For instance, all these cases dealt with the sensitive context of public elementary and secondary schools. The Court in *Edwards v. Aguillard*[211] emphasized that in applying the *Lemon* test "we must do so mindful of the particular concerns that arise in the context of public elementary and secondary schools."[212] In this respect, the Court noted that "[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure."[213] In addition, these cases involved statutes advancing or protecting explicit religious teachings (e.g., the Ten Commandments and Creation Science) or religious practices (e.g., meditation or voluntary prayer).[214] By contrast, the reliance on religious convictions in judicial deliberation does not present the kinds of concerns arising from teaching explicitly religious material to children or facilitating their performance of religious practices in public schools. If judges refrain from citing religious sources or arguments in their opinions, their opinions cannot religiously indoctrinate citizens or in anyway facilitate a religious practice.

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210. Edwards v. Aguillard, 482 U.S. 578, 591 (1987) (holding unconstitutional Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act" because "[t]he preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind"); Wallace v. Jaffree, 472 U.S. 38, 40, 61 (1985) (holding unconstitutional Alabama's statute providing for a period of silence for "meditation or voluntary prayer" because the law lacked a secular purpose); Stone v. Graham, 449 U.S. 39, 39-41 (1980) (holding that a Kentucky statute requiring the posting of Ten Commandments on the wall of each public school classroom in the State unconstitutional because it had a "pre-eminent" religious purpose); Epperson v. Arkansas, 393 U.S. 97, 103 (1968) (holding unconstitutional an Arkansas statute prohibiting the teaching of evolution in public schools and universities because the "sole reason" for the anti-evolution law was "that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group").

211. 482 U.S. 578, 591 (1987)

212. *Id.* at 585.

213. *Id.* at 584. In *Lee v. Weisman*, the Court similarly stressed that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary schools." 505 U.S. 577, 592 (1992) (holding unconstitutional the practice of clergy invocations and benedictions at middle and high school graduations).

214. *See supra* note 210.

Moreover, Michael McConnell has argued that except for *Wallace v. Jaffree*,[215] "the Court would likely have found the statutes unconstitutional on other grounds if it had not used the purpose test."[216] In *Wallace*, the Court found an Alabama statute providing for a period of silence for "meditation or voluntary prayer" unconstitutional because "[t]he sponsor of the bill that became § 16-1-20.1, Senator Donald Holmes, inserted into the legislative record—apparently without dissent—a statement indicating that the legislation was an 'effort to return voluntary prayer' to the public schools."[217] It is hard to imagine that *Wallace* could be found applicable to a judicial decision unless the judge explicitly referred to a religious source or argument in her opinion. In that case, she would not be following the religionist-separationist model but the religionist model of judicial decision making. Therefore, Supreme Court precedent provides little basis for maintaining that the religionist-separationist model of judicial decision making will violate the Establishment Clause.[218]

Nevertheless, one might argue that courts will not be fooled by the partial justification in judges' opinions and that courts will find these opinions to be merely a "sham" attempting to conceal the "predominant religious purpose" for the judges' decisions. The Court has required that the secular purpose be "sincere" and not merely "a sham secular purpose" to avoid an Establishment Clause violation.[219] Even so, the Court held in *Edwards* that "[a] religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate."[220] In that case, the Louisiana legislature's stated purpose for the Balanced Treatment for Creation-Science and Evolution-Science

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215. 472 U.S. 38 (1985).

216. McConnell, *Religious Freedom at a Crossroads*, *supra* note 203, at 145.

217. 472 U.S. at 56-57. Senator Holmes also stated in his testimony before the District Court that: "No, I did not have no other purpose in mind." *Id.* at 57.

218. *Cf.* McConnell, *Religious Freedom at a Crossroads*, *supra* note 203, at 145. (arguing that "[s]ituations in which the legislature lacks *any* secular justification for its actions are rare, and in the vast majority of cases the Court has found the purpose prong easily satisfied").

219. *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring).

220. *Edwards*, 482 U.S. at 599; *see also Wallace*, 472 U.S. at 56 (stating that "the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion"); *Lynch*, 465 U.S. at 680 (emphasizing that "[t]he Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations"). *Cf.* THOMAS C. BERG, THE STATE AND RELIGION IN A NUTSHELL 245 (1998) (arguing that *Edwards, Wallace*, *Stone*, and other cases "have not come to stand for the broad principle that a religious motivation for a law is enough to make the law unconstitutional" but for the principle "that only if a law has no significant secular purpose whatsoever does it flunk the first part of the *Lemon* test—even if legislators may also be intending to help religion").

in Public School Instruction Act was to "protect academic freedom."[221] The Court rejected this stated purpose and upheld the "Court of Appeals' conclusion that the Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting 'evolution by counterbalancing its teaching at every turn with the teaching of creationism.'"[222] The key difference between this statute and a judicial opinion is that the statute promotes the teaching of an explicit religious doctrine—creation science. The predominant religious purpose was quite evident because the issue being litigated involved the question of whether the State of Louisiana could promote an explicit religious teaching. Accordingly, the courts are unlikely to find a judge's opinion a sham because the issue being litigated will rarely involve the question of an explicit religious teaching.

For instance, in most hard cases like *Washington v. Glucksberg*,[223] the central issue will have nothing to do with a specific religious teaching but rather will involve issues such as whether terminating human life with the aid of a physician is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.[224] In *Glucksberg*, there were significant secular purposes justifying either prohibiting the right to die, such as the protection of human life, or acknowledging the right to die, such as the protection of individual liberty.[225] The Court also had two key legal precedents, *Planned Parenthood v. Casey*[226] and *Cruzan v. Director, Missouri Department of Health*,[227] that provided secular justifications for determining the scope of liberty under the Due Process Clause. Both the Supreme Court and the Ninth Circuit further found significant secular purposes in the history of either the legal prohibition of physician-assisted suicide[228] or the decriminalization of suicide.[229] Consequently, even in extremely hard cases like *Glucksberg*, courts will always, or nearly always, have several significant secular purposes to justify their decisions so that judicial opinions will rarely, if ever, be held to posit a sham secular purpose.

Another Supreme Court case rejecting a stated secular purpose, *Stone v. Graham*,[230] further supports the unlikely finding that a judicial opinion

221. *Edwards*, 482 U.S. at 586.
222. *Id.* at 589.
223. 521 U.S. 702 (1997).
224. *See Glucksberg*, 521 U.S. at 702, 705-06.
225. *Id.* at 719-21, 728.
226. 505 U.S. 833 (1992).
227. 497 U.S. 261 (1990).
228. *Glucksberg*, 521 U.S. at 710.
229. *Compassion in Dying*, 79 F.3d at 810.
230. 449 U.S. 39 (1980).

posits a sham secular purpose. In *Stone*, the statute requiring the display of the Ten Commandments in public schools also required a notation on the display stating that "'[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'"[231] The Court held that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls [was] plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."[232] A judge following the religionist-separationist model, however, would not explicitly cite religious texts like the Ten Commandments in her opinion. She would cite legal precedents, the U.S. Constitution, statutes, and public policy. Without an explicit reference to a religious text, there would be no basis to find a preeminent or predominate religious purpose.

This conclusion would likely stand even where the judge's holding coincided with her religious convictions (i.e., her holding would imply her comprehensive conviction). Indeed, in *McGowan v. Maryland*,[233] the Supreme Court rejected the claim that the Establishment Clause is violated by "federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."[234] The Court further emphasized that:

> In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.[235]

Even though the Sunday closing law originally had a religious origin, the Court then rejected the Establishment Clause challenge because having "a uniform day of rest" was a significant secular purpose for such a law.[236]

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231. *Id.* at 40 n.1.

232. *Id.* at 41.

233. 366 U.S. 420 (1961).

234. *Id.* at 442.

235. *Id.*

236. *Id.* at 445. *Cf.* Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J. L. & PUB. POL'Y 1, 2 (2002) (arguing that the case law and doctrines that comprise contemporary Establishment Clause jurisprudence support his claim "that laws that are discernibly informed by religious moral premises" generally do not, by that fact alone, violate the First Amendment).

Harris v. McRae[237] presented a similar challenge to the Hyde Amendment, which prohibits federal Medicaid funds for most abortions. The plaintiffs argued that "the Hyde Amendment violates the Establishment Clause because it incorporates into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences."[238] The Court held that the Hyde Amendment could just as well be "a reflection of 'traditionalist' values towards abortion" and that mere coincidence with Roman Catholic religious tenets, "without more," does not constitute an Establishment Clause violation.[239]

Similarly, in his dissenting opinion in *Bowers v. Hardwick*,[240] Justice Blackmun suggested that Georgia's anti-sodomy law violated the Establishment Clause because it lacked a justification "beyond its conformity to religious doctrine."[241] Although the case focused primarily on the question of whether the Due Process Clause protects homosexual sodomy as a fundamental right, the State of Georgia's arguments and Chief Justice Burger's concurring opinion supported Blackmun's suggestion. The State of Georgia invoked "Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages" in support of the anti-sodomy law.[242] Chief Justice Burger similarly claimed that the anti-sodomy law was "firmly rooted in Judaeo-Christian moral and ethical standards."[243] To the contrary, the majority held that the law was based on "ancient roots" in the common law, which

237. 448 U.S. 297 (1980).

238. *Id.* at 319.

239. *Id.* at 319-20. By contrast, Justice Stevens stated in his dissent in *Webster v. Reproductive Health Services* that a Missouri law regulating abortion was unconstitutional for various reasons including a violation of the Establishment Clause. Webster v. Reproductive Health Servs., 492 U.S. 490, 566 (1989). He argued that "the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution." *Id.* Rather than maintaining that this statement merely coincided with certain religious tenets or that legislators were motivated by religious considerations, he maintained "that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause." *Id.* at 566-67. This may serve as a warning that judges should avoid taking positions on matter such as when life begins or ends. As indicated in Part V, these are essentially religious questions and unnecessarily answering them may lead judges to make their implicit comprehensive convictions needlessly explicit.

240. Bowers v. Hardwick, 478 U.S. 186 (1986) (Blackmun, J., dissenting).

241. *Id.* at 211.

242. *Bowers*, 478 U.S. at 211.

243. *Id.* at 196 (Burger, J., concurring).

constituted a rational basis for the law.[244] Moreover, consistent with its holding in *McGowan*, the Supreme Court has never held that a law violated the Establishment Clause merely because it coincided with the religious tenets of a particular religion. As a result, it remains highly unlikely that a judicial opinion will be found unconstitutional if judges fully justify their decisions in hard cases by relying on religious convictions in their deliberations so long as they do not explicitly set forth those religious convictions in their opinions.

Given this Supreme Court precedent, the religionist-separationist model of judicial decision making can help perform the task of clarifying the secular purpose prong. Because all judicial decisions imply a comprehensive conviction, the secular purpose prong cannot mean that judicial decisions must not be based on a comprehensive conviction. Even in easy cases, existing law implies a comprehensive conviction or convictions but does not require judges to rely on those convictions for a full justification of their decision. The prohibition against murder is a good example. Approaching a stranger and killing him without any cognizable legal defense (e.g., self-defense or insanity) is clearly prohibited by the criminal laws of every state. As *McGowan* points out, the legal prohibition of murder implies many comprehensive justifications.[245] The criminal law, however, does not reference the Christian Bible, the Torah, or the Koran. The possible comprehensive justifications remain implicit. Requiring that the law have a "secular purpose" thus cannot mean that a law must be capable of prohibiting actions like murder without implying a comprehensive conviction or convictions.

Rather, the secular purpose requirement must mean that the text of the law can only provide a noncomprehensive justification for its requirements. When judges apply the law in easy cases, the law only provides a noncomprehensive justification for judges' decisions. The law implies comprehensive justifications but does not explicitly incorporate those comprehensive justifications into the law. Likewise, even though judges must rely on comprehensive convictions for fully justifying their decisions in hard cases, the law still has a secular purpose if judges resort to only noncomprehensive norms to explain their decisions in their written opinions. As in easy cases, their opinions only imply comprehensive justifications. In other words, the text of the law in both easy and hard cases only partially justifies judges' decisions. The key difference between easy and hard cases is that the latter requires judges to provide a full justification of their decisions in their deliberation while

244. *Id.* at 192-96.

245. *McGowan*, 366 U.S. at 442.

the former does not. In both cases, judicial opinions stating only noncomprehensive norms, whether legal or extra-legal, provide a secular purpose for judges' decisions and do not violate the Establishment Clause.

Therefore, the Supreme Court precedent requiring that the law have "a secular purpose" does not appear to present a significant problem for the religionist-separationist model of judicial decision making. Given the weakness of the legal Secular Purpose Objection, the frequent claim that the law must have a secular purpose makes more sense as a philosophical objection than as a legal objection.

B. The Philosophical Objection

My arguments against the philosophical version of the Secular Purpose Objection have included both a theoretical and a practical critique of legal autonomy. With respect to the theoretical critic, I have argued at length elsewhere that the attempts of Jürgen Habermas, John Rawls, Kent Greenawalt, and Michael Perry to preserve the autonomy of the law have failed.[246] Rather than repeat those arguments here, I will briefly summarize their models of judicial decision making and indicate why they are incoherent.

Jürgen Habermas and John Rawls propose versions of the separationist model of judicial decision making and argue that judges' decisions are legitimate only if they are rationally justified independently of their religious or comprehensive convictions. Rawls argues for a non-universal rational justification of the law based on a political conception of justice ("implicit in the public political culture" of a democratic society).[247] He further maintains that this "political and not metaphysical" conception of justice is part of public reason, which provides a justification for constitutional essentials and matters of basic justice.[248] Rawls holds out the U.S. Supreme Court as the "exemplar of public reason" and emphasizes that "[t]he justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally," even when the law is indeterminate.[249] In both the deliberative process and the process of explanation, Rawls asserts that judges should rely solely on the political values of public reason, which

246. For the argument supporting these conclusions about Habermas, Rawls, Greenawalt, and Perry, see references to prior articles and current book contained in *supra* note 17.

247. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 96, at 192.

248. *Id.* at 10.

249. *Id.* at 236, 237.

are independent of any particular comprehensive religious, philosophical, or moral doctrines.[250]

Similarly, Habermas argues for a universal rational justification of the law based on the procedures of the discourse principle (intersubjective rational agreement among all those affected after free and full debate).[251] He maintains that the discourse of application (including both the process of deliberation and explanation) allows for an impartial application of law that is independent of religious or metaphysical worldviews. To determine which valid legal norm is most appropriate in a particular case, Habermas contends that "one must first enter a discourse of application to test whether they apply to a given situation (whose details could not have been anticipated in the justification process) or whether, their validity notwithstanding, they must give way to another norm, namely the 'appropriate' one."[252] The selection of the "single appropriate norm" for a particular situation is what first confers "the determinate shape of a coherent order on the unordered mass of valid norms."[253] Although the coherence among the norms shifts, the answer to the legal issue is derived for the existing norms. The judge is not an interstitial legislator creating new legal norms from extra legal norms. Rather, she searches for the appropriate norm in the system of legal norms and reconstructs that system to make it the best she can in light of her application of the appropriate norm. Thus, both Habermas's and Rawls's separationist models recognize a complete independence between judicial decision making and judges' personal convictions—whether they are comprehensive, religious, political, or moral.

By contrast, Greenawalt and Perry both propose religionist-separationist models of judicial decision making and have been pioneers in taking religion seriously with respect to legal and political issues. Despite their achievements, Greenawalt's and Perry's religionist-separationist models set substantial limits on judges' reliance on religious

250. *Id.* at 139.

251. *See* HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 15, at 103-04. Once the religious and metaphysical worldviews have been eliminated, Habermas argues that "the legitimacy of law ultimately depends on a communicative arrangement: as participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those possibly affected." *Id.* at 104; *see also* 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 261-62 (Thomas McCarthy trans., 1984). Habermas further maintains that the disenchantment of the world eliminated the possibility of an "objective" legitimation of law. Assuming rationality still has some non-subjective meaning, intersubjective agreement must then become the arbiter of legitimation. Legitimation thus occurs from the procedure of coming to a rational intersubjective agreement.

252. Habermas, *Between Facts and Norms*, *supra* note 15, at 217.

253. *Id.*

and comprehensive convictions in hard cases. For example, Greenawalt argues that "shared premises and ways of reasoning have priority and that these will get judges all of the way in the vast majority of cases," but that "on exceptional occasions the indecisiveness of legal and public reasons will be sufficiently apparent to allow a judge to make a self-conscious use of personal convictions [including comprehensive and religious convictions]."[254] On the other hand, he argues that "the [judge's] opinion should symbolize the aspiration of interpersonal reason and be limited to public reasons."[255] He identifies three kinds of shared ways of reasoning or "publically accessible" grounds for political decisions—realist reasons, shared social reasons, and authority reasons (constitutional, legislative, and common law)—that judges should rely on in their opinions and that provide a basis for deciding most legal disputes.[256] Moreover, even if judges can rely on comprehensive convictions in exceptional cases, these comprehensive convictions must not appear in the judicial opinions as the public justification for that decision.

When the relevant legal materials are "underdeterminate," Perry likewise contends that judges must ascertain a persuasive rational secular argument to justify all judicial decisions (except those involving claims about human worth) even though they can simultaneously rely on an optional or auxiliary religious argument that supports the same outcome.[257] Michael Perry maintains that when citizens, legislators, and other public officials (including judges) make political choices about the morality of human conduct, both the nonestablishment norm and political morality dictate that they "should not rely on a religious argument about the requirements of human well-being unless, *in their view*, a persuasive secular argument reaches the same conclusion about those requirements as the religious argument."[258] Perry proposes a more

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254. Greenawalt, *Private Consciences*, *supra* note 30, at 149.

255. *Id.* at 150.

256. *Id.* at 24-32.

257. PERRY, RELIGION IN POLITICS, *supra* note 30, at 102-03. For further analysis of Perry's proposal, see MODAK-TRURAN, REENCHANTING THE LAW, *supra* note 17, at 156-78; Mark C. Modak-Truran, Book Review, 79 J. RELIGION 160 (1999) (reviewing MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES (1997)). Furthermore, it is not clear whether Perry's proposal should be classified as a limited religionist model or as a religionist-separationist model. In either case, he proposes the plausible secular argument constraint on judicial reliance on religious beliefs that parallels the constraints imposed by Rawls and Habermas separationist models. *See supra* note 30 and accompanying text. As noted above, however, Perry has moderated his position on the plausible secular argument requirement. *See supra* note 38.

258. PERRY, RELIGION IN POLITICS, *supra* note 30, at 6 (emphasis added). By contrast, with respect to certain religious arguments about human worth (e.g., that all

expansive role for religious convictions in hard cases than Greenawalt but still maintains that religious arguments about human well-being are optional and secondary to the required persuasive secular arguments.

Rawls, Habermas, Greenawalt, and Perry thus all maintain that judicial decisions can be fully justified independently of judges' comprehensive convictions in all, or almost all, cases. Law has an autonomous rational justification. Religious or comprehensive convictions are not essential for justifying judicial decisions and should in most cases be avoided.

Despite the ideal of an autonomous legal system, all of these models of judicial decision making depend upon particular comprehensive convictions that make their theories incoherent. The models of judicial decision making espoused by Habermas, Rawls, and Greenawalt all ironically presuppose a hidden nonrational comprehensive conviction which makes their models incoherent.[259] Similarly, Perry's persuasive secular argument requirement depends upon his Roman Catholic religious convictions.[260] For the sake of brevity, I will focus only on how Greenawalt's approach demonstrates this incoherence.

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human beings are sacred), Perry argues that these may be relied on by citizens, legislators, and other public officials "*even if*, in their view, no persuasive secular argument supports the claim that all human beings are sacred" without transgressing the nonestablishment norm or political morality. *Id.* at 6, 69.

259. Rawls claims that an objective legitimation of law must be independent of comprehensive doctrines (i.e., based on the political values of public reason) because comprehensive doctrines are nonpublic (i.e., not rational). This claim entails a comprehensive denial of all comprehensive doctrines (moral relativism), which according to Rawls is not possible, and thus results in an incoherent account of judicial decision making. *See* MODAK-TRURAN, REENCHANTING THE LAW, *supra* note 17, at 130-33. Likewise, Habermas discourse theory of justification and application rely on his claim that all comprehensive convictions are not rational and cannot be intersubjectively validated. This claim constitutes a comprehensive evaluation of all comprehensive convictions. However, this claim is self-contradictory because it presupposes (the possibility of rational comprehensive evaluation) what it denies (the possibility of rational comprehensive evaluation). *See id.* at 77-86.

260. Unlike Habermas, Rawls, and Greenawalt, Perry is self-conscious of his comprehensive conviction but fails to realize that his distinction between rational secular arguments and nonrational religious arguments depends on his nonrational Roman Catholic religious convictions. Perry emphasizes that "[t]he paradigmatic religious argument about the requirements of human well-being relies (partly) on a claim about what God has revealed." PERRY, RELIGION IN POLITICS, *supra* note 30, at 73. The implications of this characterization of religious arguments is that religious arguments are finally based on revelation. Perry contrasts religious arguments with secular arguments that are based on reason, but he does not provide a rational secular argument to support this distinction. He contends that this view is accepted by "most religious believers in the United States" and that "[t]he Roman Catholic religious-moral tradition has long embraced that position." *Id.* at 72, 74. This distinction is thus based on Perry's Roman Catholic religious convictions or other religious authority. Consequently, the requirement that judges, as legislators and executives, must have a persuasive secular argument if they

Greenawalt's principle of public accessibility requires that "people should refrain from relying upon all grounds that cannot be reasonably assessed by others, whether or not the grounds are religious, whether or not they are features of comprehensive views, and whether or not they are related to ideas of the good."[261] This distinction between accessible and nonaccessible grounds of political judgment depends upon a comprehensive evaluation of all convictions including comprehensive convictions. This comprehensive evaluation determines the classification of convictions as accessible or nonaccessible and the priority or ordering of the former over the later. Based on this comprehensive evaluation, Greenawalt determines that certain reasons or convictions are accessible or public such as authority reasons, realist reasons, and shared social reasons.[262] In addition, he maintains that other convictions are nonaccessible or private, such as most religious and nonreligious comprehensive convictions.[263] He further argues that even if comprehensive convictions are accessible (formulated in realist terms), they should not usually ground political judgments because of past conflict and persecution, the perception that they are nonaccessible, and the perception that they are prone to error.[264] In effect, comprehensive convictions are all nonaccessible or private.[265] Consequently, like Habermas and Rawls, Greenawalt's claim that comprehensive convictions are all nonaccessible or private is a comprehensive evaluation

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also rely on a religious argument about human well being is based on a nonrational religious conviction (which is based on revelation). For further elaboration on this argument, see MODAK-TRURAN, REENCHANTING THE LAW, *supra* note 17, at 158-59, 170-76.

261. KENT GREENAWALT, PRIVATE CONSCIENCES, *supra* note 30, at 5. He further argues that there are "at least four kinds of views about which the state might be neutral and which perhaps should not figure in political decision and argument: religious views, views about the good life, comprehensive views, and nonaccessible views." *Id.* at 128.

262. *See id.* at 24-32.

263. *Id.* at 39-44.

264. *Id.* at 44-45.

265. This claim, however, is based primarily on Greenawalt's reports that some people think comprehensive convictions are nonaccessible, but he does not give us an argument for why the comprehensive order of reflection is in principle nonaccessible. Apart from assuming a form of moral realism, Greenawalt does not really explain his assertion that comprehensive convictions are nonaccessible. This raises the question of whether the form of moral realism he presupposes is a comprehensive conviction that is implicitly informing this distinction. To the contrary, Greenawalt maintains that accessible realist reasons are not comprehensive reasons. They "apply to morality, that is, questions about the good life and about how we should act toward others," and "they also apply to the structure of political institutions." *Id.* at 27. Unlike comprehensive convictions, they do not provide an overarching philosophy of life or address questions such as the nature and existence of God. On Greenawalt's terms, then, he is not proposing a comprehensive conviction by declaring realist reasons, shared social reasons, and authority reasons as accessible and advocating them as the appropriate grounds for making political judgments.

of all comprehensive convictions and constitutes a nonaccessible comprehensive conviction.[266] Greenawalt's comprehensive evaluation distinguishes between accessible and nonaccessible grounds for judicial decision making based on a nonaccessible comprehensive conviction. In other words, Greenawalt's principle of public accessibility (a principle of restraint) is based on his nonaccessible comprehensive conviction. Accordingly, his religionist-separationist model of judicial decision making is incoherent because it violates the principle of public accessibility.

Even if Greenawalt's comprehensive conviction is accessible, basing his principles of restraint on either an accessible or a nonaccessible comprehensive conviction contradicts his claim that his political principles of restraint are independent of any particular comprehensive conviction.[267] Greenawalt realizes that if his principles of restraint depended upon a particular comprehensive view, others would be required to accept or adopt that comprehensive view in order for his principles of restraint to gain acceptance. In trying to avoid this situation, he proposes principles of restraint that he argues do not depend on any particular comprehensive conviction. For instance, when the relevant legal materials are indeterminate, Greenawalt maintains that judges should rely on realist reasons and shared social reasons to decide cases. Authority reasons, realist reasons, and shared social reasons are allegedly sufficient to justify judges' decisions fully without relying on comprehensive convictions except in rare cases.[268]

Contrary to his intentions, this ordering of reasons or convictions depends on his comprehensive evaluation of convictions as accessible or nonaccessible. Only those judges who deny the accessibility of all comprehensive convictions could accept Greenawalt's principle of public accessibility. For these judges, it does not appear that Greenawalt's principles of public restraint are based on a particular comprehensive conviction. They likewise accept the nonaccessibility of comprehensive convictions and fail to recognize their own comprehensive convictions.

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266. *Cf.* GAMWELL, *supra* note 51, at 114 (arguing that "the meaning of religious freedom on Greenawalt's pluralist view relies on the validity of a particular nonrational comprehensive conviction."). Gamwell further argues that "[b]ecause a denial of all religious or comprehensive convictions is itself a (negative) comprehensive claim, it prevents the validation or justification of *any* positive beliefs about human authenticity, comprehensive or otherwise." *Id.* at 139.

267. *See* KENT GREENAWALT, PRIVATE CONSCIENCES, *supra* note 30, at 125 (arguing that political theorists "*may* self-consciously present political principles that do not rest on any particular comprehensive view").

268. *Id.* at 150 (claiming that, except for a few exceptional cases, "the judge has a duty to disregard comprehensive views and nonaccessible reasons in favor of public reasons in intracourt deliberations and in deciding how to vote").

No religious judge, however, could accept this ordering of reasons in hard cases. This ordering is based on a comprehensive conviction they reject, and these principles of restraint impose an ordering of values that directly conflicts with the ordering derived from their comprehensive convictions. As a result, Greenawalt could not depend upon a voluntary agreement among citizens (like Rawls's overlapping consensus and Habermas's intersubjective rational agreement) to support these principles of restraint.

In order for these principles of restraint to be effective, they would have to be established as part of the law. This would include establishing Greenawalt's comprehensive conviction that all comprehensive convictions are nonaccessible grounds (i.e., grounds that judges should avoid) and would violate the Establishment Clause. Greenawalt himself recognizes that "[g]iven principles of religious liberty and separation of church and state that guide us, a reason that rests on a theological truth that is not generally accepted should not count as a reason for what the exiting law provides."[269] This same analysis would appear to apply to his own nonaccessible, comprehensive evaluation of all comprehensive convictions. Establishing his principles of restraint would thus result in Establishment Clause problems and objections from those with differing comprehensive convictions.

These criticisms apply equally to Habermas's, Rawls's, and Perry's models.[270] Their models represent the main types of the separationist model (Habermas's universal and Rawls's nonuniversal separationist models) and the alternative versions of the religionist-separationist model (Greenawalt and Perry). Given their incoherence, it is unlikely that a coherent model of judicial decision making can support the position that judicial decisions can be fully justified independently of religious or comprehensive convictions.

Furthermore, Parts IV and V presented practical arguments for the religionist-separationist model by analyzing *Washington v. Glucksberg*[271] and *Lyng v. Northwest Indian Cemetery Protective Ass'n*.[272] These cases practically demonstrated that judges, in their deliberations about hard cases, must rely on comprehensive convictions about authentic human existence to fully justify their decisions. Noncomprehensive norms were insufficient. Note that this was not a descriptive argument, but a normative argument that, in principle, a full justification of judges' decisions in hard cases requires reliance on comprehensive convictions.

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269. GREENAWALT, LAW AND OBJECTIVITY, *supra* note 9, at 222.

270. *See supra* note 17.

271. 521 U.S. 702 (1997).

272. 485 U.S. 439 (1988).

The judges in question may have decided based on a blind assumption of an implicit comprehensive conviction, but they should have relied on the religious or explicit comprehensive convictions that they consider true to fully justify their decisions.

Both these practical and theoretical arguments have put into question the philosophical claim that judges can fully justify their decisions in all cases without relying on comprehensive convictions. The assertion of autonomy of law is longer warranted. Moreover, neither the legal nor the philosophical Secular Purpose Objection poses a threat to the religionist-separationist model and the *reenchantment of the law*.

VIII. THE SEPARATIONIST PROCESS OF EXPLANATION

Despite the necessary reliance on religious convictions in the process of deliberation, one might respond that these comprehensive convictions should appear in judicial opinions (religionist model) because the rule of law requires that judges set forth or make public all the reasons for their decisions. Concealing these comprehensive or religious convictions about authentic human existence insincerely suggests (the Insincerity Objection) that the reasons given in the opinion were the only reasons for the judge's decision.[273] Without disclosing these comprehensive convictions, the Insincerity Objection contends that citizens would lose faith in the judicial process and that the rule of law would be undermined.

To address the Insincerity Objection, I will set forth two arguments supporting the religionist-separationist model's prohibition against writing comprehensive convictions into the law. First of all, I will argue that the Establishment Clause prohibits judges from explicitly articulating the religious or comprehensive convictions on which their decisions are based. In addition, I will contend that there are persuasive practical reasons for excluding comprehensive convictions from judicial decisions.

A. The Establishment Clause

There is substantial disagreement among the Supreme Court Justices about the parameters of the Establishment Clause. Scholars have often identified three main positions taken by the Justices—Strict Separation, Neutrality, and Accommodation—in their interpretations of the Establishment Clause.[274] These theoretical positions appear to influence

273. *See* PERRY, RELIGION IN POLITICS, *supra* note 30, at 104.

274. *See, e.g.*, THE FIRST AMENDMENT: A READER 444-84 (John H. Garvey & Frederick Schauer eds., 2d ed. 1996) (dividing articles on the modern theories of the Establishment Clause into three main groups: Strict Separation, Neutrality, and

the Justices' decisions quite substantially. For instance, even when the Justices all apply the endorsement test, they apply the test differently and reach vastly different results.[275]

Despite this disagreement, there has been long-standing agreement among the Justices as to the most basic parameters of the Establishment Clause. In the first case applying the Establishment Clause to a state statute, the Court followed a Strict Separation position and stated that "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[276] More recently, Justice Kennedy, who advocates substantial accommodation of religion by the state, has declared that "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[277] At the very least, the Establishment Clause appears to prohibit the state

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Accommodation); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1149-55 (2d ed. 2002) (stating that there are "three major competing approaches" to the Establishment Clause).

275. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793 (2000). In *Mitchell*, the central issue was whether the Federal government program for lending educational materials and equipment to public and private schools (including parochial schools) violated the Establishment Clause. *Id.* at 801. The plurality opinion by Justice Thomas (joined by Rehnquist, Scalia, and Kennedy) took an Accommodation position and held that the lending of educational materials and equipment to parochial schools does not violate the Establishment Clause even if some of those materials are used for religious indoctrination. *Id.* at 809-10. By contrast, the concurring opinion by Justice O'Connor (joined by Breyer) took a Neutrality position and argued that lending educational materials and equipment to parochial schools was constitutional because there were reasonable safeguards to prevent diversion of materials for religious indoctrination and there was only evidence of *de minimis* diversion of materials for religious indoctrination. *Id.* at 857-67. Finally, the dissenting opinion by Justice Souter (joined by Stevens and Ginsburg) took a Strict Separation position and argued that the lending of educational materials and equipment to parochial schools violated the Establishment Clause because of evidence of some actual diversion and a risk of future diversion of these materials for religious indoctrination. *Id.* at 902-10.

276. *Everson*, 330 U.S. at 15.

277. Lee v. Weisman, 505 U.S. 577, 587 (1992) (quoting Lynch v. Donnelly, 465 U.S. at 678). In this respect, Michael Perry argues that the essence of "the free exercise and nonestablishment norms is that government may not make judgments about the value or disvalue—the true value, the moral value, the social value, any kind of value—of religions or religious practices or religious (theological) tenets." PERRY, RELIGION IN POLITICS, *supra* note 30, at 9. At the very minimum, he contends that the nonestablishment norm means that the government may not take action favoring one or more religions as such (in effect discriminating against others). By writing religious convictions into the law, the state appears to be endorsing a religious conviction as true or favoring one religion over others. *Id.* at 14-16.

from explicitly embracing a particular religious justification for the law. In the case of judges, this prohibits judges from articulating religious convictions as a full justification for their decisions. By setting forth religious convictions in this manner, judges would effectively establish those religious convictions as an official religious justification for the law. Thus, even a minimalist interpretation of the Establishment Clause prohibits judges from providing a full justification of their decisions by including religious convictions in their written opinions.

The Court has recognized some minor exceptions to this general prohibition on the state endorsement of specific religious convictions. The Court has exempted the "statutorily prescribed national motto 'In God We Trust,'" and the "compensation of the Chaplains of the Senate and the House and the military services."[278] Former Chief Justice Burger refers to these accommodations of religion as "the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage."[279] However, none of these exceptions permit explicit reliance on a predominant religious purpose as a justification for the law. These exceptions deal with historic or symbolic recognitions of religion but do not rely on religion as a full justification for government decision making. To the contrary, the Supreme Court cases analyzed above revealed that statutes advancing or protecting explicit religious teachings (e.g., the Ten Commandments and Creation Science) or religious practices (e.g., meditation or voluntary prayer) were found unconstitutional because they lacked a secular purpose.[280] These statutes violated the Establishment Clause because they were based on a predominant religious purpose rather than merely recognizing the symbolic or historic significance of religion.

Despite these apparent Establishment Clause problems, the courts have not yet specifically addressed the Establishment Clause issues raised by judges relying on religious convictions in their written opinions. The Fourth Circuit has held that a judge's practice of beginning court sessions with a prayer violated the Establishment Clause.[281] In addition, several courts have considered whether religious references by judges

278. *Lynch*, 465 U.S. at 676.

279. *Id.* at 677.

280. *See supra* Part VII.A. *But cf.* Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 42, 64 (2004) (arguing that Steven Smith's and Michael Perry's "arguments that religious freedom, or human rights in general, must rest on a religious rationale . . . . provide a powerful reason that the Establishment Clause must permit the state to recognize this religious rationale" in the Pledge of Allegiance).

281. N.C. Civil Liberties Union Legal Found. v. Constangy, 947 F.2d 1145, 1146, 1152 (4th Cir. 1991).

during the sentencing process violates the offender's due process rights.[282] In this context, the courts have looked at the role or function of judges' reliance on religious convictions. For example, during the sentencing of the well-known televangelist James Bakker in *United States v. Bakker*, the judge stated that Bakker "had no thought whatever about his victims and *those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests.*"[283] On appeal, the Fourth Circuit held that the judge's "personal religious principles" were "the basis of a sentencing decision."[284] The Fourth Circuit then remanded the case for resentencing because this "explicit intrusion" violated Bakker's right to due process of law under the Fourteenth Amendment.[285] By contrast, in *State v. Arnett*, the Ohio Supreme Court held that the sentencing judge's quotation of a portion of the Gospel of Matthew "was but one factor, among many, that supported this judge's legally unremarkable decision to assign significant weight to the seriousness of Arnett's offenses against young victims."[286] More specifically, the court held that "the judge's disclosed religious principle mirrored a sentencing factor in the Ohio Revised Code" and that "the biblical passage could not be said to be the

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282. *See, e.g.*, U.S. v. Bakker, 925 F.2d 728 (4th Cir. 1991); State v. Arnett, 724 N.E.2d 793 (Ohio 2000); *see also* Mark B. Greenlee, *Faith on the Bench: The Role of Religious Belief in the Criminal Sentencing Decisions of Judges*, 26 U. DAYTON L. REV. 1 (2000). Initially, Greenlee appears to offer a religionist view of judicial decision making. He advocates what he refers to as a "wholist" account of judicial decision making and argues that judges should be able to rely on religious convictions in their deliberation and justification of their decisions. *Id.* at 18. However, he then limits the role of religious convictions in a manner consistent with the following distinction between *Bakker* and *Arnett*. With respect to *Arnett*, he contends that "the predominant function of the [biblical] reference was judicial, rather than confessional" because "it was used to assist Judge Marsh with her judicial task of determining the appropriate sentence for the defendant." *Id.* at 35. By contrast, he argues that the judge in *Bakker* inappropriately relied on religious beliefs because he substituted "sermons for judicial analysis." *Id.* at 37. Although this distinction makes sense from an Establishment Clause perspective, it hardly indicates a robust understanding of the function of religion in practical reasoning. Greenlee notes Tillich's notion of "ultimate concern" and states that "my religious upbringing plays a role in every decision I make," but fails to provide any account of the role of religious beliefs in practical reasoning. *Id.* at 8, 12. Implicitly, he suggests that religious reasons are allowed when they supplement legal reasons but not when they provide the primary justification for the judge's decision. Somehow his understanding of being "called to live out their faith on the bench" means that judges are called to express their religious convictions when those convictions are not required to resolve the legal dispute but to avoid relying on them when the law is indeterminate. *See id.* at 18.

283. *Bakker*, 925 F.2d at 740.

284. *Id.* at 741.

285. *Id.* at 740-41.

286. *Arnett*, 724 N.E.2d at 804.

primary premise for the judge's sentencing decision."[287] Thus, with respect to the Due Process Clause, judges may rely on religious convictions as an additional reason for their sentencing decisions but not as the primary reason or basis for those decisions.

Initially, these decisions appear more lenient than the Supreme Court's Establishment Clause jurisprudence.[288] Upon further analysis, these Due Process cases are consistent with the Supreme Court's interpretation of the secular purpose prong and support the religionist-separationist model's prohibition against judges' explicitly relying on religious convictions in their written opinions. Recall that the Court held in *Edwards* that "[a] religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate."[289] If judges cite their religious convictions as additional reasons for their decisions in easy cases, those convictions do not predominate. To the contrary, if judges cite their religious convictions to fully justify their decisions in hard cases, their religious convictions predominate over secular purposes. The religious convictions predominate because when properly understood, such convictions are the comprehensive condition of validity for all the judge's convictions.[290] Because religious convictions are the comprehensive condition of validity, setting forth a religious

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287. *Id.* at 802. The Ohio Supreme Court further noted that "[s]everal state supreme courts . . . have declined to vacate sentences where the judge's religious comments merely acknowledge generally accepted principles, as opposed to highly personal religious beliefs that become the basis for the sentence imposed." *Id.* at 803.

288. While these Due Process cases appear consistent with the secular purpose prong of these tests, the effects prong of the endorsement or *Lemon* tests may be grounds for finding an Establishment Clause violation for judicial citation of religious convictions as additional reasons for their decisions. Under the endorsement test, the reasonable observer may perceive the citation of religious convictions as an endorsement of those convictions even if those religious convictions are an additional, rather than the primary, reason for the judge's decision. The judge's opinion would endorse these religious convictions and send "a clear message to nonadherents that they are outsiders or less than full members of the political community." Allegheny County v. ACLU, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring in part and concurring in the judgment). Resolving the question of whether judicial reference to religious convictions as an additional justification of a decision, however, is not the central concern of the religionist-separationist model of judicial decision making. From the standpoint of the religionist-separationist model, the important question is whether religious convictions can be expressed in judicial opinions as a full justification of judges' decisions. Both the Establishment Clause and Due Process Clause appear to prohibit relying on religious convictions for that purpose.

289. Edwards v. Aguilard, 482 U.S. 578, 599 (1987); *see also Wallace*, 472 U.S. at 56 (stating that "the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion"); *Lynch*, 465 U.S. at 680 (emphasizing that "[t]he Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations").

290. *See infra* Part IV.

conviction in a judicial opinion as a full justification is writing into the law a particular comprehensive condition of validity. Any noncomprehensive reasons, including indeterminate legal norms, given by the judge in her opinion depend upon this religious conviction for their validity. Consequently, both the Due Process Clause and the Establishment Clause prohibit judges from relying on religious convictions for fully justifying their decisions in their written opinions.

Conversely, as argued above, those same noncomprehensive norms would constitute a secular purpose if religious convictions were absent from judges' decisions. Initially, this appears to be a distinction without a difference. In the first case, the judge explicitly posits her religious convictions as a comprehensive justification for those noncomprehensive norms. By expressly relying on a comprehensive conviction in her written opinion, she endorses that religious conviction as the true comprehensive condition of validity for her decision. It is the highest principal or predominate purpose for that decision. In the later case, the noncomprehensive norms merely imply one or more comprehensive convictions. By stating these noncomprehensive norms without a comprehensive justification, the noncomprehensive norms, not the implied comprehensive conviction, becomes the predominate purpose. The noncomprehensive norms are the highest level norms that explain judges' decisions, and judges avoid endorsing a particular religious conviction. This eliminates the Establishment Clause problems and allows for the possibility that a plurality of comprehensive convictions may justify these noncomprehensive norms.[291] Thus, contrary to the Insincerity Objection, judges should only partially justify their decision based on noncomprehensive norms because the Establishment Clause prohibits judges from specifying a comprehensive or religious justification in their written opinions.

B. Practical Considerations

Most judges seem to understand or intuit that judicial opinions should only provide a partial justification of their decisions. Explicit religious

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291. Franklin Gamwell's interpretation of the meaning of the religion clauses of the First Amendment similarly requires that:

> All religions are separated from the state in the sense that the state may not explicitly endorse any answer to the comprehensive question. At the same time, religion is essential to the body politic in the sense that political decisions should imply the valid comprehensive conviction. Politics is consistent in principle with a plurality of legitimate religions because they are united through democratic discourse, and adherents of all religions can consistently be democratically civil precisely because all religions claim to represent the valid understanding of human authenticity as such.

GAMWELL, *supra* note 51, at 205.

references rarely appear in judicial opinions. A recent opinion ignoring this conventional wisdom helps demonstrate the practical problems that arise when judges write their religious convictions in the law. These practical problems also provide further reasons against the Insincerity Objection.

In *Ex Parte H.H.*,[292] the Alabama Supreme Court determined that a previous child custody decision granting physical custody to the father should not be modified.[293] As part of a divorce proceeding, a California court initially awarded the father and mother joint custody of their three children, with the mother receiving primary physical custody.[294] In 1996, based on the mother's petition, a California court granted the father physical custody, and the children moved to Alabama to live with him.[295] In 1999, she filed a petition to modify the prior physical custody decree based on allegations that the father had physically abused the children.[296] The trial court evaluated the evidence and found that "although the father's disciplinary actions may occasionally be excessive, no abuse had occurred," and that the mother had failed to meet her burden for modifying the child custody arrangement.[297] The Court of Civil Appeals reversed.[298] The Alabama Supreme Court then reversed the Court of Civil Appeals on the grounds that the Court of Civil Appeals had "impermissibly reweighed the evidence" without showing that the trial court had abused its discretion in concluding that there was not sufficient evidence of child abuse.[299]

Despite the majority's brief disposition of this case, Chief Justice Moore's concurring opinion provides an elaborate treatment of the case. His opinion includes both a noncomprehensive justification and a comprehensive justification as follows:

> I concur in the opinion of the majority . . . . I write specially to state that the homosexual conduct of a parent—conduct involving a sexual relationship between two persons of the same gender—creates *a strong presumption of unfitness* that alone is sufficient justification for denying that parent custody of his or her own children or prohibiting the adoption of the children of others.

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292. Ex Parte H.H., 830 So.2d 21 (Ala. 2002).
293. *Id.* at 22.
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.* at 25.
298. *Id.* at 24.
299. *Id.* at 25, 26.

> In this case there is undisputed evidence that the mother of the minor children not only dated another woman, but lived with that woman, shared a bed with her, and had an intimate physical and sexual relationship with her. D.H. has, in fact, entered into a "domestic partnership" with her female companion under the laws of the State of California. But Alabama expressly does not recognize same-sex marriages or domestic partnerships. *Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our laws are predicated.* Such conduct violates both the criminal and civil laws of this State and is destructive to a basic building block of society—the family. The law of Alabama is not only clear in its condemning such conduct, but the courts of this State have consistently held that exposing a child to such behavior has a destructive and seriously detrimental effect on the children.[300]

Even though much of the judge's diatribe against homosexuality is offensive, he bases most of these comments on prior Alabama Supreme Court cases and Alabama statutes outlawing homosexual conduct.[301] He specifies the Alabama law in question and further argues that it supports the majority's decision.[302] Although this portion of his opinion is controversial, it does not present any Establishment Clause issues because it is based on noncomprehensive norms.

Chief Justice Moore crosses the Establishment Clause line in his comments italicized above and in his subsequent citations to *Genesis*, *Leviticus*, and St. Thomas Aquinas in support of his claim that homosexuality is "inherently evil."[303] In some cases, reference to religious convictions in judicial opinions is not problematic. For example, in *Compassion in Dying*, the Ninth Circuit surveyed religious positions on suicide but did not adopt one of those views as a justification for the law.[304] Here, Chief Justice Moore notes that Alabama Supreme Court precedent and several "Alabama statutes reinforce the idea that homosexuality is an evil disfavored under the law."[305] He then justifies those statutes and precedent by an explicit appeal to revelation. He argues that "[n]atural law forms the basis of the common law" and that

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300. *Id.* at 26 (Moore, C.J., concurring) (emphasis added) (internal citations omitted).

301. *See id.* at 27-31.

302. *Id.*

303. *See Ex Parte H.H.*, 830 So. 2d at 33-35, 37.

304. Compassion in Dying v. Washington, 79 F.3d 790, 806-08 (9th Cir. 1996); *see also* Roe v. Wade, 410 U.S. 113, 160-61 (1973) (examining various religious views on abortion).

305. *Ex Parte H.H.*, 830 So.2d at 31.

"[n]atural law is the law of nature and of nature's God as understood by men through reason, but aided by direct revelation found in the Holy Scriptures."[306] Based on William Blackstone's *Commentaries on the Laws of England*, he further claims that "because our reason is full of error, the most certain way to ascertain the law of nature is through direct revelation."[307] Moreover, he maintains that "[h]omosexuality is strongly condemned in the common law because it violates both natural and revealed law."[308] Moore quotes passages from *Genesis* and *Leviticus* in the Christian Old Testament to justify the State of Alabama's law on homosexuality.

> The author of Genesis writes: "God created man in His own image, in the image of God He created him; male and female He created them . . . . For this reason a man shall leave his father and his mother, and be joined to his wife; and they shall become one flesh." *Genesis* 1:27, 2:24 (King James). The law of the Old Testament enforced this distinction between the genders by stating that "[i]f a man lies with a male as he lives with a woman, both of them have committed an abomination." *Leviticus* 20:13 (King James).[309]

In his opinion, Chief Justice Moore thus writes a particular religious justification of the legal prohibitions of homosexuality into Alabama law. This portion of the opinion is completely unnecessary. It adds nothing to his references to legal precedent and statutory law. For that matter, his entire opinion is superfluous. Moore could have joined the majority opinion that deferred to the trial court's factual finding of insufficient evidence of child abuse. Noncomprehensive legal norms were sufficient for providing a justification of the court's decision without writing religious convictions into the law.

If Moore's opinion were the majority opinion, the litigants on appeal or in future cases would be required to follow or to challenge the judge's religious justification of "a strong presumption of unfitness" for homosexual parents. In addition to the Establishment Clause problems, this opinion raises serious practical problems. The judge's religious convictions would become an official religious precedent that must be either embraced or refuted. In a challenge to this presumption, the litigation would involve litigating the facts, the law, and the judge's religious justification of this presumption. First, the litigants must challenge his claim that the common law is based on natural law and

306. *Id.* at 32.
307. *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 42 (1765)).
308. *Id.* at 33.
309. *Id.*

revelation and that revelation is more reliable than natural law. This challenge involves litigating the issue of "what is law," which is the central question of jurisprudence, or the philosophy of law. It also raises the perennial debate in theology and the philosophy of religion regarding the relationship between reason and revelation. Furthermore, the litigants must challenge the judge's interpretation of *Genesis* and *Leviticus*, which may require a substantial discussion of biblical hermeneutics.

In addition, litigants would have to challenge Chief Justice Moore's understanding of both civil government and the role of judges, which appears similar to John Calvin's views. Calvin's understanding of civil government and the role of judges or magistrates is dramatically different from the view of civil government and judges in our pluralistic democratic society and conflicts with the Establishment Clause. For example, Calvin argues that the "civil government has as its appointed end, so long as we live among men, to cherish and protect the outward worship of God, to defend sound doctrine of piety and the position of the church, to adjust our life to the society of men, to form our social behavior to civil righteousness, to reconcile us with one another, and to promote general peace and tranquility."[310] According to Calvin, the state exists because of sin. It restrains wickedness and preserves order, but it also has a pedagogical task of helping to form good Christians (i.e., the state itself has religious significance).[311] In addition, Calvin commits "*to civil government the duty of rightly establishing religion.*"[312] Thus, the state has both a secular purpose of protecting citizens and a religious purpose of promoting the love of God.

Similarly, according to Calvin, judges or magistrates are ordained by God.[313] He notes, "[f]or it signifies that they have a mandate from God, have been invested with divine authority, and are wholly God's

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310. 2 JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 1487 (John T. McNeill ed., Ford Lewis Battles trans., 1960).

311. *See id.* at 1488. The state:

> also prevents idolatry, sacrilege against God's name, blasphemies against his truth, and other public offenses against religion from arising and spreading among the people; it prevents the public peace from being disturbed; it provides that each man may keep his property safe and sound; that men may carry on blameless intercourse among themselves; that honest and modesty may be preserved among men. In short, it provides that a public manifestation of religion may exist among Christians, and that humanity be maintained among men.

Id.

312. *Id.* (emphasis added).

313. *Id.* at 1489.

representatives, in a manner, acting as his vicegerents."[314] Calvin cites *Romans* 13:1-4 to support his claim that no powers exist except those ordained by God and to argue that the magistrate is a minister of God for our good.[315] This means that they must "submit to Christ the power with which they have been invested, that he alone may tower over all."[316] Magistrates carry out or execute the very judgments of God which allows them to punish evil doers with execution, if necessary, without violating the Decalogue (i.e., a magistrate's duties are not incompatible with piety).[317] Moreover, Calvin maintains that magistrates "are ordained protectors and vindicators of public innocence, modesty, decency, and tranquillity, and that their sole endeavor should be to provide for the common safety and peace of all."[318]

As a result, countering Justice Moore's religious justification would radically expand the interpretative issues involved in subsequent litigation. Lawyers would find themselves arguing issues of jurisprudence, theology, philosophy of religion, biblical hermeneutics, and the proper role of judges in a pluralistic democratic society in addition to arguing the facts and the law. Most lawyers and judges are quite ill-equipped to deal with these issues. Furthermore, a battle of experts would not likely make these issues more manageable. The magnitude of these issues convincingly demonstrates the interminable practical problems that would arise from judges writing their religious convictions into the law. Leaving religious convictions out of judicial decisions is not "insincere" but wise. It avoids raising additional interpretative issues that would unnecessarily add substantial complexity to resolving legal disputes.

In addition, Kent Greenawalt argues that keeping comprehensive convictions out of judicial opinions is not insincere because citizens do not "necessarily expect that public advocacy will reflect all bases of decision."[319] He contends that judges routinely conceal innovative steps in the law by suggesting that their holdings are already covered by

314. *Id.*

315. *Id.* at 1490.

316. *Id.*

317. *Id.* at 1497.

318. *Id.* at 1496.

319. GREENAWALT, PRIVATE CONSCIENCES, *supra* note 30, at 163. Alternatively, one may respond that insincerity is more of a problem of what judges say than of what they do not say. David Strauss notes that there is "a difference between not fully spelling out all of one's reasons for reaching a conclusion and stating supposed reasons that are not true—such as (in most cases), 'the Framers decided this question for us,' or 'the test requires this result.'" David A. Strauss, *The Role of a Bill of Rights*, 59 U. CHI. L. REV. 539, 548 (1992).

principles found in prior cases.[320] In addressing politics in general, he also argues that "*constructive* dialogue on deeper concerns is much more likely in other settings than the resolution of political issues" and that "there is little point in developing 'more complete' grounds, if the extra grounds developed are unlikely to enlighten others, may hinder constructive dialogue, and will probably cause feelings of exclusion and alienation."[321]

In this respect, the religionist-separationist model appreciates that legal opinions are not the best place or a helpful place to engage in debate about the meaning of authentic human existence. Interjecting religious convictions into legal opinions does not present those convictions to be tested in debate. It gives those religious convictions presumptive authority as an official religious justification of the law. The "truth" of those religious convictions would be based on the authority of the court rather than the quality of the arguments made to support them. Consequently, for all these practical reasons and the apparent Establishment Clause problems mentioned above, the religionist-separationist model prohibits judges from explicitly relying on their comprehensive or religious convictions in their written opinions.

IX. JUSTIFYING LEGAL INDETERMINANCY

Given the religionist-separationist model prohibition on setting forth comprehensive convictions in judicial decisions, judicial opinions should always be a partial justification for judges' decisions. In effect, this requirement mandates that the law should be indeterminate in the sense that legal norms should not be fully justified. Mandating legal indeterminacy, however, means that judges will not be constrained by the law and raises "the specter that judicial decision making is often or always illegitimate."[322] Ronald Dworkin argues that "indeterminacy is a substantive view to be ranked alongside the other substantive views."[323] He maintains that "claims of indeterminacy are not true by default: they

320. GREENAWALT, PRIVATE CONSCIENCES, *supra* note 30, at 163.

321. *Id.* at 164. *Cf.* Joan B. Gottschall, *Response to Judge Wendell Griffen*, 81 MARQ. L. REV. 533 (1998). Judge Gottschall argues that including religious sources when justifying decisions is "inappropriate and imprudent." *Id.* at 534. She further suggests that by relying on religious sources, a judge's decision would be perceived as "an idiosyncratic expression of [her] particular personality or background" rather than as a fair decision based on "recognized sources of legal authority" that both parties would accept. *Id.* at 534, 535.

322. *See, e.g.*, Kress, *supra* note 20, at 203.

323. Ronald Dworkin, *Indeterminacy and Law, in* POSITIVISM TODAY 5 (Stephen Guest ed., 1996).

need if not argument, which may not be available at any impressive length, at least a basis in more abstract instincts or convictions."[324]

This Part argues that the Establishment Clause provides a normative justification for legal indeterminacy in two senses. First, the Establishment Clause requires that the law is always indeterminate in the sense that the law cannot include a full justification of legal norms because that would require writing religious convictions into the law. I will refer to this as comprehensive legal indeterminancy. The Establishment Clause mandates that judicial opinions, in both easy and hard cases, should be indeterminate in this sense. For example, in an easy case involving evidence beyond a reasonable doubt that someone intentionally killed another person, the statutory prohibition of murder is determinate and would warrant a conviction. The judge can apply that statutory prohibition without fully justifying the prohibition of murder either in her deliberation or in her written opinion. Although the murder statute has not been fully justified, the judge, and the legislature, are prohibited from referencing the Christian Bible, the Torah, the Koran or any other religious convictions to provide a full justification of that statute. The possible comprehensive justifications must remain implicit. In hard cases, judges must rely on their comprehensive convictions for fully justifying their deliberations, but those comprehensive convictions should not be part of their written opinions. Therefore, the law must only provide a partial justification for legal prohibitions and must exhibit comprehensive legal indeterminacy.

Although I can only sketch the argument here, the Establishment Clause justification of comprehensive legal indeterminacy also indirectly justifies legal indeterminacy in the narrow sense assumed at the beginning of this inquiry. In this sense, the law is indeterminate such that there are hard cases where the relevant legal norms do not provide determinate answers to legal disputes. I will refer to this as noncomprehensive legal indeterminacy. The Establishment Clause indirectly justifies noncomprehensive legal indeterminacy because, at least in the context of judicial decision making, noncomprehensive legal indeterminacy is a function of comprehensive legal indeterminacy. Comprehensive legal indeterminacy ensures that noncomprehensive legal indeterminancy will persist in the legal system because the law cannot include a comprehensive justification for the law on which judges could rely to resolve hard cases.

This produces noncomprehensive legal indeterminacy in two ways. The first way that comprehensive legal indeterminacy produces noncomprehensive legal indeterminacy involves the absence of a

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324. *Id.*

comprehensive justification within the law to resolve hard cases. To understand how this occurs, the sources of noncomprehensive legal indeterminacy must be identified. Although noncomprehensive legal indeterminacy arises for many reasons, it can be classified into two broad types—intentional and unintentional. Sometimes the law intentionally includes indeterminate standards, such as the reasonable person standard, that provide for judicial discretion. These standards allow judges the flexibility to determine what is required under the particular circumstances of the case because the law cannot anticipate with sufficient precision ahead of time what would be reasonable under the circumstances of every case.[325] Noncomprehensive legal indeterminacy also arises from unintentional sources such as ambiguous and conflicting legal norms. Despite legislators' and judges' best efforts, these unintentional sources of noncomprehensive legal indeterminacy will persist. However, both intentional and unintentional noncomprehensive legal indeterminacy could be resolved from within the law if the law included a comprehensive justification (i.e., a comprehensive condition of normative validity).[326] With an established comprehensive

325. The practical necessity of intentional legal indeterminacy has been long recognized by philosophers. For example, Aristotle claims that some matters do not lend themselves to "any general principle embracing all the particulars" and must be decided by judicial decree. ARISTOTLE, NICOMACHEAN ETHICS 1282b:5 (William. D. Ross trans. & rev. by J. O. Urmson) *in* 2 THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed., rev. Oxford trans. 1984). Aristotle notes that "it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars." *Id.* at 1269a:10-12. Aristotle's most extensive discussion of this idea is in Nicomachean Ethics in terms of equity, which he calls "a corrective of legal justice." Mark C. Modak-Truran, *Corrective Justice and the Revival of Judicial Virtue*, 12 YALE J.L. & HUMAN. 249, 270-71 (2000). For further discussion of Aristotle's understanding of equity, see *id.* at 270-76.

326. Ronald Dworkin's interpretative theory suggests something like this solution. Dworkin claims that judges must try "to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community." *See* DWORKIN, LAW'S EMPIRE, *supra* note 19, at 255. The best construction thus includes "convictions about both fit and justification" and is the "right answer" in that case. *Id.* Dworkin further claims that "in a modern, developed, and complex [legal] system" a tie with respect to fit would be "*so rare as to be exotic.*" DWORKIN, A MATTER OF PRINCIPLE, *supra* note 19, at 143 (emphasis added). He further maintains that "[t]here seems to be no room here for the ordinary idea of a tie. If there is no right answer in a hard case, this must be in virtue of some more problematic type of indeterminacy or incommensurability in moral theory." *Id.* at 144. Dworkin's interpretative method posits that there is some determinative notion of "political morality" (justification or purpose) that along with precedent (fit) could produce this legal determinacy. *See* DWORKIN, LAW'S EMPIRE, *supra* note 19, at 225-58. For this "political morality" to provide a full justification in all cases, however, it must be a comprehensive conviction. Otherwise, there would be cases where this political morality was indeterminate or where there was a conflict among the principles of political morality that could not be resolved without a comprehensive conviction. Thus, although I am not able

justification, the law would provide a comprehensive norm that could be used to resolve conflicts between norms, eliminate ambiguity, and aid judges in discerning how intentionally indeterminate standards should be applied in the context of a particular case. Despite these benefits, the Establishment Clause prohibits establishing this comprehensive justification or conviction and mandates comprehensive legal indeterminacy. As a result, noncomprehensive legal indeterminacy cannot be resolved from within the law.

In addition, comprehensive legal indeterminacy produces noncomprehensive legal indeterminacy because judges are permitted to fully justify their decisions in hard cases based on their own comprehensive convictions. In other words, comprehensive legal indeterminacy enhances noncomprehensive legal indeterminacy because judges can draw on a large number of comprehensive convictions for deciding hard cases. These comprehensive justifications are competing with one another to shape the law in often conflicting ways. This occurs because disagreement about comprehensive convictions translates into disagreements about which noncomprehensive norms, including different noncomprehensive legal norms, are fully justified. Accordingly, judges will resolve similar hard cases differently and articulate different interpretations of the law. The law will thus embody conflicting legal norms and be indeterminate.

For example, in *Washington v. Glucksberg*,[327] the competing interpretations of the concept of liberty in the Due Process Clause implied different comprehensive convictions. Given these different comprehensive convictions, it should not be surprising that the Supreme Court Justices and Ninth Circuit judges could not agree on the scope of liberty in the Due Process Clause, on the Due Process Clause method of interpretation, or even on how to define the relevant issue in the case. These different comprehensive convictions justified different conceptions of liberty and different methods of Due Process Clause analysis which resulted in conflicting opinions in this case.

Without an established religion, there is no comprehensive justification within the law that can be evoked to settle this disagreement and eliminate the noncomprehensive legal indeterminacy. The law does not include a comprehensive condition for legal validity.[328] Even if a judge's

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to specify the full argument here, this would mean that Dworkin's interpretative theory would require establishing a comprehensive justification for the law in violation of the Establishment Clause.

327. 521 U.S. 702 (1997).

328. Critical legal scholars have argued similarly that the law is incoherent because it does not include a metaprinciple to resolve legal indeterminacy. Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 331-34 (1989). However, Ken Kress points out that

opinion makes the law more determinate, it cannot provide a comprehensive condition for legal validity within the law. As future hard cases arise, the law will still not include a full justification that would eliminate the need for judges to rely on their own comprehensive convictions. Without establishing a comprehensive condition of legal validity, the law will continue to include both intentional hard cases, involving indeterminate legal standards, and unintentional hard cases, in which ambiguous or conflicting legal norms are inadequate to resolve legal disputes. Consequently, the Establishment Clause prohibition against establishing an official comprehensive justification for the law provides a normative justification for comprehensive legal indeterminacy and the noncomprehensive legal indeterminacy resulting from it.

The religionist-separationist model takes into account this Establishment Clause normative justification of legal indeterminacy. Because the law cannot include a comprehensive justification, the religionist-separationist model maintains that judges must confine the full justification of hard cases to their deliberations. Their written opinions should only partially justify their decisions based on noncomprehensive norms. Comprehensive justifications can be implied but not expressed. On this account, the full justification of the law in hard cases is shifted from the law to individual judges. As a result, a plurality of comprehensive convictions implicitly informs the law and provides for its full justification without encountering Establishment Clause problems.

X. JUSTIFYING RELIGIOUS CONVICTIONS

Given that a plurality of comprehensive convictions informs the full justification of judges' decisions in hard cases, several questions arise that need to be addressed. Can judges rely on any comprehensive conviction? If not, how can religious beliefs be evaluated? Moreover, how can the law have a rational justification if judges rely on comprehensive convictions?

These questions suggest some common assumptions about comprehensive convictions that are rejected by the religionist-separationist model of judicial decision making. The central assumption rejected by this model is that religious convictions are nonrational. This assumption presumes that religious convictions must merely be believed and are equally true in the sense that they cannot be rationally validated. If this assumption were true, judges could not determine which religious

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they further argue that "we cannot provide, in advance, fully explicit metaprinciples to resolve all conflicts accurately describes a limitation of all rules of behavior, not just legal theory." *Id.* at 334.

convictions were credible to common human experience and reason. They could rely on any religious conviction to justify their decisions in hard cases. Legal indeterminacy would thus result in illegitimacy because the law would lack a rational foundation.

By contrast, the religionist-separationist model maintains that religious convictions can be rationally validated through critical reflection. Although providing a complete defense of this assumption is beyond the scope of this article, I support this assumption in several ways. First, Part VII.B. showed that assuming that religion is nonrational resulted in incoherent separationist and religionist-separationist accounts of judicial decision making. The accounts of judicial decision making proposed by Rawls, Habermas, Greenawalt, and Perry were incoherent because they presupposed comprehensive convictions but denied the possibility of rational comprehensive reflection. Conversely, Parts IV, V, VI, VIII, and IX demonstrated that assuming that religion is rational results in a coherent religionist-separationist account of judicial decision making. This Part will further support this assumption by briefly noting the substantial philosophical and theological support for the role of reason in articulating and evaluating religious convictions. In addition, it will set forth Schubert Ogden's account of the role of reason in theological and philosophical reflection on religious convictions and suggest some minor refinements of Ogden's position.

A. Religion Convictions and Reason

Despite the common assumption that religion is nonrational, many theologians and philosophers have argued that religious convictions depend, at least in part, on rational reflection for their articulation and evaluation. This does not mean that they have agreed upon the definition of reason, its role in critical reflection, or its priority with respect to revelation. Differences about these issues should not take away from the important role reason has played in formulating and critiquing religious convictions. Most pointedly, some philosophers and theologians have engaged in "natural theology," which attempts "to construct a doctrine of God without appeal to faith or special revelation but on the basis of reason and experience alone."[329] Famous attempts at natural theology include St. Anselm's ontological arguments for the existence of God[330] and St. Thomas Aquinas's five ways to prove God's existence.[331] More recently, Charles Hartshorne has carried on this

329. VAN A. HARVEY, A HANDBOOK OF THEOLOGICAL TERMS 158 (1964).

330. ST. ANSELM, PROSLOGION (M.J. Charlesworth trans., Univ. of Notre Dame Press 1979).

331. ST. THOMAS AQUINAS, SUMMA THEOLOGICA I-I, Q. 2, A.3 *in* 1 BASIC WRITINGS OF SAINT THOMAS AQUINAS 21-24 (Anton C. Pegis ed., 1945) (arguing that

tradition by arguing that a relativistic conception of God makes it possible to defend the Ontological Argument for the existence of God.[332] Richard Swinburne also has argued that the concept of God is internally coherent[333] and that the existence of God is a more probable and better explanation of the universe than alternative theories.[334] These are but a few examples of a long tradition of rational arguments for the existence of God.

Reason also has been central to systematic theology and philosophical theology even though there has not been agreement on how the role of reason should be defined. At one extreme, Immanuel Kant argues that philosophical theology depends on pure reason to understand the possibility and the attributes of the concept of God.[335] At the other extreme, Paul Tillich claims that reason alone cannot give answers to the ultimate questions about life because in the existential situation, reason contradicts itself.[336] Philosophy helps analyze the existential situation in which we live, but "[r]evelation is the answer to the questions implied in the existential conflicts of reason."[337] Somewhere in between, David Tracy maintains that "contemporary Christian theology is best understood as philosophical reflection upon the meanings present in

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particular features of the world require the existence of God: from change to a "First Mover," from causation to a "First Cause," from contingent beings to a Necessary Being, from degrees of goodness to Perfect Goodness, and from order to a Supreme Designer).

332. CHARLES HARTSHORNE, THE LOGIC OF PERFECTION (1962); *see also* CHARLES HARTSHORNE, ANSELM'S DISCOVERY: A RE-EXAMINATION OF THE ONTOLOGICAL PROOF OF GOD'S EXISTENCE (1991); CHARLES HARTSHORNE, A NATURAL THEOLOGY FOR OUR TIME (1967); CHARLES HARTSHORNE, THE DIVINE RELATIVITY: A SOCIAL CONCEPTION OF GOD (1948).

333. RICHARD SWINBURNE, THE COHERENCE OF THEISM (rev. ed., 1993).

334. RICHARD SWINBURNE, THE EXISTENCE OF GOD (rev. ed., 1991).

335. *See* IMMANUEL KANT, LECTURES ON PHILOSOPHICAL THEOLOGY (Allen W. Wood & Gertrude M. Clark trans., 1978). In *Philosophical Theology*, Kant focuses on the role of the regulative idea of God in understanding the necessary conditions of the possibility of being. He claims that "[h]uman reason has a need of an idea of highest perfection, to serve as a standard according to which it can make determinations." *Id.* at 21. In this respect, Kant argues that God is the idea whose being is presupposed by all other beings. *Id.* Thus, philosophy (pure reason) aids religion by assisting theology in determining the nature of the regulative idea of God as the highest being that is implied by and consistent with the moral law. *Id.*

336. PAUL TILLICH, 1 SYSTEMATIC THEOLOGY 18-28 (1951).

337. *Id.* at 147. Tillich further argues that reason raises the existential questions but one must take a leap of faith and enter into the theological circle to receive the revealed answers to these questions. There is no conflict or synthesis between philosophy and theology. "Philosophy deals with the structure of being in itself; theology deals with the meaning of being for us." *Id.* at 22. Thus, the Unconditioned is known only through religion (revelation); philosophy is thus overcome or surpassed by religion.

common human experience and the meanings present in the Christian tradition."[338]

Although these approaches incorporate reason and philosophy into theology in different ways, they all support the necessary role of reason for theological reflection about religious convictions. Religious convictions are not exempt from critical reflection; they are the product of critical reflection. This is not to say that other theologians have not deemphasized or minimized the role of reason in theological reflection.[339] Rather, it is to emphasize that there are numerous theologians and philosophers who have embraced reason as a central part of the theological task of articulating and evaluating religious convictions. These positions thus further support the assumption that religious convictions are rational and subject to critical reflection.

B. Ogden's Account of Rational Religious Reflection

Likewise, Schubert Ogden maintains that reason plays an essential role in the articulation and evaluation of religious convictions. He rejects two common assumptions about theology that preclude critical reflection on religious convictions: "(1) that theology as such has to appeal to special criteria of truth for some if not all of its assertions; and (2) that the theologian as such has to be a believer already committed to the truth of the assertions that theological reflection seeks to establish."[340] To the

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338. DAVID TRACY, BLESSED RAGE FOR ORDER: THE NEW PLURALISM IN THEOLOGY 34 (1975).

339. For John Calvin, a religious argument based on revelation is more reliable because human reason is corrupted by sin (self-deception). 1 JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 35-37 (John T. McNeill ed., Ford Lewis Battles trans., 1960). Calvin begins the *Institutes of the Christian Religion* with a discussion of "The Knowledge of God the Creator." *Id.* at 35. He claims that "[n]early all the wisdom we possess . . . consists of two parts: the knowledge of God and of ourselves." *Id.* He argues that the latter is not clearly understood without the former. We must first look upon God's face, and then descend from contemplating him to scrutinize ourselves. *Id.* at 37. Without knowledge of God, we fail to feel "our own ignorance, vanity, poverty, infirmity, and—what is more—depravity and corruption." *Id.* at 36 (i.e. existential apprehension is the meaning of knowledge in a religious context). We fail to see that we owe everything to God (the source of everything that is good) and that our own powers of self-understanding are deficient (natural theology is not possible because of sin). Without piety ("reverence joined with love of God which the knowledge of his benefits induces"), true knowledge of God is not possible. *Id.* at 41. Thus, because human powers alone cannot know God because of sin, revelation is required. In order to have proper knowledge of God and self, we must read Scripture. Through revelation, God lays down the law of what we should do. Moreover, Calvin emphasizes that "[b]ecause these [spiritual] mysteries are deeply hidden from human insight, they are disclosed solely by the revelation of the Spirit." *Id.* at 280.

340. OGDEN, ON THEOLOGY, *supra* note 58, at 103. The famous Anglican theologian, Richard Hooker, makes a similar claim when he argues that "how the books of holy

contrary, he argues that religious claims are subject to critical validation. Religious convictions are different in the sense that they are comprehensive, but they are not beyond critical or rational validation. In fact, he maintains that "it is the very nature of a religion to make or imply the claim to formal religious truth."[341] In other words, religious convictions, like any cognitive claim, suggest that they can be validated in a non-question begging way.

1. Religion and Basic Faith

Before explaining how religious convictions can be critically validated, more must be said about Ogden's conception of religion. Recall that Ogden defines religion as "the primary form of culture in terms of which we human beings *explicitly* ask and answer the existential question of the meaning of ultimate reality for us."[342] The existential question is the comprehensive question, which is presupposed by all other questions. It asks "how we are to understand ourselves and others in relation to the whole."[343] In answering the existential question, religion attempts to make sense of "our basic faith in the meaning of life, given the facts of life as we actually experience it."[344]

As noted in Part II, a basic faith in the meaning of life is an implicit "answer" to the existential question which is presupposed by all human activity. Ogden further distinguishes between "the *existential* understanding or faith [basic faith] that is constitutive of human existence as such and the *reflective* understanding or faith whereby what is presented existentially can be re-presented in an express, thematic, and conceptually precise way."[345] This distinction helps clarify the relation between faith and reason and what this distinction means for understanding the nature of religious convictions. All humans "live by faith" in the existential sense because this existential or basic faith is presupposed by all human activity. "The whole of human life, including our reflective life, is based on our existential faith."[346] This basic faith is the preunderstanding that informs all reflective thought and activity. In

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scripture contain in them all necessary things, when of things necessary the very chiefest is to know what books we are bound to esteem holy, which point is confessed impossible for the scripture itself to teach." RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY 112 (Arthur Stephen McGrade ed., Cambridge Univ. Press 1989) (1593).

341. OGDEN, IS THERE ONLY ONE, *supra* note 49, at 13.

342. *Id.* at 5.

343. *Id.* at 6.

344. *Id.*

345. *Id.* at 71.

346. *Id.* at 72.

this sense, "faith seeks understanding" because this basic faith has priority to the expression and understanding of that faith.

By contrast, religion attempts to express the existential or basic faith thematically. It makes a fully reflective faith or understanding possible by providing an object for reflection. Religion does this by providing the concepts and symbols "whose express function is to mediate authentic self-understanding" by re-presenting this basic faith.[347] This mediation of self-understanding has both a subjective and an objective side. Self-understanding or an understanding of existence is the subjective side or reference of religion. The objective side or reference of religion consists of "the particular [religious] concepts and symbols through which the question of our existence can alone be asked and answered in an explicit way."[348] Ogden further argues that every explicit answer to the existential question is a specific answer in terms of the religious concepts and symbols of a particular culture. In this sense, religious convictions are "thoroughly historical" because they derive their particular religious concepts and symbols from those available in the culture.[349]

At the same time, each particular religion also expresses or implies that it is "the authorized representation of the answer to this question" because "every religion at least implicitly claims to be the true religion."[350] By the "true religion," Ogden means the formally true religion which provides the norm by which all other substantive religions are measured.[351] In other words, this express or implied claim to validity means that religions hold themselves out to be the true understanding of the basic faith that informs all human activity.[352] Ogden maintains that this implies that these religious claims are credible to all humans, such that they can be validated by reason and common human experience. As specified more fully below, this further implies that these religious claims can become fully reflective faith with the aid of philosophy and theology. Consequently, religious faith is prior to reason in the sense that it is not yet fully reflective, but it is not prior to reason in the sense that it is

347. OGDEN, IS THERE ONLY ONE, *supra* note 49, at 8.

348. *Id.* at 10. Alfred North Whitehead suggests a similar dichotomy between subjective and objective religion. He defines "religion, on its doctrinal side," as "a system of general truths which have the effect of transforming character when they are sincerely held and vividly apprehended." ALFRED NORTH WHITEHEAD, RELIGION IN THE MAKING 15 (1926). He then defines religion as "what the individual does with his own solitariness." *Id.* at 16. He goes on to emphasize that "religion is primarily individual and the dogmas of religion are clarifying modes of external expression . . . Expression, and in particular expression by dogma, is the return from solitariness to society." *Id.* at 132.

349. OGDEN, IS THERE ONLY ONE, *supra* note 49, at 10-11.

350. *Id.* at 11.

351. *Id.* at 12-13.

352. *See id.* at 12.

exempt from rational reflection.[353] Rather, religious faith thematically articulates the basic faith so that philosophy and theology can aid in articulating and validating this basic faith more precisely.

2. Religion, Philosophy, and Theology

Philosophy and theology are also forms of culture, but they are secondary forms of culture that reflect on the validity of the claims made by religion.[354] According to Ogden, "*[p]hilosophy in general is the fully reflective understanding of the basic existential faith that is constitutive of human existence.*"[355] Through rational reflection, it attempts to raise this basic faith to "the level of full self-consciousness, in an express, thematic, and conceptually precise way."[356] In order to do this, philosophy analyzes common human experience to discern how this basic faith is "already expressed or implied in the whole tradition of human culture."[357] This basic faith is expressed or implied especially in religion but also in law, morality, social habits, literature, art, science, and "'throughout the meanings of words and linguistic expressions.'"[358] With respect to religion, philosophy critically reflects on the credibility of the claims of religion. It holds religious convictions to the same standards of credibility—reason and common human experience—as other claims. Through this process of reflection, philosophy attempts to discern whether the religious convictions have been able to achieve a fully reflective understanding of our basic faith.

Similarly, theology consists in "critical reflection on the validity claims of some specific religion."[359] For example, Christian theology critically reflects on two distinct validity claims: that the Christian witness is 1)

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353. *Id.* at 14.

354. Although religion can be distinguished from philosophy and theology, "there is no complete separation between primary and secondary forms of culture" because "[t]he results of theological and philosophical reflection not uncommonly find their way back to the level of primary culture and there serve a properly religious as distinct from a properly theological or philosophical function." OGDEN, IS THERE ONLY ONE, *supra* note 49, at 8.

355. OGDEN, ON THEOLOGY, *supra* note 58, at 73.

356. *Id.*

357. *Id.*

358. *Id.* at 73, 74 (quoting ALFRED NORTH WHITEHEAD, MODES OF THOUGHT 96-97 (1938)).

359. OGDEN, IS THERE ONLY ONE, *supra* note 49, at 33-34. In discussing the nature of theology in general and Christian theology as a particular example of theological reflection, Schubert Ogden argues that "*[a]lthough theology is a single movement of reflection, it has three distinct moments which allow for its differentiation into the interrelated disciplines of historical, systematic, and practical theology.*" OGDEN, ON THEOLOGY, *supra* note 56, at 7. For my purposes here, I will focus on theology as a single moment rather than specifying its three distinct aspects.

"adequate to its content"; and 2) "fitting to its situation."[360] Ogden further clarifies that the claim to be "adequate to its content" is really two claims.[361] The first claim is that the Christian witness is appropriate.[362] He argues that "whether or not a given witness or theology is appropriate to Jesus Christ must be determined, finally, by whether or not it is in substantial agreement with this earliest accessible stratum of Christian witness."[363] Appropriateness then attempts to discern the core religious concepts and symbols of the earliest Christian witness as a criterion for evaluating Christian theological claims.

The second claim is that the Christian witness is "credible to human existence as any woman or man experiences it."[364] Ogden recognizes, however, "that there is nothing like a consensus about what is to count as such truth [about human existence]."[365] Despite this disagreement, he claims that no claims to truth, including religious claims, are exempt from this criterion. Ogden asserts that, "[o]n the contrary, any understanding of theology that insists on its including such validation is bound to seem more credible than any understanding that precludes it."[366] Like in philosophy, the relevant criteria of credibility are "common human existence and reason."[367] It is at this point that Ogden clarifies that religious convictions are subject to the same criteria of credibility as any other claim about human existence. Credible religious convictions are not just credible to believers but can be shown to be credible for humans qua humans. In other words, credible religious convictions can be validated by reason and common human existence. As a result, "philosophy and Christian theology are not only closely analogous but because of the peculiar relation between their respective objects, between our basic existential faith and specifically Christian faith, also overlap or in a certain way coincide."[368]

What distinguishes theology and philosophy (in its relation to religion) is their respective objects. Theology is critical reflection on the validity claims of a specific religion while philosophy may critically reflect on the

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360. OGDEN, IS THERE ONLY ONE, *supra* note 49, at 34-35. The first validity claim is the specific task of systematic theology while the second validity claim is the specific task of practical theology. *See id.* The following discussion will focus on the role of systematic theology in critically validating religious convictions.

361. SCHUBERT M. OGDEN, DOING THEOLOGY TODAY 7 (1996) [hereinafter OGDEN, DOING THEOLOGY TODAY].

362. *Id.*

363. OGDEN, IS THERE ONLY ONE, *supra* note 49, at 39.

364. OGDEN, DOING THEOLOGY TODAY, *supra* note 361, at 7.

365. *Id.* at 19.

366. *Id.*

367. OGDEN, IS THERE ONLY ONE, *supra* note 49, at 36.

368. OGDEN, ON THEOLOGY, *supra* note 58, at 88.

claims of many different religions or in general on the basic faith implied by all human activity. Furthermore, philosophy is only concerned about whether religious convictions are credible to common human experience and reason, whereas theology must be concerned about whether religious convictions are both appropriate to the relevant religious witness and credible to common human experience and reason. The criterion of appropriateness in theology clarifies that, unlike philosophy, theology originates in a special revelation. This special revelation is additional evidence for which theology must account, but which philosophy does not. However, this special revelation claims to provide the true understanding of the basic existential faith. It claims to be formally true "not only for all other true religion, but also for any other existential truth whatever, including that of philosophy."[369] Consequently, "[b]ecause theology and philosophy by their very natures finally lay claim to the same basic ground, appeal to the same historical evidence—in short, serve an identical ultimate truth—their material conclusions must be in the last analysis mutually confirming if either is to sustain its essential claim."[370]

Moreover, common human experience and reason are clearly not self-defining terms. For example, common human experience could include a role for religious experience (experience of the Divine). Given that religious experience is common to at least some humans, it is part of "common human experience." By the use of the term common, I do not think Ogden intends to claim that only experiences that all recognize as common count but that all experiences that could in principle be common count. Otherwise, the more astute perceptions about experience would be left out because not all individuals would recognize their validity. In other words, the insights into the nature of authentic human existence provided by religious experience can be included in the resources that individuals use to evaluate the traditional answers to the existential question.[371]

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369. OGDEN, IS THERE ONLY ONE, *supra* note 49, at 71.

370. OGDEN, ON THEOLOGY, *supra* note 58, at 88.

371. For example, William Alston provides an extended discussion of the epistemic significance of perceiving God. *See generally* WILLIAM P. ALSTON, PERCEIVING GOD: THE EPISTEMOLOGY OF RELIGIOUS EXPERIENCE (1991). His central thesis is "that experiential awareness of God, or as I shall be saying, the *perception* of God, makes an important contribution to the grounds of religious belief." *Id.* at 1. William James also argues that religion "shall mean for us *the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine.*" WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE 31 (Martin E. Marty ed., Penguin Books 1982). James further claims "that feeling is the deeper source of religion, and that philosophic and theological formulas are secondary products, like translations of a text into another tongue." *Id.* at 431.

However, arguing for a definitive account of reason and common human experience is not required to establish that religious convictions are subject to critical reflection just like other claims about human existence. Ogden's account of philosophy and theology aims to articulate an understanding of religious convictions that shows they are subject to critical reflection rather than attempting to settle the interminable debate about the nature of reason and common human experience. Whatever reason and common human experience mean, they imply at the very least that humans have some ability to transcend the religious convictions and self-understanding given to them by religious traditions in order to evaluate those convictions. In this respect, reflective self-understanding or faith (religion in its subjective reference) results from the freedom that individuals have through critical reflection to transcend both themselves and the world (including religion in its objective reference). Through critical reflection, individuals understand themselves and the world as objects of understanding and evaluate that understanding based on reason and common human experience. The critical reflection on religion by philosophy and theology thus allows individuals to transcend their religious convictions and to reflect on their validity.

3. Pluralistic Inclusivism

Given that religious convictions can be critically validated, Ogden could be read to suggest that there is only one true religion that can be arrived at by critical reflection. If this were the case, the state could establish this religion so that the law would include a comprehensive justification to aid judges in deciding hard cases. This reading, however, would be seriously misguided. To the contrary, Ogden maintains that the debate about religious pluralism has been mistaken because it has proceeded from the assumption that there is either one true religion (monism) or that there are many equally true religions (pluralism). He argues that religious monism comes in two varieties: exclusivism and inclusivism. For example, in its Christian form, exclusivists claim that there is "no salvation outside of the Church" or "no salvation outside of Christianity."[372] By contrast, Christian inclusivists argue that

> [T]he possibility of salvation uniquely constituted by the event of Jesus Christ is somehow made available to each and every human being without exception [usually through the fragmentary explication of the true religion (Christianity) by other religions] and, therefore, is exclusive of no one unless she

372. OGDEN, IS THERE ONLY ONE, *supra* note 49, at 28-29.

> or he excludes her- or himself from its effect by a free and responsible decision to reject it.[373]

The alternative usually proposed to these two forms of monism is pluralism. Pluralists maintain "not only that there *can be* many true religions but there actually *are*."[374] On this account, all religions are equally true, and one religion cannot be shown to be true and another false.

Conversely, Ogden contends that religious convictions are capable of critical validation. Some religious convictions are capable of critical validation by theology and philosophy and others are not. This seems to suggest religious monism, but Ogden argues for another option, which he calls pluralistic inclusivism.[375] He maintains that the logical contradictory to religious monism "is not that there actually *are* many true religions, but only that there *can be*."[376] In other words, more than one religion may be capable of critical validation. More than one religion may be the true reflective understanding of our basic existential faith.

Also, as a product of critical reflection, religious convictions can be modified and corrected based on further reflection and based on what is learned from dialogue with other religions. The pursuit of religious truth is never complete. Through on going reflection and encounters with other religions, the possibility for improvement is ever present. Consequently, even if a religion could be shown to be more true than others, Ogden would oppose the establishment of an official religion. Establishing an official religion would cut off the opportunity for further improvement and refinement of religious truth. It would stifle the pursuit of religious truth and jeopardize further progress from subsequent rational reflection and dialogue among those holding a plurality of religious convictions.

4. *Consequences for the Religionist-Separationist Model*

Assuming Ogden's arguments for justifying religious convictions and pluralistic inclusivism succeed, there are two significant implications for the religionist-separationist model of judicial decision making. First, all comprehensive or religious convictions cannot be presumed to be equally true. Judges must validate their religious convictions before relying on them in hard cases. At the very least, they must determine that these religious convictions are fully reflective—credible to common human existence and reason. Once this has been done, judges are warranted in

373. *Id.* at 31.
374. *Id.* at 27.
375. *See id.* at x-xi.
376. *Id.* at 83.

relying on those religious convictions for fully justifying their deliberations in hard cases.

However, as noted in Part IV, this does not mean that judges must become theologians. They are not expected to produce a systematic theological defense of their religious convictions. Rather, judges may meet this burden in several other ways. Judges may rely on theological justifications of a theologian or on the official doctrine of a religious tradition as long as they examine this theological justification and conclude that it is fully reflective. Also, judges have likely been reflecting on their religious convictions, to some extent, their entire lives. Once they are satisfied that their religious convictions are fully reflective, this validation will suffice unless something calls this conclusion into question. In either case, judges will not usually be validating their religious convictions during their deliberations about hard cases. This validation will likely occur prior to their deliberations. If so, their focus in hard cases will not be on validating their religious convictions, but on justifying noncomprehensive norms and the choice among them. If not, the religionist-separationist model of judicial decision making requires that judges critically validate their religious convictions *during* their deliberations and *before* relying on these religious convictions to justify their decisions. Therefore, if judges follow this process of critically validating their religious convictions, their full justification of their decisions in hard cases will provide a rational justification of the law even though the law is indeterminate.

Second, pluralistic inclusivism provides a further justification for the religionist-separationist model prohibition against writing religious convictions into judicial opinions. Judges should not write their religious convictions into the law, not because religious convictions are nonrational and incapable of critical validation, but because religious convictions are always open to further refinement and validation. If judges adopted an official religious justification for the law in their written opinions, they would establish that religious justification as presumptively true. In addition to the Establishment Clause and practical problems discussed above, this would stifle the pursuit of religious truth in several ways. The first problem is that judges are not theologians or philosophers. Most judges are not trained to provide a systematic account of their religious convictions even if the religious convictions they hold are true. Any religious convictions written in judicial opinions would likely be inaccurately or inartfully expressed. In addition, any state recognition of a religious truth would be problematic. The act of establishing an official religious justification of the law would tend to isolate that justification from critique and to make the practical decision based on that religious justification difficult to modify. That

religious justification would function like precedent, and it would have presumptive validity. Those challenging it would not only have the burden of showing that an alternative religious justification was true and that the state religious justification was false, but they would also have to persuade those in power to change this religious justification.

For example, if Chief Justice Moore's account above was taken to be the official religious justification of "a strong presumption of unfitness" for homosexual parents, challengers would then have to persuade subsequent judges both that the presumption was wrong and that the religious justification was wrong. Further, the challenger would have to show not only that the Christian argument against homosexuality was flawed but also that Christianity itself was flawed. If Buddhism could be shown to be true and Christianity false, the challenger would have to persuade Christian judges, like Justice Chief Moore, that their Christian religious convictions were not true. Even if the Buddhist was right, the practical difficulty of convincing the Christian judge to recognize his error would be immense.

To the contrary, pluralist inclusivism supports the religionist-separationist model of judicial decision making because it requires that the law should only be implicitly informed by religious convictions that judges have critically validated. This requirement prevents the state from ruling out religious convictions ahead of time. By not allowing an establishment of religion, the debate about which religious convictions provide the fully reflective account of our basic faith can continue. This requirement also shifts to judges the responsibility for critically validating their religious convictions before relying on them in hard cases. At the same time, this requirement and the religionist-separationist model of judicial decision making allow for the full justification of the law even though the state does not establish an official religion. Full justification of the law by individual judges would likely result in a plurality of comprehensive convictions implicitly informing the law.[377] Consequently, by following the requirements of pluralistic inclusivism and the religionist-separationist model, judges can reenchant the law by giving the law a rational religious justification without violating the Establishment Clause.

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377. Similarly, Jean Bethke Elshtain has argued that "a variety of norms and rules are constitutive of plural communities and that a democratic polity has an enormous stake in keeping such plurality alive. For this is the only way to keep democratic politics alive." Jean Bethke Elshtain, *The Question Concerning Authority, in* RELIGION AND CONTEMPORARY LIBERALISM 253, 254 (Paul J. Weithman ed., 1997).

XI. CONSEQUENCES OF REENCHANTING THE LAW

Rather than creating an illegitimate influence on the law, judicial reliance on comprehensive or religious convictions in accordance with the religionist-separationist model helps solve several conundrums about the law. One of the central consequences of reenchanting the law is to disclose that much of the disagreement between judges in hard cases does not occur at the level of the law. It is not that some judges "correctly" interpret the legal norms and others are mistaken. In hard cases, the law itself does not provide a dispositive answer to the dispute. Even if judges are completely clear about the parameters of the law they are interpreting and deal effectively with the legal precedent, statutes, or other legal norms in dispute, they may disagree about what extra-legal norms are controlling. Adjudicating these competing extra-legal norms cannot be done without justifying those norms and the choice among them. If judges hold different religious convictions, they may fully justify contrary extra-legal norms based on those religious convictions. This is not to say that one or both of the judges could not be mistaken about the validity of his or her religious convictions. That very well may be the case. Furthermore, some judges may make decisions without explicitly relying on religious convictions so that their choices only imply comprehensive convictions. The disagreement between these judges, however, is not about the "law" but about which comprehensive conviction is true. This disagreement is at a higher level of reflection and cannot be resolved by focusing on legal norms and noncomprehensive extra-legal norms. To resolve this disagreement, the debate should turn to the comprehensive convictions that justify these different decisions. Reflection on this level of justification may disclose mistakes in the process of fully justifying a judge's decision or that a judge was relying on an unwarranted comprehensive conviction.

Given that the law is constantly being shaped in hard cases by judges' comprehensive or religious convictions, the law is also not autonomous or "coherent," the way some, like Ronald Dworkin, wish it to be.[378] This incoherence is not necessarily because judges fail to interpret the law correctly but because they do not all share the same comprehensive convictions. The incoherence in the law stems, in part, from the plurality of comprehensive convictions in our society that are reflected in the law. Without some unlikely conversion of all judges to the same comprehensive conviction, the law is likely to continue to be shaped by competing and conflicting comprehensive convictions. David Kairys notes that the indeterminacy of law

378. *See supra* note 327 (discussing Dworkin's interpretative theory of law).

> stems from the reality that the law usually embraces and legitimizes many or all of the conflicting values and interests involved in controversial issues and a wide and conflicting array of 'logical' or 'reasoned' arguments and strategies of argumentation, without providing any legally required hierarchy of values or arguments or any required method for determining which is most important in a particular context.[379]

By contrast, the religionist-separationist model maintains that the indeterminacy of the law is principled, not happenstance. Even if the law could specify the "required hierarchy of values" ahead of time, the Establishment Clause would prohibit it from doing so. The law must remain indeterminate because making it determinate would require establishing a religious conviction in violation of the Establishment Clause.[380] In other words, if the law included a full justification for hard cases like abortion, euthanasia, and homosexual marriage, it would require establishing a religious conviction in the law. As a result, legal indeterminacy is a constant feature of a legal system, like ours, which prohibits the establishment of religion.

Rather than the law itself providing a comprehensive and coherent system for resolving disputes, the demands of coherent decision making are shifted to the individual judge. In easy cases, judges should apply the existing law to settle the dispute. In hard cases, judges' deliberation should aspire to provide a full and coherent justification of their decisions based on their religious convictions even though the explanation given in their written opinion is only a partial justification of that decision. They may rely on noncomprehensive extra-legal norms, but these norms must, at some point, have been justified by their religious convictions. The rancorous debate over the appointment of U.S. Supreme Court justices and other judges suggests that citizens and legislators already intuitively understand that judges' decisions in hard cases depend upon their most fundamental beliefs, which are their explicit comprehensive or religious beliefs.[381] Our citizens and legislators have not fallen for the illusion of an autonomous legal system.

The contentious debate surrounding this appointment process stems in large part, however, from the misperception that relying on religious convictions in judicial decision making undermines the rationality of judicial decision making. To the contrary, judicial reliance on explicit comprehensive or religious convictions in hard cases increases rather than decreases rational judicial decision making and has a disciplining

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379. KAIRYS, *supra* note 78, at 4.

380. For a more developed argument supporting this conclusion, see MODAK-TRURAN, REENCHANTING THE LAW, *supra* note 17, at 257-75.

381. *See supra* note 18.

effect on judges.[382] Rather than blindly assuming that their decisions are justified,[383] judges fully justify the noncomprehensive extra-legal norms they rely on to decide hard cases. This entails justifying all the noncomprehensive extra-legal norms they rely on and the choice among them. They don't merely assume that these extra-legal norms are justified and that the choice among them is self-evident. Further, results-oriented judging is prohibited. Outcomes cannot be embraced merely because they are politically desirable and/or expedient. Judges cannot conveniently rationalize their decisions in hard cases by arbitrarily choosing extra-legal norms to support desired outcomes. They cannot rely on noncomprehensive extra-legal norms that are inconsistent with their religious convictions. In their deliberations about hard cases, judges must determine how the desired outcome connects to noncomprehensive extra-legal norms. In turn, those noncomprehensive extra-legal norms and the choice among them must be fully justified by a religious conviction that the judge holds to be true. This process of full justification in judicial deliberation should deter, rather than permit, judges from embracing outcomes that cannot be fully justified by their religious convictions. Consequently, religious convictions will then have a disciplining effect on judicial decision making and require judges to become more rational.

In addition, judges cannot indiscriminately rely on whatever comprehensive or religious conviction they desire. Comprehensive convictions are not exempted from rational critical reflection. Self-critical judicial decision making also requires judges to be self-critical about their religious or comprehensive convictions. Removing the constraints prohibiting reliance on religious convictions does not mean that judicial decision making is based only on "faith" or is nonrational. Conversely, judicial decision making becomes more self-reflective. Rather than relying on a basic faith in the meaningfulness of human existence or an implicit comprehensive conviction, judges are self-aware about the role of their religious convictions in fully justifying their decisions in hard cases and about the requirement of critically justifying

382. *Cf.* Failinger, *supra* note 91, at 703 (arguing that "[i]f we force religion underground, judges may easily mistake latent religious or moral beliefs for public policy, creating real monsters of vagueness or unpredictability").

383. There may be circumstances where a more intuitive process of judicial decision making constitutes a second-best alternative. *See* Mark C. Modak-Truran, *A Pragmatic Justification of the Judicial Hunch*, 35 U. RICH. L. REV. 55 (2001) (arguing that in some cases, a subjective sense of certainty and pragmatically testing the consequences of a hunched decision may justify judges relying on their hunches about what the outcome of a case ought to be). Here, however, I am concerned with an ideal normative account of how judges should proceed in justifying their decisions in hard cases.

their religious convictions before relying on them for this full justification.

Finally, despite the plurality of comprehensive convictions informing judicial deliberation in hard cases, judges will not necessarily make highly divergent decisions in hard cases. First, judges may reach the same result even though their deliberations are informed by different noncomprehensive extra-legal norms and different comprehensive convictions. In Cass Sunstein's terms, these situations constitute "incompletely theorized agreements on practical outcomes."[384] There may also be agreement on certain noncomprehensive extra-legal norms that are fully justified by different comprehensive convictions and that can be relied on by judges to decide hard cases. In addition, there are influences on judicial decision making that promote convergence. For example, Ronald Dworkin has argued that despite the divergence in judicial convictions about the justifying purpose, goal, or principle governing legal practice as a whole, a variety of forces temper these differences to precipitate convergence.[385] In this respect, he claims that:

> Every community has paradigms of law, propositions that in practice cannot be challenged without suggesting either corruption or ignorance . . . The most powerful influences toward convergence, however, are internal to the character of interpretation. The practice of precedent, which no judge's interpretation can wholly ignore, presses toward agreement; each judges' theories of what judging really is will incorporate by reference, through whatever account and restructuring of precedent he settles on, aspects of other popular interpretations of the day. Judges think about law, moreover, within society, not apart from it; the general intellectual environment, as well as the common language that reflects and protects that environment, exercises practical constraints on idiosyncrasy and conceptual constraints on imagination. The inevitable conservatism of formal legal education, and of the process of

384. CASS SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 37 (1996). Sunstein argues that law is basically comprised of "incompletely theorized agreements on particular outcomes, accompanied by agreements on the narrow or low-level principles that account for them." *Id.* This allows for substantial disagreement on more general theoretical principles that attempt to explain and legitimize the law.

385. DWORKIN, LAW'S EMPIRE, *supra* note 19, at 87-88. David Strauss echoes a similar sentiment about the common law and common law constitutional interpretation when he argues that "[a] judge who conscientiously tries to follow precedent is significantly limited in what she can do." David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 926 (1996).

> selecting lawyers for judicial and administrative office, adds further centripetal pressure.[386]

Although arguing for much more convergence than I would support,[387] Dworkin's general point can be extrapolated to apply to judicial reliance on comprehensive convictions. In addition to the factors mentioned by Dworkin, the predominance of the Judeo-Christian tradition in the United States may also lead to convergence by judges in deciding certain hard cases because of shared aspects of the comprehensive convictions making up this tradition. These shared aspects will allow full justification of noncomprehensive extra-legal norms by a plurality of comprehensive convictions. These shared aspects will also promote convergence if they are part of the comprehensive convictions that are only implied by judicial decisions that have not been fully justified. Taking all these aspects of convergence together means that fully justifying judicial decisions in hard cases will not necessarily result in radically different applications of the law. This convergence thus makes it appear as though judges are not relying on a plurality of comprehensive convictions in hard cases. As a result, this presents an additional reason why the separationist model has been so widely accepted and why the religious dimension of judicial decision making has remained substantially hidden.

XII. CONCLUSION

In conclusion, my religionist-separationist model of judicial decision making results in a *reenchantment of the law* in a post-modern form. Unlike the modern consensus that the law can be rationally justified independently of religious convictions, religious convictions are required for fully justifying judges' decisions in hard cases. The demands of full justification in hard cases reintroduces religious convictions into the process of judicial deliberation. Rather than resorting to a "premodern" establishment of a particular religious conviction as authoritative for justifying the law, a plurality of comprehensive convictions may implicitly inform and shape the law in the process of judges fully justifying their deliberations in hard cases. Judicial opinions, however, should only be a partial justification. The law should remain indeterminate because the

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386. DWORKIN, LAW'S EMPIRE, *supra* note 19, at 88. *Cf.* KARL LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA, §§ 55-58 (Michael Ansaldi, trans., Paul Gewirtz, ed., 1989) (arguing that sociological factors such as the operating technique of judges and lawyers, facts of a case, and real-life norms are powerful sources of certainty or predictability).

387. Dworkin argues that "[o]ur constitution is law, and like all law it is anchored in history, practice, and integrity. Most cases at law—even most constitutional cases—are not hard cases. The ordinary craft of a judge dictates an answer and leaves no room for the play of personal moral conviction." DWORKIN, FREEDOM'S LAW, *supra* note 121, at 11.

Establishment Clause precludes judges from writing their comprehensive or religious convictions into the law. In other words, the Establishment Clause prohibits judges from fully justifying their written opinions because opinions can only include noncomprehensive norms. Although a full justification of judicial deliberation in hard cases requires religious convictions, the process of explanation gives the illusion of the autonomy of law. Religious convictions are thus the *silent prologue* to any full justification of judges' decisions in hard cases.

In addition, the anticipated arguments against the religionist-separationist model have failed. The claim that religionist-separationist model violates the Establishment Clause because judges' decisions are not based on a predominant secular purpose does not hold up under close scrutiny of the Supreme Court Establishment Clause jurisprudence. The fact that judges' opinions imply a comprehensive justification or justifications is not enough to find that their opinions lack a secular purpose. As long as judges do not write their religious convictions into the law and justify their decisions with noncomprehensive norms, they provide a secular purpose for their decisions and will not raise any Establishment Clause problems. The philosophical version of the Secular Purpose Objection was likewise defeated. Part VII showed that the separationist and alternative religionist-separationist models of judicial making that claimed to be independent of comprehensive convictions all depended on comprehensive convictions and were incoherent. In addition, judges are not insincere by leaving their religious or comprehensive justifications out of their opinions but consistent with the Establishment Clause (i.e., the "rule of law") and a proper understanding of religious pluralism. Leaving out religious justifications also facilities consensus on legal results and lower-level legal rules and principles without raising the thorny philosophical, theological, and hermenuetical questions implicated by religious justifications. Surprisingly, the Establishment Clause also provides a normative justification for comprehensive legal indeterminacy and the noncomprehensive legal indeterminacy resulting from it. Finally, Ogden's account of justifying religious convictions and pluralistic inclusivism provided support for the assumption that religious convictions can be critically validated. Hence, the religionist-separationist model has survived its most likely objections and provides a coherent account of judicial decision making under the conditions of legal indeterminancy.

The religionist-separationist model, however, does pose some potential risks. Judges may claim to follow it but not critically validate their religious convictions or fully justify their decisions. These judges would be inappropriately relying on religious convictions that may not be

capable of critical validation. They may also wrongly assume that certain results, like prohibitions on homosexual sodomy, follow from their religious convictions without bothering to justify that assumption. Some judges may further specify their religious convictions in their written opinions like Chief Justice Moore. Violating normative constraints is not unique to the religionist-separationist model. There will be some judges who violate the normative constraints of any model of judicial decision making. Legal indeterminancy opens the door to illegitimate judicial decision making in hard cases. Unless it becomes possible to police judges' thoughts, the most one can do is provide strong arguments in support of these normative constraints and hope that judges have the integrity to follow them.

Despite this risk, the reenchantment of the law will substantially broadened the constitution of jurisprudence and make judicial decision making more self-critical. Currently, jurisprudence in the legal academy includes many schools of thought such as law and economics, critical legal studies, feminist jurisprudence, liberal jurisprudence, and communitarian jurisprudence. In addition to these, we should, and already do, see new additions such as Christian Jurisprudence,[388] Jewish Jurisprudence,[389] and Islamic Jurisprudence.[390] Furthermore, each of these broad categories can be further subdivided to reflect the plurality of religious convictions within each category. For example, Christian Jurisprudence may be subdivided into Episcopalian, Presbyterian, Methodist, Roman Catholic, Baptist, and Lutheran Jurisprudence.[391]

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388. *See, e.g.*, CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell, Robert F. Cochran, Jr., & Angela C. Carmella eds., 2001) [hereinafter CHRISTIAN PERSPECTIVES].

389. *See, e.g.*, Morris Traube, *The Right to Die: A Comparison of Jewish Law and American Constitutional Law*, 21 QUINNIPIAC L. REV. 417, 418 (2002) (arguing that Jewish ethical principles may influence the debate in the halls of the various legislatures and that "the strong Judeo-Christian heritage of this nation suggests the possibility, albeit an attenuated one, that such heritage may influence the interpretation of our laws and Constitution," especially on the question of a fundamental right to die); Steven H. Resnicoff, *Lying and Lawyering: Contrasting American and Jewish Law*, 77 NOTRE DAME L. REV. 937, 937 (2002) (arguing that "Jewish law rules provide useful guidance for the possible amendment of America's secular legal ethics prescriptions"); Samuel J. Levine, *Teaching Jewish Law in American Law Schools: An Emerging Development in Law and Religion*, 26 FORDHAM URB. L.J. 1041, 1044 (1999) (noting that his students "often gain a new perspective on American Law as a result of examining the contrast cases in Jewish law").

390. *See generally* 15 J. L. & RELIG. 1-632 (2000-2001) (special issue focusing on Islamic law and jurisprudence).

391. *See* CHRISTIAN PERSPECTIVES, *supra* note 388, at 241-403 (including articles discussing Roman Catholic, Calvinist, Anabaptist, Baptist, and Lutheran perspectives on the law); *see also* Failinger, *supra* note 91, at 702 (arguing that the wisdom of the Lutheran

However, this does not mean that all comprehensive convictions are valid bases for judicial decision making in hard cases. Judges must critically validate these comprehensive convictions before relying on them. Assuming that many religious convictions can be validated, a plurality of religious convictions will continue to shape the law implicitly. The law will be reenchanted not by establishing an official state religion but by the implicit religious convictions that continue to shape the law in the process of judges interpreting and applying the law in hard cases. Normative theories of law will no longer float unattached to religious convictions, and the autonomy of law will be no more.

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tradition could provide rhetorical and analogical insight for judges (especially Chief Justice Rehnquist who is Lutheran)).