

1-15-2013

## Symposium Introduction: The Competing Claims of Law and Religion: Who Should Influence Whom?

Robert F. Cochran Jr.

Michael A. Helfand

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Constitutional Law Commons](#), [First Amendment Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

Robert F. Cochran Jr. and Michael A. Helfand *Symposium Introduction: The Competing Claims of Law and Religion: Who Should Influence Whom?*, 39 Pepp. L. Rev. Iss. 5 (2013)  
Available at: <https://digitalcommons.pepperdine.edu/plr/vol39/iss5/1>

This Symposium is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact [Katrina.Gallardo@pepperdine.edu](mailto:Katrina.Gallardo@pepperdine.edu), [anna.spath@pepperdine.edu](mailto:anna.spath@pepperdine.edu), [linhgavin.do@pepperdine.edu](mailto:linhgavin.do@pepperdine.edu).

# Symposium Introduction: The Competing Claims of Law and Religion: Who Should Influence Whom?

Robert F. Cochran, Jr.\* and Michael A. Helfand\*\*

## I. INTRODUCTION

## II. THE TOPICS

- A. *The State of the Culture Wars and a Proposed Ceasefire*
- B. *Neutrality*
- C. *The Priority of God or Law?*
- D. *Separation of Religion and State*
- E. *Application of the Religion Clauses: Endorsement and Regulation of Religion*
- F. *Law, Religion, and Influence*

## III. CONCLUSION

### I. INTRODUCTION

That law and religion come into conflict is seemingly inevitable. Both systems create their own integrated normative systems, translating shared values and ethics into rules and obligations. Such lofty goals generally serve society well. Individuals derive meaning, identity, and community from both law and religion. Indeed, the two often reinforce each other's efforts as both law and religion are frequently invoked in crusades against oppression, evil, and tyranny, with notable examples in United States history including Abraham Lincoln's "Second Inaugural"<sup>1</sup> and Martin Luther King's "I Have

---

\* Louis D. Brandeis Professor of Law, Pepperdine University School of Law; Director, Herbert and Elinor Nootbaar Institute on Law, Religion, and Ethics.

\*\* Associate Professor of Law, Pepperdine University School of Law; Associate Director, Diane and Guilford Glazer Institute for Jewish Studies. We would like to thank Lauren Hartley, Nicole Rodger and the rest of the *Pepperdine Law Review* staff, whose hard work ensured the success of this symposium volume.

1. Abraham Lincoln, President of the United States, Second Inaugural Address (Mar. 4, 1865) (transcript available at <http://memory.loc.gov/service/rbc/lprbcsms/scsm0304/001r.jpg>).

a Dream” speech.<sup>2</sup>

But the relationship between law and religion is not always reinforcing—to the contrary, the two often find themselves at loggerheads. In truth, the relationship between law and religion is so deeply fraught precisely because both aspire to the similar lofty goals of imposing rules and obligations, each demanding the ultimate allegiance of those who come within their respective jurisdictions. And it is these aspirations for supremacy that make us, at times, justifiably uneasy and nervous about the competing ambitions of both law and religion.

We thus stand in an ambivalent relationship to both law and religion. Religion can provide us with a higher purpose and sense of meaning. But it also has the ability to motivate mass violence and intolerance.<sup>3</sup> It is therefore not surprising that religion’s introduction into public discourse often serves as a source of concern and resentment.<sup>4</sup> At the same time, law, which can promote lofty ideals such as equality and dignity, also can, to quote Robert Cover, “signal and occasion the imposition of violence upon others.”<sup>5</sup> Indeed, the abuse of legal authority has caused some of the most horrifying atrocities in recent human history.

Given the potential for both law and religion to promote the most noble of human goods and the most depraved of human evils, the endless jousting between the two—each continuously seeking to tame the other—will undoubtedly remain a permanent feature of the human experience. Indeed, it seems every new day brings yet another debate over the proper respective roles for law and religion to play in a twenty-first century liberal democracy. Shortly before the conference, which serves as the basis for this symposium, there were clashes over requiring religious employer-provided health insurance to include coverage for contraception,<sup>6</sup> the proposed ban of

---

2. Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963) (transcript available at <http://www.americanrhetoric.com/speeches/mlkhaveadream.htm>).

3. See, e.g., Amos N. Guiora, *Religious Extremism: A Fundamental Danger*, 50 S. TEX. L. REV. 743, 743 (2009) (noting that particularly religiously motivated terrorism constitutes “one of the gravest threats against democratic societies in the 21st century” because, among other reasons, “[r]eligion is a powerful motivator for both positive social change and mass violence [and i]t is a force in society that is difficult for many in a secular society to truly understand”).

4. This debate frequently revolves around John Rawls’s claim that religious argumentation should not provide the ultimate grounding for political claims in the public sphere. See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 783–84 (1997). For a selection of responses, see JEFFREY STOUT, *DEMOCRACY AND TRADITION* 65–77 (2004); ROBERT F. COCHRAN, JR., *FAITH & LAW: HOW RELIGIOUS TRADITIONS FROM CALVINISM TO ISLAM VIEW AMERICAN LAW* 3–7 (2008); Robert Audi, *Religious Values, Political Action, and Civic Discourse*, 75 IND. L.J. 273 (2000); Abner S. Greene, *Constitutional Reductionism, Rawls, and the Religion Clauses*, 72 *FORDHAM L. REV.* 2089 (2004); Andrew R. Murphy, *Rawls and a Shrinking Liberty of Conscience*, 60 *REV. POL.* 247 (1998); Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 *SAN DIEGO L. REV.* 817 (1993).

5. Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1601 (1986).

6. See Erik Eckholm, *Poll Finds Wide Support for Birth Control Coverage*, N.Y. TIMES, Mar. 1, 2012, <http://www.nytimes.com/2012/03/02/us/politics/americans-divided-on-birth-control->

circumcision in San Francisco,<sup>7</sup> the rise of anti-sharia legislation aimed at prohibiting courts from relying upon religious law,<sup>8</sup> the scope of constitutional protection for religious institutions from anti-discrimination statutes,<sup>9</sup> and the viability of a presidential candidacy given the candidate's professed religious affiliation.<sup>10</sup>

One response to these clashes has been further entrenchment, with advocates from across the political and religious spectrums working to raise the metaphorical wall of separation to new heights.

For some secularists, this entrenchment means ensuring that the public sphere remains free of religious symbols, courts remain free of reference to religious law, and legislative debate remains free of religious argumentation. From such a vantage point, the increased visibility of religious individuals, institutions, and groups in the public sphere has sparked concerns over the

coverage-poll-finds.html?\_r=1; Sarah Kliff, *Lawmakers Debate Mandated Coverage of Contraceptives in Health-Care Law*, WASH. POST, Feb. 16, 2012, [http://www.washingtonpost.com/politics/lawmakers-debate-mandated-coverage-of-contraceptives-in-health-care-law/2012/02/16/gIQAgf3jIR\\_story.html](http://www.washingtonpost.com/politics/lawmakers-debate-mandated-coverage-of-contraceptives-in-health-care-law/2012/02/16/gIQAgf3jIR_story.html); Lisa Wirthman, *Health vs. Faith: The Debate over Insurance for Contraceptives*, DENVER POST, Mar. 4, 2012, [http://www.denverpost.com/opinion/ci\\_20083126](http://www.denverpost.com/opinion/ci_20083126).

7. See Adam Cohen, *San Francisco's Circumcision Ban: An Attack on Religious Freedom?*, TIME, June 13, 2011, available at <http://www.time.com/time/nation/article/0,8599,2077240,00.html>; Jennifer Medina, *Efforts to Ban Circumcision Gain Traction in California*, N.Y. TIMES, June 4, 2011, <http://www.nytimes.com/2011/06/05/us/05circumcision.html>; Valerie Richardson, *San Francisco Ban on Circumcision a Cut Too Deep for the Faithful*, WASH. TIMES, June 13, 2011, <http://www.washingtontimes.com/news/2011/jun/13/for-faithful-san-fran-ban-on-circumcision-a-cut-to/?page=all>.

8. Bill Raftery, *An Examination of 2011 Sharia Law & International Law Bans Before State Legislatures*, GAVEL TO GAVEL (Jan. 27, 2011), <http://gaveltogavel.us/site/2011/01/27/an-examination-of-2011-sharia-law-international-law-bans-before-state-legislatures/> (collecting state legislative initiatives aimed at banning sharia and international law); see also Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1233 n.4 (2011) (collecting bills).

9. The most notable example has been the recent debate over the ministerial exception, which the Supreme Court addressed in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012). For some commentary, see Thomas C. Berg, Kimberlee Wood Colby, Carl H. Esbeck & Richard W. Garnett, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175 (2011); Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 106 NW. U. L. REV. COLLOQUY 96 (2011); Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 156 (2011); see also Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1 (2011).

10. See Michael Brendan Dougherty, *Did Romney's Mormonism Doom Him in South Carolina?*, BUS. INSIDER (Jan. 21, 2012), [http://articles.businessinsider.com/2012-01-21/politics/30650015\\_1\\_mitt-romney-anti-mormonism-newt-gingrich](http://articles.businessinsider.com/2012-01-21/politics/30650015_1_mitt-romney-anti-mormonism-newt-gingrich); Jason Horowitz, *Romney's Religion Still a Sticking Point*, WASH. POST, Jan. 2, 2012, [http://www.washingtonpost.com/politics/romneys-religion-still-a-sticking-point/2012/01/02/gIQA71y6WP\\_story.html](http://www.washingtonpost.com/politics/romneys-religion-still-a-sticking-point/2012/01/02/gIQA71y6WP_story.html); Kenneth T. Walsh, *Mitt Romney's Mormon Issue*, U.S. NEWS & WORLD REP., Feb. 6, 2012, available at <http://www.usnews.com/news/blogs/Ken-Walshs-Washington/2012/02/06/mitt-romneys-mormon-issue>.

compatibility of religious ideology and the fundamental commitments of the liberal nation-state. Thus, critics of mixing religion into the public sphere aim to push religion out so as to promote a political culture grounded in universal theories of individualism.<sup>11</sup>

But secularists are not the only ones calling for further fortification of the wall of separation. Indeed, many religionists have similarly generated a call for further entrenchment, advocating that their communities withdraw from American political life and focus inwards on their own shared communal obligations and values.<sup>12</sup> This agenda has been accompanied by a growing trend towards a “new multiculturalism,” with groups marshaling their collective power not to secure inclusion within the public sphere, but instead to demand autonomy and self-government outside the public sphere.<sup>13</sup>

Despite these attempts to disentangle political and religious life, it is difficult to imagine their complete rupture within American society. If recent legal debates provide any indication, it is that the complex interactions between religious and political norms will remain a permanent feature of the American condition even as some advocates on both sides of the political spectrum seek to wall off the political from the religious—and vice versa. Indeed, as the Supreme Court recognized some time ago: “No perfect or absolute separation is really possible . . . .”<sup>14</sup> Notwithstanding attempts to the contrary, religion remains an active participant in the American cultural landscape. Indeed, many of our legal controversies arise precisely *because* religion and politics still continue to engage in a healthy, robust, and heated conversation.

Thus, litigation over the constitutional protections afforded the Christian Legal Society occurs because the Christian Legal Society functions within the confines of a public law school administered by the state of California.<sup>15</sup> Legislatures have sought to limit the ability of courts to reference religious law because religious groups continue to enforce religious rulings within the

---

11. For a discussion of the political philosophy underlying the focus on universalism and the politics of equal dignity, see Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25–44 (Amy Gutmann ed., 1994).

Such a perspective is captured in the French principle of *laïcité*. For recent analysis of *laïcité*, see Frederick Mark Gedicks, *Religious Exemptions, Formal Neutrality, and Laïcité*, 13 IND. J. GLOBAL LEGAL STUD. 473 (2006); see also T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419 (2004); Meira Levinson, *Liberalism Versus Democracy? Schooling Private Citizens in the Public Square*, 27 BRIT. J. POL. SCI. 333 (1997).

12. See Helfand, *supra* note 8, at 1268–82.

13. See *id.*

14. *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 670 (1970).

15. See *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971 (2010).

confines of the United States legal system.<sup>16</sup> And debates over the mandated health insurance coverage provided by religiously affiliated hospitals and universities occur because such institutions remain fully entrenched within civil society.<sup>17</sup>

This reality of continuous interaction between religion, law, and politics served as the baseline assumption of the Third Annual Religious Legal Theory Conference, titled *The Competing Claims of Law and Religion: Who Should Influence Whom?* on February 23–25, 2012, sponsored by Pepperdine University’s Nootbaar Institute on Law, Religion, and Ethics and Pepperdine’s Diane and Guilford Glazer Institute for Jewish Studies. At its core, the conference theme presumed that law and religion—and in turn, religion and politics—forever engage each other in conversation, each providing its own perspectives on how to resolve everyday social problems.<sup>18</sup> So often, the situs of this conversation is the individual whose self-understanding flows from the ongoing dialogue between the religious and political components of one’s identity.<sup>19</sup> In this way, individuals remain—to use Michael Sandel’s term—“encumbered” by their contextual existence<sup>20</sup> and the dialogic character of their religious and political commitments.<sup>21</sup> These competing and complimentary strands of individual identity evolve because there is no realistic way to wall off religion from law or religion from politics.

Of course, once we take for granted that law, religion, and politics are not hermetically sealed off from one another, the questions turn to how we should incorporate and balance these disparate streams of wisdom. The

16. See *supra* note 8 and accompanying text.

17. See *supra* note 6 and accompanying text.

18. See, e.g., AMY GUTMANN, *IDENTITY IN DEMOCRACY* 178–91 (2003) (criticizing strict separationism and advocating a theory of “two-way protection” where “there is a reciprocal relationship between ethical identity and democratic politics”); see also AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS* 117 (2001) (advocating a theory of transformative accommodation that promotes the circulation of power between both religious authority and state authority).

19. See, e.g., 2 CHARLES TAYLOR, *Atomism*, in *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS* 187, 187–210 (1985); CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 31–41 (1991).

20. See Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 *POL. THEORY* 81, 90–91 (1984).

21. For further discussion of the dialogic and discursive character of individual identity, see SEYLA BENHABIB, *In the Shadow of Aristotle and Hegel: Communicative Ethics and Current Controversies in Practical Philosophy*, in *SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS* 23, 23–67 (1992); SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* 1–22 (2002); see also JÜRGEN HABERMAS, *Three Normative Models of Democracy*, in *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* 239, 239–52 (Ciaran Cronin & Pablo De Greiff eds., 1998).

*Competing Claims of Law and Religion* conference panels and speakers considered almost every angle of these questions, addressing debates about family law, medical care, legislative prayer, anti-discrimination law, student life on campus, and commercial law. Speakers examined these questions from the perspectives of a wide variety of religious traditions, from numerous constitutional viewpoints, and from several academic disciplines, including sociology, philosophy, political science, and theology, as well as law.

The following contributions to this symposium have been selected from the wide range of presentations at *The Competing Claims of Law and Religion* conference.<sup>22</sup> They capture some of the most pressing issues and debated concepts in the field of law and religion.

## II. THE TOPICS

### A. *The State of the Culture Wars and a Proposed Ceasefire*

We begin this symposium edition with the Nootbaar Institute's Louis D. Brandeis Lecture, "Law, Religion, and the Common Good," which was delivered at the conference by sociologist James Davison Hunter. In his conference lecture, Hunter lays out the current state of the conflict between law and religion in the United States.<sup>23</sup> It is not a pretty picture. Both sides of the culture wars seek to gain political power and to achieve their objectives through law; law serves as a weapon in the hands of each.<sup>24</sup> Each is fighting for control of the law, attempting to regulate more and more.<sup>25</sup> There is no common morality to which the competing sides may look; the sides have incommensurable values.<sup>26</sup> Freedom suffers, because law is the means of defining the good.<sup>27</sup>

To address this clash, Hunter calls for a ceasefire.<sup>28</sup> He suggests that both sides pull back from the use of law and give other cultural institutions room to grow so as to give "greater independence and authority for those civic institutions that do generate and enable values—faith, the arts, education, family, and philanthropy."<sup>29</sup> In the terms of the religion clauses of the Constitution, Hunter calls for greater freedom for religion and for less

---

22. A complete schedule from the conference is available at <https://law.pepperdine.edu/nootbaar/news-events/events/law-and-religion/Nootbaar-Law-and-Religion-Brochure.pdf>.

23. James Davison Hunter, *Law, Religion, and the Common Good*, 39 PEPP. L. REV. 1065 (2013).

24. *Id.* at 1079.

25. *Id.* at 1079–80.

26. *Id.* at 1076–77.

27. *Id.* at 1075.

28. *Id.* at 1082.

29. *Id.*

religious establishment.<sup>30</sup>

Responding to Hunter, Zachary Calo addresses the challenge of a postsecular world, a world in which, quoting Hunter, we are faced with “the empirically undeniable persistence of religion in the late modern world, the recognition of the limits of secular epistemology and reason,”<sup>31</sup> “an intensifying and unstable pluralism,”<sup>32</sup> and “no possibility of deep moral consensus.”<sup>33</sup> Calo challenges Christians to maintain a difficult balance—advancing a theological jurisprudence which presents Christianity as “the true story of law” while resisting “the violence of advancing a univocal account of law in a culture devoid of any common cultural basis.”<sup>34</sup> He argues that Christians should pursue “a modesty about what can and ought be reasonably accomplished within a pluralistic order.”<sup>35</sup>

Patrick Brennan has little use for modesty. He holds up the recently enacted, explicitly Christian, Hungarian constitution as a model and argues—based on theologically-grounded, Thomistic, natural law—for the role of law and authority in establishing values.<sup>36</sup> Brennan criticizes what Hunter identifies as a “minimalist view of ‘natural law.’”<sup>37</sup> Brennan quotes Benjamin Rush, a signatory to the Declaration of Independence: “Nothing but the Gospel of Jesus Christ will effect the mighty work of making nations happy.”<sup>38</sup> Brennan argues that we have it on divine authority that “all authority comes from God”<sup>39</sup> and that “it is for the authority of the Church to tell the state what moral principles should inspire its social activity and its legislation.”

### B. Neutrality

In his conference presentation, Andrew Koppelman proposes neutrality as an alternative to radical secularists’ call for “complete eradication of religion from public life” and religious traditionalists’ call for “frank state

---

30. *Id.*

31. *Id.* at 1067.

32. *Id.*

33. Zachary R. Calo, *Faithful Presence and Theological Jurisprudence: A Response to James Davison Hunter*, 39 PEPP. L. REV. 1083, 1086 (2013).

34. *Id.*

35. *Id.* at 1088.

36. Patrick McKinley Brennan, *The Mighty Work of Making Nations Happy: A Response to James Davison Hunter*, 39 PEPP. L. REV. 1091, 1092–95 (2013).

37. *Id.* at 1102 (quoting JAMES DAVISON HUNTER, *TO CHANGE THE WORLD* 332 n.9 (2010)).

38. *Id.* at 1105 (quoting GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 366 (1991)).

39. *Romans* 13:1.

endorsement of religious propositions.”<sup>40</sup> According to Koppelman, “First Amendment doctrine treats religion as a good thing,” but insists “that religion’s goodness be understood at a high enough level of abstraction that the state takes no position on any live religious dispute.”<sup>41</sup> The state can affirm “religion in general,” but not any religion in particular.<sup>42</sup> Under Koppelman’s “neutrality,” the public square is not stripped of religious argument.<sup>43</sup> Citizens are free to assert religious arguments for political positions, but opponents may challenge such claims.<sup>44</sup> He acknowledges that this “may be acrimonious, but at least we’ll be talking about what really divides us. . . . It’s more respectful to just tell each other what we think and talk about it.”<sup>45</sup> Koppelman argues that: “Citizens may make whatever religious arguments they like in favor of a law, so long as the law that is ultimately passed is justifiable in nonreligious terms. Because government may not take a position on religious truth, a law that can only be justified in religious terms is invalid.”<sup>46</sup>

Chad Flanders launches a two-fold attack on Koppelman’s claim that allowing endorsement of religion defined at a very high level of abstraction is neutrality.<sup>47</sup> Flanders agrees “with the radical secularist, that Koppelman’s abstract ‘religion in general’ is too much like religion to be neutral, but [agrees] with the religious traditionalist, that religion in general may not capture perfectly what many (or most) of us mean by religion.”<sup>48</sup> Flanders explores why we prefer religion: “Religion gives us a special kind of hope, a hope that transcends the mundane. This is a type of good that can’t be captured by secular theories: it suggests that no matter the appearances, the world as such is just, or at least tends towards justice.”<sup>49</sup>

Richard Garnett also challenges Koppelman’s claim that his description of First Amendment jurisprudence is neutral toward religion. Indeed, Garnett argues that “the coherence and attractiveness of the regime Koppelman proposes and defends depends substantially on its not being—at least, not entirely—‘neutral.’”<sup>50</sup> Whereas Koppelman and Flanders consider religion-law tensions from a state-centric view—what is the state going to do

---

40. Andrew Koppelman, *And I Don’t Care What It Is: Religious Neutrality in American Law*, 39 PEPP. L. REV. 1115, 1115 (2013).

41. *Id.* at 1116.

42. *Id.* at 1136.

43. *Id.*

44. *Id.* at 1133.

45. *Id.*

46. *Id.* at 1136.

47. Chad Flanders, *Can We Please Stop Talking About Neutrality? Koppelman Between Scalia and Rawls*, 39 PEPP. L. REV. 1139, 1140 (2013).

48. *Id.*

49. *Id.* at 1146 (citing CHARLES TAYLOR, *A SECULAR AGE* (2007)).

50. Richard Garnett, *Neutrality and the Good of Religious Freedom: An Appreciative Response to Professor Koppelman*, 39 PEPP. L. REV. 1149, 1155 (2013).

about religion?—Garnett considers them from the perspective of the church.<sup>51</sup> He explores the Second Vatican Council’s *Declaration on Religious Liberty*, which envisions a “healthy secularity”—one that “respects the distinction between religious and political authority.”<sup>52</sup> Moreover, Garnett calls on government to support the “structure of religious freedom” and to encourage “a web of independent, thriving, distinctive, self-governing (in their appropriate spheres) institutions.”<sup>53</sup>

### C. *The Priority of God or Law?*

In his symposium contribution, Michael Paulsen argues that both free exercise and non-establishment were grounded by the founders and should today be grounded on “the priority of God.”<sup>54</sup> According to Paulsen, “Freedom of religion, understood as a human legal right, is government’s recognition of the priority and superiority of God’s true commands over anything the State requires or forbids.”<sup>55</sup> Paulsen argues for protection of any religious exemption claimant who “has any plausible claim to religious truth.”<sup>56</sup> Such claims law should be rejected only if the claimant seeks to violate the “clear, universal moral command of God.”<sup>57</sup> Paulsen also grounds non-establishment in religious truth: “[b]ecause God’s commands, rightly perceived, trump the State’s commands, it makes no sense to say that the State can determine what God’s commands are and whether an individual or group has rightly perceived them.”<sup>58</sup> Accordingly, “[W]e do not trust the State to tell us the proper way to know, worship, and serve God.”<sup>59</sup>

Eugene Volokh objects to Paulsen’s proposals and calls for “the priority of law.”<sup>60</sup> Volokh contends that Paulsen’s proposals “would require the government to judge quintessentially theological questions.”<sup>61</sup> It appears that they would restrict the judiciary to religious believers. “How can

---

51. *Id.*

52. *Id.* at 1157.

53. *Id.* at 1158.

54. Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159 (2013).

55. *Id.* at 1160.

56. *Id.* at 1162.

57. *Id.*

58. *Id.* at 1160.

59. *Id.* at 1161.

60. Eugene Volokh, *The Priority of Law: A Response to Michael Stokes Paulsen*, 39 PEPP. L. REV. 1223 (2013).

61. *Id.* at 1223.

someone who doesn't believe in God figure out what the 'clear, universal moral command of God' would be, if there were a God?"<sup>62</sup> In addition, Volokh questions the great privileges that Paulsen's proposals would give religious believers vis-à-vis non-believers. "Why should *my* belief in what God commands me to do allow me to take something away from *you*, when you don't share this belief?"<sup>63</sup> Volokh argues that legislatures are making good practical judgments regarding when to provide religious freedom protections and that we should continue to rely on them.

#### *D. Separation of Religion and State*

In his symposium contribution, Abdullahi Ahmed An-Na'im argues that law and religion should be "[c]omplementary, [n]ot [c]ompeting."<sup>64</sup> He calls for the "separation of Shari'a and Law."<sup>65</sup> According to An-Na'im, "[t]here is a realm of legitimate interaction between legal and religious norms" but "Shari'a, by its nature and purpose, can only be freely observed by believers, and its principles lose their religious authority and value when enforced by the state."<sup>66</sup> He says:

[Law should be based on] the human judgment of those who control [legal] institutions [and] should not be misrepresented as "religious." This is what I refer to as the separation of Islam and the state. On the other hand, the religious beliefs of Muslims, whether as officials of the state or private citizens, tend to influence their actions and political behavior. I refer to this reality as the connectedness of Islam and politics.<sup>67</sup>

In turn, "Islam and the state must be institutionally separate in order to safeguard the possibility of being Muslim out of personal conviction rather than conformity to the coercive will of the state."<sup>68</sup>

Mohammad Fadel criticizes An-Na'im's proposal as "separationist."<sup>69</sup> According to Fadel, An-Na'im ignores the risk of "non-religious citizens capturing the state and using it to further their own, sectarian, or even at

---

62. *Id.* at 1224.

63. *Id.*

64. Abdullahi A. An-Na'im, *Complementary, Not Competing, Claims of Law and Religion: An Islamic Perspective*, 39 PEPP. L. REV. 1231 (2013).

65. *Id.* at 1239.

66. *Id.* at 1234.

67. *Id.*

68. *Id.* at 1237.

69. Mohammed Fadel, *Seeking an Islamic Reflective Equilibrium: A Response to Abdullahi A. An-Na'im's Complementary, Not Competing, Claims of Law and Religion: An Islamic Perspective*, 39 PEPP. L. REV. 1257, 1259 (2013).

times anti-religious, ends.”<sup>70</sup> Thus, “in lieu of a separationist paradigm, the law should adopt a paradigm of principled reconciliation in which legal values and religious values are in a state of continual dialogue, with the potential that each may inform and shape the other.”<sup>71</sup> Fadel supports John Rawls’ framework, where law is based on “principles of justice that adherents of reasonable comprehensive doctrines, whether religious or non-religious, can endorse for morally compelling reasons internal to their own conceptions of the good.”<sup>72</sup> As a result, “A reasonable religious citizen will therefore not propose the use of coercive power to enforce religious norms that cannot reasonably be justified within the limitations of public reason.”<sup>73</sup>

*E. Application of the Religion Clauses: Endorsement and Regulation of Religion*

Whereas most of the articles in this symposium edition address broad questions of law and religion theory, many speakers at the conference addressed narrower questions of law’s relationship to religion. Included in this symposium edition are three articles addressing specific questions about how law relates to religious enterprises.

Analyzing one facet of contemporary Establishment Clause jurisprudence, Mark Strasser discusses the non-endorsement test, a test proposed by Justice O’Connor and, at times, applied by the Supreme Court.<sup>74</sup> In the words of Justice O’Connor, this test would preclude the government from sending a “message to [religious] nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”<sup>75</sup> Following a review of the cases, Strasser concludes that,

the test is likely to remain one of the tests used by the Court to determine whether Establishment Clause guarantees have been violated . . . but will in reality pay mere lip service to religious minorities’ sincere reactions to a variety of practices privileging some religions over others and privileging religion over non-

---

70. *Id.* at 1261.

71. *Id.* at 1260.

72. *Id.* at 1267.

73. *Id.*

74. Mark Strasser, *The Endorsement Test Is Alive and Well: A Cause for Celebration and Sorrow*, 39 PEPP. L. REV. 1273 (2013).

75. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1983) (O’Connor, J., concurring).

religion.<sup>76</sup>

Addressing the role of law and religious institutions of higher education, Susan Stabile criticizes the current standard under which the National Labor Relations Board determines whether it has jurisdiction over religious colleges and universities.<sup>77</sup> Under current rules, in order to receive an exemption, such institutions must establish that they have a “substantial religious character.”<sup>78</sup> Stabile argues that this test “is an unnecessarily intrusive one that substitutes the government’s views about what it means to be religious for the views of the institution and the religious community with which it is affiliated.”<sup>79</sup> She advocates the current D.C. Circuit rule, which requires that in order to get an exemption, a college or university need only establish that it “(a) holds itself out to the public as a religious institution; (b) is non-profit; and (c) is religiously affiliated.”<sup>80</sup>

Approaching a somewhat similar question of legal regulation of religious institutions, Barak Richman argues that rabbi certification organizations should be subject to Sherman Act anti-trust regulation.<sup>81</sup> He argues that these organizations,

severely limit the supply of rabbis available to hiring congregations and prevent both rabbis and congregations from enjoying the benefits of an open labor market. They also meaningfully interfere with a congregation’s ability to deliberate fully over whom to interview, pursue, and select to be its religious leader of choice. In short, these tight restraints on employment convert the rabbinic organizations into professional cartels that simultaneously restrain the operation of a potentially competitive labor market and prevent congregations from freely expressing their religious practices and beliefs.<sup>82</sup>

#### *F. Law, Religion, and Influence*

A final pair of papers address questions of religion’s influence on law

---

76. Strasser, *supra* note 74, at 1274.

77. Susan J. Stabile, *Blame it on Catholic Bishop: The Question of NLRB Jurisdiction Over Religious Colleges and Universities*, 39 PEPP. L. REV. 1317 (2013).

78. See *Carroll Coll., Inc. v. NLRB*, 558 F.3d 568, 571 (D.C. Cir. 2009) (“In a series of decisions following *Catholic Bishop*, the NLRB created a framework for analysis that looked to whether a school has ‘substantial religious character’ to determine if it is exempt from jurisdiction.”).

79. Stabile, *supra* note 77, at 1319.

80. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1347 (D.C. Cir. 2002).

81. Barak D. Richman, *Saving the First Amendment from Itself: Relief from the Sherman Act Against the Rabbinic Cartels*, 39 PEPP. L. REV. 1347 (2013).

82. *Id.* at 1348.

from broadly philosophical perspectives: one proposing a specific form of religious influence on law and lawyers, the other suggesting that religion has greater influence on law in Western liberal countries than liberalism is willing to acknowledge.

Sherman Clark argues that law can learn from religion and that lawyers can learn from preachers.<sup>83</sup> Drawing from Socrates, Clark notes ways in which both law and religion can and do influence character: “While the construction of character is a more obvious aspect of religious than legal thought, law, including legal argument, can be constitutive in similar ways.”<sup>84</sup> “[L]egal speech can learn from religious speech how to be less small, and perhaps more ennobling.”<sup>85</sup> It can do so by direct exhortation (challenging people to be people of character), by direct attribution (addressing people as if they were people of character), and by modeling character.<sup>86</sup>

John Hill explores the thought of John Stuart Mill and concludes that many of the legal concepts that are dear to liberals’ hearts are grounded in a religious worldview.<sup>87</sup> “The contradictions [between theism and naturalism] within Mill’s thought are the contradiction of liberalism itself.”<sup>88</sup> Hill highlights “ways in which modern liberal political thought depends upon ideas integral to the God-centered conception of the world,” including its views of human rights, freedom, and responsibility.<sup>89</sup> For example, “Taking rights seriously means taking seriously the idea of a transcendent moral order that measures the positive law of particular nations.”<sup>90</sup>

### III. CONCLUSION

*The Competing Claims of Law and Religion* generated a lot of discussion among participants with competing claims. Such discussions can lead to mutual understanding and common ground; a deeper understanding of one another’s positions may lead us to identify unseen possibilities; reflection may yield transformation. Nevertheless, as George Marsden has noted, “Ultimately we do not solve all of the problems of pluralism by better

---

83. Sherman J. Clark, *To Teach and Persuade*, 39 PEPP. L. REV. 1371 (2013).

84. *Id.* at 1371.

85. *Id.*

86. *Id.* at 1377–88.

87. John Lawrence Hill, *Theism, Naturalism, and Liberalism: John Stuart Mill and the “Final Inexplicability” of the Self*, 39 PEPP. L. REV. 1401 (2013).

88. *Id.* at 1405.

89. *Id.* at 1402.

90. *Id.* at 1402–03.

communication and more ‘dialogue.’ The more we understand each other the more likely we are to also discover some fundamental differences.”<sup>91</sup> We suspect that the discussions at the *Competing Claims* conference generated some of all of these results.

When we look at some of our present disagreements, we may see little hope of resolution. But when we look at our broader history we can see areas where common understandings have emerged. Some surprising coalitions have been formed: freedom of religion in the United States emerged, in part, through the collaborative efforts of Baptists and Enlightenment liberals. Some people with strong convictions have been persuaded by others: states adopted non-establishment provisions through the political processes; Calvinists and Roman Catholics have emerged among the strongest supporters of religious freedom. Our history also shows, however, that these conversations are not easy. It took decades, even centuries, of conversation and struggle within and among religious and non-religious traditions to resolve such questions. We are hopeful that the discussions at the *Competing Claims* conference and the articles in this symposium will play a helpful role in this ongoing dialogue and will contribute to the enduring dialectic of law and religion.

---

91. GEORGE MARSDEN, *THE OUTRAGEOUS IDEA OF CHRISTIAN SCHOLARSHIP* 57–58 (New York: Oxford Univ. Press, 1998).