

FOREWORD: ON RELIGIOUS CONSTITUTIONALISM

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Thanks to the generosity of Donald C. Clark, Jr., '79, the Rutgers Journal of Law and Religion and the Rutgers Law School have over the last seven years sponsored a splendid set of endowed programs on religion and law. Some have been individual lectures.¹ More recently, the Journal has hosted symposia featuring several divergent voices.² This past year, the Clark lecture took on a new and exciting challenge.

I.

A.

The First Amendment to the United States Constitution forbids Congress from making any law respecting an establishment of religion.³ Our courts have interpreted that clause, in the light of a distinctively American set of experiences and ideas, to prohibit both the federal and state governments from establishing religion.⁴

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¹ See, e.g., Douglas Laycock, *The Religious Exemptions Debate*, 11 RUTGERS J.L. & RELIGION 139 (2009).

² See, e.g., Symposium, *Town of Greece (pts. A & B)*, 15 RUTGERS J.L. & RELIGION 490 (2014), 15 RUTGERS J.L. & RELIGION 611 (2014); Symposium, *Religious Practice: Counseling and Representing Faith-Based Organizations*, 14 RUTGERS J.L. & RELIGION 457 (2013).

³ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion”).

⁴ One classic formulation appeared in Justice Black’s majority opinion in *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947):

The “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. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor

Other countries—even countries deeply committed to religious liberty—do not share our constitutional assumptions.⁵ And this symposium invites us to engage in a thought experiment, to ask what a tighter integration of church and state—even an explicitly religiously-grounded constitution for a religiously-committed society—might look like. It challenges us to think seriously and rigorously about different possible visions of religion and state.

This exercise is important in its own right, to help us engage with a pluralistic world. We need to ask whether the idea of a religious constitution is coherent, what forms such a constitution might take, and whether it could be both faithful and humane. This thought experiment is also important for the indirect light it might shed on the distinctive dimensions of the American constitutional imagination.

the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and State.”

Justice Black’s view concededly represents the more “separationist” end of the spectrum in the American constitutional debate on religion and state. But even the more conservative or “accommodationist” side of that debate would read the Establishment Clause to at least

prohibit the designation of any church as a “national” one [and] . . . stop the federal government from asserting a preference for one religious denomination or sect over others. [And given] the “incorporation” of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects.

Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting). As one of this year’s symposium authors put it, this is a difference that, however contentious in the American context, is in the larger scheme of things, measurable “in millimeters, not meters.” Patrick McKinley Brennan, *An Essay on Christian Constitutionalism: Building in the Divine Style, for the Common Good(s)*, 16 RUTGERS J.L. & RELIGION 478, 481 (2015).

⁵ See generally STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, *THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES* (2d ed. 2009); Rex Ahdar & Ian Leigh, *Is Establishment Consistent with Religious Freedom?*, 49 MCGILL L.J. 635 (2004); Richard Albert, *American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective*, 88 MARQ. L. REV. 867 (2005).

Each of the three principle articles in this symposium—by Patrick McKinley Brennan,⁶ Steven Friedell,⁷ and Asifa Quraishi-Landes,⁸ giving their accounts of, respectively, Christian (and more specifically Catholic), Jewish, and Islamic constitutions and constitutionalism—is a remarkable and powerful document in its own right. Together, they engage each other and the rest of us in a fascinating and important conversation.⁹ As the thought experiment itself contemplated, the three articles in this symposium are, to varying degrees, less interested in setting out detailed institutional structures or declarations of rights than in articulating outlines of possibilities and statements of principle.¹⁰ They are more in the nature of meta-constitutional platforms than specific constitutional proposals.

The three essays here represent the distinct visions of their respective authors. Three different authors could have given us three very different religious and jurisprudential arguments. That, though, is both inevitable and for the good. The goal of this exercise, after all, is to expand our imaginative horizons, not constrict them.

Each of these articles speaks for itself. My goal in this Foreword is just to point out some of the common challenges they face and some of the differences and similarities among them.

B.

Of the three articles in this symposium, the one that is in many ways the most emphatic and totalizing, and the most self-consciously doing battle with the assumptions of liberal modernism, is Patrick Brennan's essay on Catholic constitutionalism. Brennan's arguments might, as he admits,

⁶ Brennan, *supra* note 4.

⁷ Steven F. Friedell, *A Jewish Constitution*, 16 RUTGERS J.L. & RELIGION 541 (2015).

⁸ Asifa Quraishi-Landes, *Islamic Constitutionalism: Not Secular. Not Theocratic. Not Impossible*, 16 RUTGERS J.L. & RELIGION 553 (2015).

⁹ Had the symposium included a fourth voice, a good candidate would have been any of the prominent Protestant thinkers representing one of the several theological traditions that distinguish fairly sharply between the missions of the church as a community of believers and the civil state responsible for the welfare of God's created order. See, e.g., Stanley Hauerwas, *The Servant Community: Christian Social Ethics*, in THE HAUERWAS READER 371 (2001); DAVID VANDRUNEN, *LIVING IN GOD'S TWO KINGDOMS: A BIBLICAL VISION FOR CHRISTIANITY AND CULTURE* (2010).

¹⁰ Professor Quraishi-Landes's article does flesh out a bit more in the way of specific constitutional details than the other two essays.

seem out of step with current Catholic teaching, but he adroitly grounds himself in strains of traditional Catholic thought that he argues (contrary to the general consensus) have never been authoritatively put aside. In contrast, the other two essays, though they also invoke deep wells of pre-modern thought within their own traditions, do so at least in part to reconcile rather than oppose religious constitutionalism and the values of modernity.

This might all unsettle any reader too wrapped up in current clichés about the “class of civilizations”¹¹ and alarms about the threat of “Sharia law.” But it should not really be surprising. It simply reflects the diversity of possible interpretations within each of these three religious normative worlds. More important, it suggests the ways in which modernity itself has both influenced religious traditions and obscured some of their more complex and even paradoxical spiritual and intellectual resources.¹²

But it is possible to dig deeper into these three essays. I want to focus on two crucial challenges that lurk at or right beneath the surface of any discussion of religious constitutionalism. The first, to which I will devote the most pages, is the dreaded T-word: Theocracy. The second is the P-word: Pluralism.

II.

Most of us, whether religious believer or not, fear theocracy as a form of government. But is a religious constitution necessarily the same as a theocracy? Professor Quraishi-Landes’s project wants us to imagine a state that is emphatically Islamic but just as emphatically not a “theocracy.” She actually titles her essay “Islamic Constitutionalism: Not Secular. Not Theocratic. Not Impossible.” Professor Friedell argues that Jewish constitutionalism would allow, but by no means require or even favor or encourage, a theocratic form of government.¹³ Professor Brennan never uses the term theocracy, but as already suggested, seems to come closest to proposing precisely that.

¹¹ See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996).

¹² Cf. Quraishi-Landes, *supra* note 8, at 560–64 (discussing the “colonial disruption” of traditional Islamic constitutional structures). Accord John Strawson, *Revisiting Islamic Law: Marginal Notes from Colonial History*, 12 GRIFFITH L. REV. 362 (2003). See also Ira M. Lapidus, *The Separation of State and Religion in the Development of Early Islamic Society*, 6 INT. J. MIDDLE E. STUD. 6 (1975).

¹³ Friedell, *supra* note 7, at 548–49.

Yet the meaning of “theocracy,” much like other the meaning of other terms in the constitutional imagination such as, say, “democracy,”¹⁴ is actually complex and contestable.¹⁵ So let’s proceed step by step.

A.

“Theocracy” might be defined as (at least an aspiration to) the direct and unmediated¹⁶ rule of God.¹⁷ Of course, even a theocracy so defined is likely to leave some room for purely human will, and that is an issue to which I will need to return. First, though, we face a more immediate and fundamental puzzle.

¹⁴ See Larry Jay Diamond, *Elections Without Democracy: Thinking about Hybrid Regimes*, 13 J. DEMOCRACY 21, 21 (2002); W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. THE ARISTOTELIAN SOC’Y 167 (1956).

¹⁵ This is not the place to attempt a full-scale intellectual history or genealogy of the idea of “theocracy.” The term was apparently coined by Josephus, who at one point (and contrary to his accounts elsewhere) argued that the law of Moses established the government of the Jewish nation, not as a monarchy or other conventional form, but as “what—if a forced expression be permitted—may be termed a ‘theocracy,’ placing all sovereignty and authority in the hands of God.” JOSEPHUS, 2 AGAINST APION *165 (Loeb Classical Library ed., H. St. J. Thackeray trans., 1926)). A more recent classic source characterized the primordial Judaic constitution as a “theocracy” because it was “so arranged that the organs of government were without any independent power, and had simply to announce and execute the will of God as declared by priest and prophets, or reduced to writing as a code of laws.” Emil Friedrich Kautzsch, *Religion of Israel*, in 5 HASTING’S DICTIONARY OF THE BIBLE 630a, quoted in HENRY JOEL CADBURY, NATIONAL IDEALS IN THE OLD TESTAMENT 81 (1920). My own three proposed definitions here—rule by God, rule by religious law, and rule by religious institutions—is in some sense a riff on Kautzsch, though I did not come across his definition till after completing my own discussion in this Foreword. For many commentators, the only genuinely “theocratic” period in early Judaic history was the era of the “judges” before the institution of the monarchy. See Michael Walzer, IN GOD’S SHADOW: POLITICS IN THE HEBREW BIBLE 71 (2012) (“Kingship, then arises in Israel as an entirely practical response to the dangers of theocratic (charismatic) rule”). See also *infra* notes 24–28 and accompanying text (discussing some religious authors’ account of theocratic “anarchy,” particularly as modeled by the pre-monarchic era, as a religious and political ideal).

¹⁶ I recognize, and the following discussion will make clear, that the meaning of “direct and unmediated” might itself be unclear or contestable.

¹⁷ For a thorough discussion of what it might mean to imagine that God could speak to and command human beings, see NICHOLAS WOLTERSTORFF, DIVINE DISCOURSE: PHILOSOPHICAL REFLECTIONS ON THE CLAIM THAT GOD SPEAKS (1995). For a defense of the idea that God can speak to human beings through the revelation of specific religious texts, see SAMUEL FLEISCHACKER, THE GOOD AND THE GOOD BOOK: REVELATION AS A GUIDE TO LIFE (2015).

Classical Judaism and Islam are both religions of law. To be sure, they are not *only* religions of law. They also overflow with mysticism, theology, poetry, and much more. But they are crucially and distinctively religions in which adherence to an all-encompassing system of law, covering not only ritual and ecclesiastical matters but also every imaginable topic encompassed by secular civil legal systems, is central to the spiritual life. Indeed, both traditions identify religious law with a word—Halakhah for Jews and Shariah for Muslims—whose literal meaning is something like “way” or “path.”

Religious law is usually thought to be—to a greater or lesser extent—of or from God. But one characteristic of religions of law is that they tend to shift their normative focus from God to God’s law.¹⁸ The point of the spiritual exercise, as it relates to law, is not to read the mind of God, but to work out a discipline of juridical hermeneutics capable of generating legal meaning according to sensible and convincing criteria. Some religious texts and thinkers celebrate this displacement, as in the famous Talmudic story that insists that God’s law is “not in heaven.”¹⁹

¹⁸ See KHALED ABOU EL FADL, *REASONING WITH GOD: RECLAIMING SHARI’AH IN THE MODERN AGE* (2014); MICHAEL WYSCHOGROD, *THE BODY OF FAITH: GOD AND THE PEOPLE OF ISRAEL 188–90* (1996) (“There is a tendency for the law to become self-sufficient and for God the lawgiver to recede from the horizon”).

Rabbi Joseph Soloveitchik famously tried to close that gap, but in a way that still emphasized the difference between seeking direct access to God and finding God in the intricate details of religious law:

Homo religiosus ascends to God; God, however, descends to halakhic man. The latter desires not to transform finitude into infinity but rather infinity into finitude Transcendence becomes embodied in man’s deeds that are shaped by the lawful physical order of which man is a part.

JOSEPH P. SOLOVEITCHIK, *HALAKHIC MAN* 45 (1984).

¹⁹ As the Talmud tells the tale, a group of Rabbis were disputing a point of law. Rabbi Eliezer successfully invoked a series of miracles to buttress his argument, but the other rabbis, who were in the majority on the question, did not relent. Finally,

a Heavenly Voice cried out: “Why do ye dispute with R. Eliezer, seeing that in all matters the halachah agrees with him!” But R. Joshua arose and exclaimed: “It is not in heaven.” What did he mean by this? — Said R. Jeremiah: That the Torah had already been given at Mount Sinai; we pay no attention to a Heavenly Voice, because Thou hast long since written in the Torah at Mount Sinai, After the majority must one incline.

Others are more ambivalent.²⁰ But the transposition from God to God's law is in any event crucial. And it means that, quite apart from the details of either Professor Friedell's or Professor Quraishi-Landes's articles, neither a Jewish nor an Islamic constitution can be "theocratic" in this purest sense.

Christianity is a different story. Christianity first developed in a Jewish milieu. But at some point in the early centuries of Christian faith, most Christians began to see themselves as "juridical gentiles," free from the obligations of Halakhah, at least as understood as a comprehensive religious legal system.²¹ That has historically left Christianity with the challenge of making sense of that normative gap, so to speak, a question to which I will return shortly. But be that as it may, it also allows Patrick Brennan to argue directly that "the defining mark of a Christian commonwealth that it submits to Christ the King as the supreme lawgiver"²² and to proclaim the duty of that distinctively Christian commonwealth "to recognize the social royalty of Our Lord Jesus Christ"²³ and insist that "a state that

R. Nathan met Elijah and asked him: What did the Holy One, Blessed be He, do in that hour? — He laughed [with joy], he replied, saying, "My sons have defeated Me, My sons have defeated Me."

Baba Mezi'a 59b (Soncino ed.). To be sure, the tradition is more complicated and conflicted than this one text alone would suggest. For a recent important discussion of "realism" and "nominalism" in rabbinic thought, see CHRISTINE HAYES, WHAT'S DIVINE ABOUT DIVINE LAW? EARLY PERSPECTIVES (2015).

²⁰ See Wyschogrod, *supra* note 18, at 189–90 ("There is . . . no logical way to be secure before God when God is silent and the Torah is the guide for conduct. The lack of inner turmoil that describes much of Orthodox existence probably results from a weakening of the sense of direct responsibility to God that is the basis for religious reality.") Wyschogrod, despite this critique, is a religiously observant Jew. Martin Buber's critique of the displacement of God by law went much further. As he put it in his famous exchange with Franz Rosenzweig, "the law has no universal validity for me, but only a personal one. I accept, therefore, only what I think is being spoken to me." Franz Rosenzweig & Martin Buber, *Revelation and Law*, in ON JEWISH LEARNING 109, 115 (Nahum N. Glatzer, ed. & trans., 1955). See also MARTIN BUBER, ON JUDAISM 81–82 (Nahum N. Glatzer, ed., 1967, 1996 ed.) ("But when, instead of uniting them for freedom in God, religion keeps men tied to an immutable law and damns their demand for freedom, . . . when, instead of keeping its elemental sweep inviolate, it transforms the law into a heap of petty formulas, . . . then religion no longer shapes but enslaves religiosity.")

²¹ See Perry Dane, *Take These Words: The Abiding Lure of the Hebrew Bible In-Itself*, 4 HEBRAIC POL. STUD. 230, 250 (2009).

²² Brennan, *supra* note 4, at 482.

²³ *Id.* at 499.

recognizes that Christ is King knows that civil rulers . . . are vicereagents of the true King, not rulers in their own right.”²⁴

B.

Even with all that, though, it will not do to conclude that Patrick Brennan’s Catholic constitution is a theocracy in the sense of aspiring to “the direct and unmediated rule of God.” Brennan’s account might not *displace* God’s direct rule, as would occur in a religion of law, but it does *mediate* God’s rule. It mediates it through both revelation and natural law. And, most strikingly, it mediates through the authoritative teaching of the Catholic Church to whose guidance the Christian government must defer.²⁵

Nor, in a sense, could it be otherwise. For, in fact, as others have pointed out, a genuine theocracy defined as the direct and unmediated rule of God is, in human terms, exactly the opposite of what it might seem to be. It is not a form of autocracy but of anarchy. In fact, while most of us, including all three of the essayists in this symposium, might flinch at any notion of anarchy, some important religious thinkers have found the idea of theocratic anarchy to be both powerful and deeply right. Thus, for example, Martin Buber understood the true golden age of the people of Israel to be, not the era of Davidic kingship, but the preceding period of the Judges,²⁶ when “every one did what was

²⁴ *Id.* at 502.

²⁵ *Id.* Significantly, while the Catholic Church expects believers to accept its teachings, with different degrees of authority, it does not claim a prophetic capacity to channel God’s direct voice. *See Catechism of the Catholic Church* §§ 888-92. Even the infallible declarations of the Church or individual Popes are not conceived of as divine utterances as such but as human statements of a certain specific sort that are, by the will of God, protected from certain specific sorts of errors. *See* First Vatican Council, First Dogmatic Constitution on the Church, chapter 4.

²⁶ *See* MARTIN BUBER, *KINGSHIP OF GOD* 136 (Richard Scheimann, trans., 3d ed., 1990). As Samuel Hayim Brody explains, Buber understood the “tendency towards direct theocracy [to have] expresse[d] itself in two ways” during the premonarchic period that included the age of the *shoftim* (usually but misleadingly translated as “judges”).

First in the community’s choice of a charismatic leader, whom it recognizes as temporarily inhabited by the *charis* of divine spirit. This is the case of Moses, Joshua, and the various *shoftim* in the Book of Judges. The second aspect of theocracy occurs between the death of one charismatic leader and the rise of another one. We might refer to this interregnum most appropriately as *anarcho*-theocracy. There is literally no

right in his own eyes.”²⁷ And the Russian Christian thinker Dmitry Sergeyeovich Merezhkovsky foresaw a future revolutionary “theocratic anarchy” in which “Christ Himself” would be the “sole ruler,” a society with “no institutions and no authorities” in which “Love replaces law and renders limitations on power, such as Constitutions or legal guarantees of personal rights, unnecessary.”²⁸

C.

Maybe, then, we need to revise our definition of theocracy from the direct, unmediated, rule of God to the rule of either religious law and religious norms or religious institutions. (As I have just emphasized, religious thinkers such as Martin Buber and Dmitry Sergeyeovich Merezhkovsky might consider either of these forms of governance to be, not theocracy at all, at least not “direct theocracy,” but its antithesis.²⁹ But if only for the purpose of rounding out the conversation here, we might want to afford ourselves a little more latitude.)

Grounding a definition of theocracy on the rule of religious law brings us back to the specifically Christian question I bracketed a couple of pages ago: making sense of the normative gap left over when mainstream Christians determined that their faith would not be, at least in the Jewish sense, a religion of law.³⁰ This question applies both to the individual religious life and the governments formed by those individuals.

(human) ruler in Israel and there are no corresponding institutions. The separate tribes tend to their own business, confident that [God] still rules as King even when He declines to issue new orders. Internally, the people feel themselves to be under an invisible government; externally, there appears to be no government at all.

Samuel Hayim Brody, *Is Theopolitics an Antipolitics: Martin Buber, Anarchism, and the Idea of the Political*, ACADEMIA.EDU 78, https://www.academia.edu/14003095/Is_Theopolitics_an_Antipolitics_Martin_Buber_Anarchism_and_the_Idea_of_the_Political (footnote omitted).

²⁷ *Judges* 17:6. See also JACQUES ELLUL, ANARCHY AND CHRISTIANITY 46–47 (Geoffrey W. Bromiley, trans. 1991).

²⁸ I am relying here on a summary and paraphrase in BERNICE GLATZER ROSENTHAL, DMITRI SERGEEVICH MEREZHKOVSky AND THE SILVER AGE: THE DEVELOPMENT OF A REVOLUTIONARY MENTALITY 196 (1975). See also LEO TOLSTOY, ANARCHY AND CHRISTIANITY: TWO ESSAYS ON CHRISTIAN ANARCHISM (2013 ed.).

²⁹ See *supra* notes 26–28 and accompanying text.

³⁰ See *supra* note 21 and accompanying text.

For some traditions within Christianity, the Christian self-conception justified a deep religious antinomianism. For others, it created an enormous space for what we now call “secular law,” even while recognizing the continuing importance and authority of religiously-motivated morality.³¹ Yet other Christians—the American puritans, for example—did try in various times and places to reappropriate for themselves at least pieces of the once-discarded system of Biblical law.

For many Catholics over the centuries, the answer to the puzzle has been found in large part in a theory of natural law—basic principles of human conduct infused by God into the very structure of human thought. For Patrick Brennan, this Catholic tradition is both a resource and in some ways a challenge. For “natural law” is not, strictly speaking, religious law at all but an element of human reason, accessible in principle to persons of all faiths or no faith. Moreover, as Brennan himself emphasizes, natural law is foundational but not by itself comprehensive.³² The details of law need to be filled in by human will and judgment, not merely human interpretation.³³

Nevertheless, Professor Brennan firms up what might be considered the “theocratic” dimension of his constitutional account in several important ways. First, he posits not just any Christian

³¹ For a classic discussion of the complex and sometimes contradictory relationship between the general Christian ethos that prevailed in pre-modern Europe and the characteristic details of specific legal systems, see HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983). As one recent author, speaking more specifically about the English legal tradition, has put it:

It is often supposed that English law [in medieval times or later] was somehow based on the law of the Christian Church. This is deeply misleading. Those who created and nurtured the common law were, of course, Christians and influenced by Christian morality. But the basic ideas of property and obligation were pre-Christian, and the details were worked out differently in different institutions

Sir John Barber, QC, *Magna Carta and Personal Liberty*, in *MAGNA CARTA, RELIGION, AND THE RULE OF LAW* 81, 87 (Robin Griffith-Jones & Mark Hill, QC, eds., 2015).

³² Brennan, *supra* note 4, at 508–09.

³³ For an alternative account of natural law, which gives human judgment and human deliberation over ends and means a much more than interstitial role, see Perry Dane, *Natural Law, Equality, and Same-Sex Marriage*, 62 *BUFF. L. REV.* 291 (2014); Perry Dane, *The Natural Law Challenge to Choice of Law*, in *THE ROLE OF ETHICS IN INTERNATIONAL LAW* (Donald E. Childress, III, ed., 2011).

constitution, but a Christian constitution for a thickly-constituted “Christian commonwealth” emerging out of a strong consensus about religious values and religious truth.³⁴ Second, he insists that even in creatively and filling in the elements of a legal system that cannot be derived directly from the natural law, the lawmaker in that Christian commonwealth needs to adopt “the divine style.”³⁵ Third, he argues that the state has a duty to seek after religious truth, which in his view is most perfectly found in the Catholic Church.³⁶ Fourth, his constitution both recognizes the coercive authority of the Church within its appropriate jurisdiction over its own members *and* the authority of the Church’s teachings on faith and morals over the Christian commonwealth itself.³⁷ Fifth, he imagines a sort of dialectical process whose ultimate goal is not merely a commonwealth built on natural law, but one devoted to divine law.³⁸ Indeed, he understands the general principles of natural law and the particularities of time and place of the specific community working together, scissor-like, toward an ultimately more perfect end.³⁹

Nevertheless, for all this, which is admittedly quite a lot, Professor Brennan’s account can only be “theocratic,” as I have defined it in this subsection, *to a point*. Despite the sophistication and richness of Brennan’s account, one is still left wondering how *legally* theocratic his “Christian commonwealth,” adhering to natural law even as it aims upwards toward the divine, would or could actually be.

D.

The Jewish and Muslim cases might—potentially—seem more straightforward. After all, if both Judaism and Islam are religions of law, and if each commits itself to a comprehensive and all-encompassing system of religious law, then it might stand to reason that a “Jewish constitution” or “Islamic constitution” would simply enforce the full scope of that comprehensive and all-encompassing system of law. Indeed, some Jews and some Muslims would assume precisely that, and some would even use violence in the service of such a cause. Yet, in fact, both Professor

³⁴ Brennan, *supra* note 4, at 483–88.

³⁵ *Id.* at 510–17.

³⁶ *Id.* at 529–35.

³⁷ *Id.*

³⁸ *Id.* at 535–37.

³⁹ *Id.* at 537–40.

Quraishi-Landes and Professor Friedell—each drawing expertly on classical sources and pre-modern practices within their respective traditions—propose something very different.

Professor Quraishi-Landes's account is rooted in the pluralistic nature of *fiqh*—the necessarily human, imperfect, and widely diverse interpretation of Shariah. That indispensable legal pluralism in turn motivates a fundamental constitutional bifurcation. On one side of that divide is a community of communities, a collection of thick normative jurisdictions, each adhering to one of the various schools of *fiqh* or—crucially—to one or another non-Muslim faith. These communities would govern most of the details of life, individual conduct, and terms of social co-existence comprehensively governed by a religion of law. But they would also be volunteeristic. On the other side of the bifurcation is a much thinner, democratically-governed, state apparatus devoted, not to religious hermeneutics, but to *siyasa*, the pragmatic pursuit of the public good. (The central government would also—an important detail—craft its own set of rich but secular rules as a default option for anyone unwilling to commit to one of the volunteeristic schools of interpretation.) That state apparatus, in turn, would be subject to a further constitutional check, grounded in the fundamental purposes of Shariah to guarantee the common good broadly understood.⁴⁰ Professor Quraishi-Landes persuasively argues that her model of Islamic constitutionalism comes closer than any existing form of government—whether secular or ostensibly “Islamic”—to following the precedent of classical, premodern, Islamic regimes, while also taking seriously the insights of modernity and contemporary conceptions of human rights and individual dignity.

Professor Friedell's constitutional scheme is also deeply committed to diversity, though of a different sort. The key to his analysis is a sharp appreciation of the various ways in which the Halakhah, as all-encompassing and comprehensive as it is, is also self-limiting. To begin with, the minutely detailed, all-reaching, sweep of the Halakhah only applies to Jews. Non-Jews are not bound to it, even in principle. Instead, they are only obligated to a set of basic principles known as the Seven Noahide Commandments.⁴¹ And the laws established by those non-Jewish and secular governments are in turn, as a matter of Halakhah, largely binding on Jews. Moreover, even as to Jews themselves,

⁴⁰ Quraishi-Landes, *supra* note 8, at 576.

⁴¹ Scholars have long debated whether the Noahide Commandments should be understood as a Jewish version of natural law theory.

the technical details of the Halakhah are in many instances defeasible. The rabbinic tradition has recognized that legal coercion can actually frustrate the Halakhah's specifically religious mission as a system of spiritual discipline and a vehicle for personal piety. In addition, the Halakhah itself values compromise and the quest for peace. And in many contexts it leaves substantial room for both private ordering and communal legislation, even when they seem to contradict the specifics of halakhic doctrine. Most audaciously, perhaps, Professor Friedell argues that the details of the Halakhah "as developed and interpreted in Talmudic and post-Talmudic times were often impractical," an ideal construct that to function as a set of functional legal rules "needed to be supplemented or supplanted by other legal norms."⁴²

Very much like Professor Quraishi-Landes, Professor Friedell focuses on the ultimate purposes of religious law as he understands it, which include not only knowing God and living in harmony with God's will, but also "demonstrating loving-kindness to all others" and "preserving social order" through pragmatic governance.⁴³ And very much like Professor Brennan, he understands the relationship between law and society in dialectical terms: the law helps educate the people toward virtue, and that in turn can allow the law to move from merely maintaining social order to achieving more specifically religious ends.

E.

That two of the authors in this symposium could draw from the paradigmatic religions of law—Islam and Judaism—theories of religious constitutionalism so open to diversity, pragmatism, and universal concepts of justice might seem paradoxical. But it can be explained, I think, by the very positivity of religious law. Bodies of religious law such as *fiqh* and Halakhah are forms of spiritual discipline that encourage the sort of "legalistic" obsession with detail and formality associated with both Islam and Judaism. But, for that very reason, they value the process of interpretation as

⁴² Friedell, *supra* note 7, at 546.

⁴³ *Id.* at 552. For what it's worth, my own view of the relationship between the details of the law and their ultimate purpose is a mite less hierarchical. Sometimes, the contradiction between legal rules and legal principles, or for that matter between the body of law and our more general moral sensibilities, cannot be resolved, and we can only be left with a difficult existential choice.

much as or more than particular substantive conclusions. And that in turn opens up a principled and practical space in which other discourses—both moral and pragmatic—can function and sometimes even prevail. So it turns out that these Islamic and Jewish forms of constitutionalism, like Professor Brennan’s Catholic constitutionalism though for very different reasons, are only theocratic to a point, if they are theocratic at all.

F.

So we are left with a last possibility: theocracy as rule by religious institutions. Again, though, none of the three essays proposes quite that. As noted, a central plank of Professor Quraishi-Landes’s Islamic constitutionalism is a separation between a central non-clerical government devoted to pragmatic legislation for the common good and volunteeristic communities guided by the interpreters of *fiqh*. To be sure, her system also includes an ultimate “shari’ah check” on the central government, but defined in terms that that “should also be satisfactory to secularists.”⁴⁴ Professor Friedell’s more open-ended theory allows for the possibility of rule by religious authorities, but also envisions a system of Jewish government in which the role of rabbis would be merely “advisory”⁴⁵ and goes on to argue that “when most or a sizable minority of the community are non-religious and opposed to rabbinic authority, the rabbinic role under a Jewish constitution *must be* no more than advisory.”⁴⁶ And while Professor Brennan’s Catholic constitutionalism accords significant authority to the institutional Catholic Church, he too—following Christian practice even during the height of historic “Christendom”—does not put the actual institutions of government in the hands of the Church.

III.

So what about the P-word: Pluralism? Much of secular political theory is animated by the imperative to make sense of and accommodate the profound diversity not only of legal

⁴⁴ Quraishi-Landes, *supra* note 8, at 577.

⁴⁵ Friedell, *supra* note 7, at 548. *See also id.* at 546 (discussing merely advisory role of the rabbis in some historical self-governing Jewish communities).

⁴⁶ *Id.* at 548 (emphasis added).

interpretations but of human conceptions of the good.⁴⁷ Can religious constitutionalism even begin to confront that same challenge? The answer, again, might seem counter-intuitive.

As already noted, Professor Quraishi-Landes actually builds the fact and even the theoretical necessity of pluralism—both within Islam and between Islam and other faiths—into the very center of her constitutional vision. Professor Friedell's approach to pluralism is similarly generous and grounded in three distinct principles: First, the thickest and most comprehensive details of Jewish law only apply to Jews. Second, even as to Jews, the legal system should not impose obligations that the people will not tolerate. Third, in any event the primary responsibility of the government is to enforce broad principles of justice and fairness, not the details of religious observance.

Professor Brennan's essay might seem, on the surface, to be more hemmed in and begrudging. After all, he repeatedly insists on the duty of the state he envisions to acknowledge and live out the truth of the Catholic faith and to organize its style of lawmaking as well as its public life and public worship in accordance with those truths. Indeed, Professor Brennan emphasizes that "while man's supernatural happiness is properly the work of the Church (and man's natural happiness is properly the work of the state), the state is under a divine obligation to affirmatively and actively assist the Church in her work, including through appropriate lawmaking."⁴⁸ To be sure, Professor Brennan also thinks it important for the state to tolerate minority faiths, because no person should be forced to be Catholic, but he has in mind a fairly formal toleration, and he would not hesitate to ban at least some "false religions" on the basis of the threat they posed to society even apart from any specific criminal acts that their members might commit.⁴⁹ Toleration, Professor Brennan argues, "is a reasoned response to a presently intransigent conflict amidst a plurality of values and of religions, but toleration . . . is not exempt from the requirements of the common good."⁵⁰

But this surface impression is, again, deceptive. After all, Professor Brennan's entire system is premised on the existence, not merely of a Catholic political order, but of a Catholic commonwealth, a commonwealth that arises out of the powerful

⁴⁷ See generally WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE (2002).

⁴⁸ Brennan, *supra* note 4, at 502.

⁴⁹ *Id.* at 534–35.

⁵⁰ *Id.*

consensus of a thickly-constituted community to establish for itself a truly Christian constitution. The members of that community, if they are to be able to create a genuine religious commonwealth for themselves, would need to be fervently committed both to the truths of the faith *and* to an imperative to write those truths into the public structure of their lives.

In his paper, Professor Brennan suggests that his constitutional vision necessarily assumes a “predominantly Christian nation”⁵¹ in that very thick sense of the term. And he carefully emphasizes that, in that sense, the United States is “emphatically not a predominantly Christian nation.”⁵² Nor can one imagine that any other country in the world today is. Indeed, in responding to a question after the oral delivery of his paper at our symposium, Professor Brennan seemed to suggest, if I read him correctly, that a “predominantly Christian nation,” in his strong sense of the term, would actually need to be an overwhelmingly Christian nation in that strong sense of “Christian.” Or, to put it another way, Professor Brennan is deeply sensitive to the fact of pluralism, even though he does not celebrate it, in that he suggests a theory of Christian constitutionalism that he knows could not be applied to any current, actually existing, human society.

IV.

A.

None of the three constitutional theories represented in this symposium would pass muster under the Establishment Clause to the United States Constitution. That is baked into the premises of the thought experiment motivating the three essays. Some observers, though, might find this conclusion to be not only doctrinally obvious but normatively crucial. As one scholar has argued, among

[the] basic notions of democracy . . . are the demands that all power be both temporal and temporary. A properly democratic government must therefore be defined by both political and religious agnosticism—a renunciation of the idea that any political majority

⁵¹ *Id.* at 482.

⁵² *Id.* at 489.

is permitted to define and enforce any set of absolute political or religious truths.⁵³

In this view, even a “mild theocratic government,” and even a majoritarian theocracy, would not only be “contrary to the basic themes set forth in [our own] . . . Establishment Clause and . . . Bill of Rights, but . . . also contrary to the basic theoretical requisites of any proper constitutional democracy.”⁵⁴

This is not the place for an extended analysis of this and similar views. But it might be worth pointing out, as many of us have for a long time, that the distinctly American notion of disestablishment is itself arguably a form of religious constitutionalism grounded, at least in part, in a specific set of theological arguments and faith commitments.⁵⁵ To be sure, that set of theological arguments might be attractive even to those (I include myself) who come from very different religious traditions. But that by itself does not make them any less religious.

More to the point, though, the three essays in this symposium illustrate that the distinction between secular and religious forms of constitutionalism is more complex and perhaps more normatively elusive than one might have supposed. Religious forms of constitutionalism *are* different. But the larger conversation of contemporary constitutional theory can only be deepened and clarified by treating them as legitimately within its domain.⁵⁶

B.

With that in mind, it might be worth concluding with this observation. If there is one connecting thread in the three essays that form this symposium, it is a singular concern with the state’s role in advancing the common good, in particular what might be called the “secular” common good, however differently that idea

⁵³ Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 727–28 (2006).

⁵⁴ *Id.* at 728.

⁵⁵ See Perry Dane, *Separation Anxiety*, 22 J.L. & RELIGION 545, 566–70 (2007) (review essay on NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM* (2005)), and sources cited.

⁵⁶ Cf. Simon Cábuela May, *Religious Democracy and the Liberal Principle of Legitimacy*, 37 PHIL. & PUB. AFF. 136, 169 (2011) (“There is . . . no reason to believe that the parties in the original position would consider a religious democracy that respected the egalitarian provisions of the democratic principle as less legitimate than a political system governed by the liberal principle.”)

might understood in each of the three accounts. Some modern liberal states, by contrast, have had a harder time, to some extent, committing themselves to a deep sense of the common good. This is partly the result of a political and constitutional theory grounded in a sometimes overly narrow conception of “public reason.”⁵⁷ But it is, I think, also the fruit of a much more contingent set of considerations: an odd combination of empirical and normative skepticism on the one hand and an atmosphere of factional self-interest, hyper-partisanship, political shallowness, and bombast on the other.

At the same time, though, to add a further layer of paradox to our current situation, the modern liberal state has sometimes tended to be particularly intolerant of persons who seek to opt out of whatever views and policies it has strongly embraced. It is, that is to say, in some important ways, more monist, more willing to press its advantage, and less pluralist, less willing to engage with competing views and alternative normative imaginations, than at least some of the religious states envisioned in the articles in this symposium. It suffers, that is to say, from a structural normative solipsism that gets activated and exaggerated by particular moments of passion and self-righteousness.

Again, I do not want to overstate the case. And this is not the place to pursue these observations in detail. But the sort of concerns expressed here do confirm the importance of engaging in an ongoing and open conversation about how to organize constitutional theories and actual states—whether religious or secular or some combination of the two—that can try to promote our highest and best aspirations as social beings while also respecting the divergent communities that any state will contain and treating each individual person justly and humanely. The three articles in this symposium, over and above their many other merits, have the singular merit of expanding our imaginative horizons in ways that can only enliven and enrich that vital common exploration.

⁵⁷ This is not the place for a full-fledged bibliography of the vast literature on “public reason” that has most importantly grown out of, or responded to, the work of John Rawls. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* (Expanded Ed., 2011). For one recent important effort, though, to refine liberal political theory in ways that better accommodate religious voices into the arena of public debate, see, e.g., KEVIN VALLIER, *LIBERAL POLITICS AND PUBLIC FAITH: BEYOND SEPARATION* (2014).