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IDEOLOGY AS INTERPRETATION: A REPLY TO PROFESSOR GREENE'S THEORY OF THE RELIGION CLAUSES

*Scott C. Idleman**

The last several years have witnessed a dramatic increase in scholarly commentary concerning the proper place of religion in the nation's political life. In this reply, Scott Idleman critiques a recent article by Professor Abner Greene, in which Greene contends that a political balance is inherent in the religion clauses of the First Amendment. According to Greene, because religious arguments are by their nature inaccessible to those outside the faith, the Establishment Clause should be interpreted to preclude express legislative reliance on religious values or arguments, thereby minimizing the alienation of nonreligious citizens. At the same time, because this interpretation would effectively restrict the political participation of religious citizens, the Free Exercise Clause should be interpreted to grant religious citizens prima facie exemptions from the enforcement of otherwise applicable laws. The author argues that Greene's thesis rests on an erroneous distinction between religious and nonreligious forms of belief and argumentation, an unduly narrow conception of the participatory political process, and a doctrinally unsupported and administratively unrealistic interpretation of the Establishment Clause. Additionally, the author suggests that Greene's thesis betrays both an unstated ideological commitment to the intrinsic goodness of secularism and an implicit devaluation of religious belief. He concludes that the disenfranchisement of religious citizens is simply not a proper response to the complex relationship between government and religion, and that any meaningful interpretation of the religion clauses must take full account of the nature and importance of religion to its adherents and to society.

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In the spring of 1993, Professor Abner Greene published *The Political Balance of the Religion Clauses*,[1] in which he argued that the Establishment Clause's prohibition against express legislative reliance on religious values requires a corollary offset under the Free Exercise Clause—namely, that religious citizens receive prima facie exemptions from the enforcement of otherwise applicable laws. Professor Greene's proposal is both weighty and provocative, and *The Political Balance* will likely be received as yet another contribution to the growing literature on the role of religion in lawmaking and on the complex relationship between religion and government. Because the article rests on a number of logically untenable bases, however, it simply cannot go unanswered. Indeed, his apparent willingness to overlook various analytical and empirical shortcomings renders the value of his thesis questionable and thus the consequences of that thesis unjustifiably significant.

This short essay provides one response to Professor Greene's work; at the same time, it provides a more general critique of the larger ideological vantage point from which Greene and others approach the subject of religion and lawmaking. Part I presents a brief overview of Greene's thesis, as well as extended summaries of the two elements of his thesis with which I take greatest issue. Part II then sets forth my critique of *The Political Balance*, the thrust of which is devoted to undermining several of Greene's critical premises, particularly his initial effort to distinguish religion and nonreligion in a logically coherent and constitutionally meaningful way. I conclude that, in the balance, his efforts are unable to withstand close scrutiny and that his thesis ultimately and necessarily collapses from the failure of these underlying premises.

I. SUMMARY OF *THE POLITICAL BALANCE*

For the purposes of summary and analysis, Greene's thesis can be broken down into four logically sequential elements. Essentially he contends that: (1) religion can be uniquely defined by its "reference to an extrahuman source of value, of normative authority";[2] (2) such reference renders religious claims inaccessible to citizens "who don't share the relevant religious faith," effectively excluding them from "meaningful participation in the political process";[3] (3) pursuant to his reading of the Establishment Clause, religious values therefore cannot serve as the basis of positive law; and (4) precisely because of this restriction, the Free Exercise Clause should be read to give religious claimants, and only religious claimants, "prima facie exemptions"

1. Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993).
2. *Id.* at 1617.
3. *Id.* at 1619.

from otherwise applicable laws which interfere with their religious conduct. This ultimate symmetry between the two clauses—with the "Free Exercise Clause . . . giv[ing] back what the Establishment Clause takes away"[4]—is what Greene calls their "political balance," and only through such a balance, he argues, can the clauses be coherently reconciled with one another and with basic principles of liberal democratic theory.[5]

Needless to say, the above summary oversimplifies Greene's thesis. Before proceeding to a full-fledged critique of his article, therefore, it is worth elaborating on the middle pair of these four elements—the matter of inaccessibility and its consequences under the Establishment Clause—especially because I take issue in part II primarily with those two components.[6]

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4. *Id.* at 1644.

5. Specifically, Greene argues that his thesis attempts "to explain the relationship between the religion clauses in a way that accounts for the proper role of religion in politics," *id.* at 1612, by which he means that his model confronts, rather than avoids, the implications for religion of the "widely accepted premise of liberal democratic theory . . . that the legitimacy of legal obligation turns, in part, on the ability of citizens to offer their values for adoption as law." *Id.* at 1613. At the same time, Greene claims to "offer[ ] a new defense of the embattled religion-clause doctrine of the Warren and Burger Courts." *Id.* at 1612-13. This latter rationale seems rather secondary, though, and in any event strikes this author as the logically less defensible of the two.

6. *See infra* parts II.A & C. This is not to say that I entirely agree with the first and fourth elements of his thesis. For example, element one—which provides that the uniqueness of religion may inhere in its reference to an extrahuman source of value—is largely unassailable, but only because he readily concedes that it is a *popular* conception of religion, rather than one which would be embraced, say, by sociologists of religion or by anthropologists. *Id.* at 1617 ("[T]here is reason to think that when most people speak of 'religion,' they are thinking of some such . . . reliance on a source of normative authority that is not based solely on human reason or experience."). To be sure, although Greene notes that "[b]y far the most common criterion mentioned by scholars as definitive of 'religion' is a reference beyond human experience to an extrahuman source of value," *id.*, the scholars whom he cites are almost all professors of law, and not of psychology, sociology, religious studies, or anthropology. *See id.* at 1617 n.25.

Likewise, the fourth and final element of his thesis, concerning the free exercise implications, also requires a significant concession or caveat. As noted earlier, see *supra* text accompanying note 4, Greene would give to the religious claimant a "prima facie exemption" from the governmental action in question. Unfortunately, Greene then concedes that "the right to exemption is only prima facie and might well be outweighed by other interests" and that he specifically "do[es] not address how the balance between governmental and individual interests should be struck." Greene, *supra* note 1, at 1638 n.77; *see also id.* at 1612 n.4. This passing omission is ever so critical, however, precisely because the strength or meaningfulness of any prima facie exemption would be entirely contingent on the nature of that balance. Indeed, to the extent that the government interest is deemed legitimate, and so long as the religious claim is not taken seriously on its own terms (for example, as a means to avoid sin or divine retribution or eternal damnation), there is no reason to think that the claimant should not lose most of the time, despite the existence of a prima facie exemption. By avoiding the nature of the government-claimant balance, in other words, Greene effectively leaves untouched the strong likelihood that religious claimants will simply *not* prevail against the governmental entity in question. *See generally* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 126-35 (1993) (discussing the need for meaningful protection of nonmainstream religious practices).

A. The Inaccessibility of Religious Beliefs and Argumentation

First, Greene argues that religion's reference to extrahuman sources of normative authority renders religious discourse inaccessible, in a politically meaningful way, to those not sharing the "leaps of faith" which often define or constitute religious belief. He claims, in other words, that religion's "reference out" to the extrahuman is inherently exclusionary, for it "involves pointing toward a source of value that people can share not as United States citizens, but only as citizens in the kingdom of the same God."[7] In turn, the relevant consequence of expressly grounding a law in religious values is that

> dissenters are left with the options of (a) converting to the relevant faith and thus gaining access to the source of values animating the law, (b) arguing with the religious believers about whether they have properly construed the commandments of their faith, or (c) persuading those believers that their faith is "false." Unless they come to share the faith, dissenters cannot meaningfully compete in the debate over how conclusions from religious faith should be enacted into law.[8]

Standing in contrast to this "reference out," contends Greene, is a source of normative authority which he calls "reference to human experience"—that is, "express reference to facts about human behavior and conclusions reached about the causes and effects of such behavior."[9] So inherently accessible is this "human experience," in fact, that Greene considers it to be "the common denominator for political debate."[10] To illustrate the differential effect of using these two sources in lawmaking, he offers the following example:

> Imagine . . . legislators arguing for the banning of abortions "because they're immoral." If pressed in debate, assume that the legislators explain that they (a) have observed human suffering, (b) distinguish human beings from animals because of the language abilities of the former, (c) are concerned about slippery slopes, and (d) resolve close questions in favor of preserving life. That sort of response is quite different from the response of legislators who say, "We believe in Christ as Lord, and His scriptures say that life is sacred, and therefore abortion is wrong." Nonbelievers can have a dialogue with the former legislators based on sharable observations and conclusions about human experience; with the latter legislators, a nonbeliever might reasonably feel muted by the reference to the legislators' God and the claim of authority based in an extrahuman power.[11]

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7. Greene, *supra* note 1, at 1620.
8. *Id.* at 1619.
9. *Id.* For my critique of his concept of "human experience," including the lack of a clear or comprehensive definition, see *infra* notes 51-59 and accompanying text.
10. Greene, *supra* note 1, at 1619.
11. *Id.* at 1622.

According to Greene, then, religion differs meaningfully from nonreligion insofar as the former adverts to sources of value lying beyond the universally shared or sharable source of value which he calls human experience. Human experience by nature is inclusionary and accessible; religion by nature is not. In turn, Greene argues that it is precisely this distinction which should determine the proper interpretation of the Religion Clauses and thus, by necessary effect, the proper role of religion in the nation's political life.

B. The Establishment Clause's Prohibition on the Express Use of Religious Argumentation

Having settled upon such a distinction, Greene next addresses the constitutional consequences which attach to religion's inaccessibility. Specifically, and pursuant to his own understanding of the Establishment Clause, he argues that this defining characteristic precludes religious claims from serving expressly as a normative ground for legislation. "Basing law on an express reference to an extrahuman source of value should matter for Establishment Clause analysis because such reference effectively excludes those who don't share the relevant religious faith from meaningful participation in the political process."[12] According to Greene, such exclusion amounts to an "Establishment Clause injury,"[13] the avoidance of which "[r]equir[es] that laws have an express secular purpose rather than merely a plausible one . . . "[14] and that "any expressly religious purpose for the law must be no more than ancillary and not itself dominant."[15] Moreover, Greene sees this prohibition on the express use of religious values as entirely congruent with the meaning of the concept of "establishment":

> [T]here is more than one way to establish a church. Funneling religious faith into a pattern of legal obligations and rights would, in the extreme case in which all aspects of the faith were turned into law, convert the state into the church. Of course we all agree that the government may not require worship, prayer, and the like. But *partial* establishment should be just as forbidden as complete establishment. When legislation is expressly based on religious arguments, the legislation takes on a religious character, to the frustration of those who don't share the relevant religious

12. *Id.* at 1619.

13. *Id.* at 1622. Throughout his article, Greene describes this political-constitutional injury in several different ways. *See id.* (nonbelievers "might reasonably feel muted"); *id.* at 1620 (nonbelievers might be "disempower[ed]"); *id.* at 1630 (nonbelievers might experience "frustration"). Interestingly, these are words not normally associated with harms cognizable under the Constitution, although in reply Greene might simply contend that religion-related injuries are *sui generis* and thus beyond analogy to other constitutional harms.

14. *Id.* at 1622.

15. *Id.* at 1624.

faith and who therefore lack access to the normative predicate behind the law.[16]

The key legal effect of inaccessibility, therefore, is that it engenders the Establishment Clause injury of alienation or exclusion from the political participatory process. And because religious argumentation is by its very nature inaccessible, the only means to avoid creating an unconstitutional establishment would be to preclude expressly the use of such argumentation in the process of legislative lawmaking.[17] My efforts now turn to a critique both of this claim and of Greene's underlying conceptions of access and of the lawmaking process.

II. CRITIQUE OF *THE POLITICAL BALANCE*

Let me begin by reiterating that I do not take serious issue with the free exercise half of Greene's political balance, the fourth element of his thesis. That half of the balance, to be sure, seems only fair in light of his nonestablishment analysis, and therefore critiquing it here at any length would be counterproductive.[18] More importantly, it would be inappropriate to address his vision of religious free exercise precisely because his antecedent Establishment Clause analysis and the premises supporting it are so problematic.[19] This part of the article critically evaluates those premises and their resultant model of nonestablishment. Part II.A examines the concept of accessibility as it relates to public or legislative discourse and asks whether Greene's concept of access, especially when used to distinguish religion from nonreligion, is truly defensible either in theory or in application. Part II.B then takes issue with Greene's understanding of the political or lawmaking process, arguing that his thesis gains strength only through an unrealistic conception of the nature and purposes of that process. Finally, part II.C critiques the nonestablishment rationale—namely,

16. *Id.* at 1630.

17. Greene's views as to the propriety of using religious argumentation in the process of *judicial* lawmaking are not clear. One senses that at an ideological level, Greene would likely disfavor such use. If so, however, he would presumably require an altogether different theoretical basis on which to exclude religious argumentation because the potential for citizen alienation is simply not the same in the adjudicative context. For a variety of perspectives on the matter, see Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989); Michael J. Perry, *Religious Morality and Political Choice: Further Thoughts—and Second Thoughts—on Love and Power*, 30 SAN DIEGO L. REV. 703, 724-26 (1993); Scott C. Idleman, Note, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433 (1993).

18. At the same time, however, I would argue that his free exercise model ultimately fails to confront the critical issues inherent in religious conduct cases. *See supra* note 6. For a discussion of free exercise theory in general, see, e.g., John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779 (1986); Scott C. Idleman, *The Sacred, the Profane, and the Instrumental: Valuing Religion in the Culture of Disbelief*, 142 U. PA. L. REV. 1313, 1358-79 (1994).

19. Interestingly, Greene was quite aware that he might lose readers well before the free exercise analysis. *See* Greene, *supra* note 1, at 1640 ("The 'reference out' that makes religion special becomes relevant to the Free Exercise Clause calculus only if one sees it as a reason to disable religion under the Establishment Clause.").

the prevention of political alienation—which necessarily undergirds *The Political Balance* but which itself lacks serious independent support even without my critiques in subparts A and B.[20]

A. The Criterion of Accessibility

I begin my critique with the second element of his thesis, which holds that religious claims are inherently inaccessible to those outside the relevant faith. In particular, Greene suggests that one must actually adhere to any given religious faith if one is to "gain[ ] access to the source of values" associated with that faith and that those outside the faith "cannot meaningfully compete in the debate over how conclusions from religious faith should be enacted into law."[21] The normative authority of "human experience," in contrast, does not suffer from this kind of inaccessibility, such that express reliance upon it as a supposed source of values when shaping public policy is fully permissible.

Although this conceptual relationship between accessibility and an individual's source of normative authority undoubtedly has resonance with many readers, religious and nonreligious alike, it is entirely too sweeping and ill defined to support a general theory of public discourse, let alone provide the key to unlocking an appropriate interpretation of the First Amendment. Indeed, as the analysis below will demonstrate, Greene's criterion of accessibility is the single most problematic element of his thesis, suffering from definitional ambiguity, from what I shall call categorical overbreadth and underbreadth, and from several rudimentary logical errors or fallacies.

First, Greene fails to define *access* in any comprehensive way and then uses the term potentially to mean a number of different things.[22] At several points, for example, he suggests that the key to access is whether citizens outside of a particular religious system can "share" the premises supporting a claim resulting from that system.[23] If this is the meaning of access, however, then Greene has merely stated a truism and nothing more: people who do not believe in *X* do not share a

20. Needless to say, my three-fold assault cuts deep into the logical and theoretical structure of Greene's model. Indeed, the sole remaining element is his initial premise that religion and nonreligion are generally distinguishable by the former's reference outward to an extrahuman source of normative authority. As noted elsewhere in this essay, see *supra* note 6, I have little problem with such a claim, particularly when qualified as nothing more than a generalization.

21. Greene, *supra* note 1, at 1619.

22. Another related term which Greene avoids defining is *meaningful* or *meaningfully*, as in his contention that political outsiders cannot "meaningfully compete in the debate" over lawmaking. *Id.* Worse yet, *meaningfully* appears simply to be a synonym for *with access*. To compete meaningfully, in other words, is apparently to compete with access. Thus, when Greene states that the use of religious argumentation denies access, which in turn precludes meaningful participation, the latter clause regarding meaningfulness is nothing but the second half of a tautology.

23. *See, e.g., id.* at 1620, 1622.

belief in the truth of *X*.[24] At some points, though, Greene goes one step further and asserts that religious premises are "not currently available to [nonadherents] for evaluation."[25] This, in turn, suggests that nonbelievers not only lack a commonality of belief with believers, but that nonbelievers could not share religious premises even if they so desired, lacking comprehensibility as well. That, at least, would be the common understanding of the phrase "currently not available." Of course, Greene may simply mean that as long as nonbelievers refuse to share religious premises (the first definition of *access*), they will remain unable to address fully the truth or merit of those premises. This would indeed be a bizarre proposition to make, however, because it basically amounts to bootstrapping on the voluntary choices of nonbelievers. Surely nonbelievers need not convert to a new religious faith every time they want access to the premises associated with that faith, but neither should their choice not to convert be transformed into a claim that those premises are "currently unavailable to them for evaluation" in some objective or involuntary sense. In any event, my point at this stage of the analysis is not to critique Greene's model of access as such, but rather simply to highlight that even Greene's basic terminology, the definitional foundation upon which his thesis rests, is afflicted with ambiguity, illogic, and thus inadequacy.

Second and more significant, Greene's conception is at once both overbroad and underbroad, sweeping both too much and too little within its ambit.[26] It is overbroad, first of all, insofar as it places the whole of religious belief and argumentation into one narrow and misleading pigeonhole—categorizing all religious claims as inaccessible when in fact only a subset might warrant that label, treating all religious denominations as fungible when in fact they may differ extraordinarily from one another, and suggesting that religious beliefs do not draw on what he calls "human experience" when in fact many do so all the time. Regarding the supposed inaccessibility of religion, for

24. Alternatively, some passages suggest that the access problem arises from the closed-mindedness or nondialogic attitude of believers. *See id.* at 1622. However, Greene cannot seriously maintain that this would result in a lack of access, let alone provide a reason to banish religion from politics under the Establishment Clause. *See* Carter, *supra* note 17, at 941-42; Idleman, *supra* note 17, at 448-50.

25. Greene, *supra* note 1, at 1622.

26. The terms *overbreadth* and *underbreadth* are borrowed primarily from the First Amendment expression context. *Overbreadth*, in that context, describes governmental restrictions which, in their attempt to quash constitutionally unprotected speech, also happen to quash constitutionally protected speech. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.8 (4th ed. 1991). *Underbreadth*, in contrast, is new to the expression jurisprudence of the First Amendment and was recently used in a concurring opinion to describe the majority's apparent requirement that specific subcategories of fighting words may be banned only if all such subcategories are banned. Hence the law in question, because it banned only certain types of fighting words, was sardonically said by the concurrence to be "underbroad" according to the majority's analysis. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2553 (1992) (White, J., concurring).

example, consider his claim that citizens, short of a conversion, cannot have access to religious values for the purpose of political deliberation. "As a non-Christian," he says, "I can't meaningfully debate with a Christian whether certain values do or do not stem from her faith in Jesus Christ."[27] Indeed, when faced with a religious argument in support of a law, people outside a particular faith such as himself

> are left with the options of (a) converting to the relevant faith and thus gaining access to the source of values animating the law, (b) arguing with the religious believers about whether they have properly construed the commandments of their faith, or (c) persuading those believers that their faith is "false."[28]

What is most striking about Greene's array of choices for the nonadherent is that it says too much. Not only does it fail to prove his point regarding access, its latter two options suggest that access is actually a function of one's perseverance rather than one's ontological orientation. Consider for a moment the latter two alternatives, options (b) and (c). What exactly does Greene find objectionable about these alternatives? Why are religious premises inherently "not currently available to [nonadherents] for evaluation,"[29] such that options (b) and (c) are not feasible? One possibility is that options (b) and (c) might require nonadherents to expend effort, and perhaps a significant amount of it, to place themselves in a position of competent debate over the truth or doctrinal accuracy of others' beliefs. After all, why should nonadherents have to learn the *Bible* or the *Koran* when Christians and Muslims have no such extra burden, because the latter should already possess the common source of normative authority called "human experience"? Notwithstanding the unhelpful criterion of political alienation,[30] this argument cannot be taken seriously for at least three reasons. First, it effectively bootstraps on modern Establishment Clause doctrine, which is one important reason why most publicly schooled citizens remain vastly ignorant of comparative religious teachings and worldviews. Second, it strongly implies that religious and nonreligious ways of knowing are not merely different, but that the latter are actually somehow superior.[31] Finally, it ignores the

27. Greene, *supra* note 1, at 1623.

28. *Id.* at 1619.

29. *Id.* at 1622.

30. *See infra* part II.C (discussing political alienation as a possible harm under the Establishment Clause).

31. *Cf.* William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 846-47 (1993) ("[E]ven if faith can be epistemologically distinguished from reason, the conclusion that mores produced by rational discourse are superior to those derived by faith seems arbitrary at best. . . . [T]he epistemological attack on religion suggests a hierarchy of beliefs that is inconsistent with First Amendment Free Speech Clause jurisprudence, which posits that all ideas are equal."). To be sure, it is not unlike the English-only position concerning the use of non-English languages in various public or governmental settings, which is seemingly neutral (purporting to be grounded in practicality and civic unity) but is often simply a pretense for a belief in one's own ethnic or cultural superiority.

existence of countless other similar barriers to meaningful political participation, such as literacy in the social or physical sciences, history, the arts and humanities, contemporary geopolitics, or simply the jargon and intricacies of the legal and political processes. Contrary to Greene's perspective, the infusion of religion into lawmaking for the purpose of advancing religious values does not inherently or inevitably exclude nonbelievers; rather, it imposes on them the civic responsibility to engage in an educated, sophisticated debate over issues which necessarily implicate our deepest, most fundamental beliefs about the nature and ethics of the human race.

Option (c) is further problematic, even if one rejects the civic responsibility argument set forth above. Under option (c), if you recall, the nonadherent could attempt to "persuad[e] . . . believers that their faith is 'false.' "[32] In turn, the notion of proving false another's faith suggests that the nonadherent is himself either: (1) an atheist who believes that no extrahuman source of normative authority exists (such that all faiths are false),[33] or (2) an adherent to a different religion who believes that he or his religion knows the nature of true or truthful faith. The problem arises when either choice is viewed in conjunction with Greene's concept of political alienation. That concept, and thus his entire thesis, hinges on the idea that the alienation which a nonadherent experiences as a result of another's reference to an extrahuman source of normative authority is unique and that this uniqueness is what justifies the elimination of such references from the legislative context. But what if the nonadherent is one of our two characters described above—the atheist or the adherent to another religion—and thus does not take seriously the speaker's religious reference? What if, as would likely be the case, the nonadherent does not believe that the speaker's reference is really to an extrahuman source of normative authority? The answer, it would seem, is that Greene's thesis is rendered impotent by its own design. For if the religion is actually deemed false, then any extrahuman source of normative authority associated with that religion must also be deemed false. In turn, if that source is false, then surely no one can have access to it. And if no one can have access to it, then the nonadherent's individual lack of access cannot possibly be a source of alienation—or at least cannot engender the unique sort of alienation which Greene contends is actionable under the Establishment Clause. Indeed, although the atheist-nonadherent might still experience alienation of a sort, no longer would the extrahuman dimension of the legislators'

32. Greene, *supra* note 1, at 1619.

33. Because Greene does not explicitly limit *extrahuman* to the theistic realm, see *id.* at 1617 nn.24-25, I use *atheist* in an equally broad sense to denote one who denies the existence of extrahuman sources of normative authority. *Cf.* PETER A. ANGELES, DICTIONARY OF PHILOSOPHY 20 (1981) (defining *atheism*, in relevant part, as a "disbelief in any kind of supernatural existence that is supposed to affect the universe.").

references be the culprit; rather, it would simply be the perceived irrationality of their discourse. To the atheist, legislative references to the will of God would presumably be akin to a debate which took seriously the gods of Greek mythology—surely an alienating experience, but hardly because the nonadherent has been especially denied access to those gods.[34]

These criticisms of Greene's conception of access are not intended to skirt the fact that some religious belief systems actually do claim to be privy to forms of understanding not accessible to those outside the faith. In effect they say to outsiders, as Greene pejoratively puts it, " 'I know something you don't know' . . . ."[35] In turn, such systems may be classified as exclusionary, and thus access to them can be said to be denied, if only because they go out of their way to maintain that status. But these clearly do not account for a vast number of other religious belief systems which, although likely requiring a leap of faith to procure the opportunity to benefit fully from the religion's beliefs,[36] nevertheless are often quite accessible to nonbelievers as far as their capacity to comprehend the content and importance of various beliefs or doctrines is concerned.[37] Why, one need only look around at contemporary theologians and seminarians—many of whom are seriously agnostic—to appreciate that traditional faith is not a prerequisite to comprehension.[38] The upshot, then, is that although Greene's conception undoubtedly describes *some* religious denominations, it is grossly overbroad and thus cannot be used as a paradigm to talk about *all* religious denominations, let alone to exclude them all from the political arena.[39]

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34. Of course Greene could attempt to extricate himself from his definitional difficulties by adjusting the terms *atheist* and *extrahuman* to minimize their interdependency, effectively undoing my effort to have them overlap. *See supra* note 33. As a practical matter, however, that strategy would prove unhelpful, because most Establishment Clause situations do in fact involve theistic religion, not some mystical ontology at the borders of the term *extrahuman*.

35. Greene, *supra* note 1, at 1635.

36. Note the use of the term *opportunity*. There are no guarantees in many religious systems even for believers, indicating that conversion is in fact not always the key to access. Some believers will invariably seem or claim to be closer to truth or ultimacy or God than others, a point which Greene ignores by painting all believers as "haves" and all nonbelievers as "have-nots."

37. *See* Idleman, *supra* note 17, at 444-45. Additionally, finding identifiably nonreligious groups which also claim, to various degrees, that they have sole access to the truth or to the meaning of life would not be difficult. Exclusivity is a human trait, present by definition in any community, and not a trait of the religious alone.

38. *See, e.g.*, Paul Wilkes, *The Hands That Would Shape Our Souls*, ATLANTIC MONTHLY, Dec. 1990, at 59.

39. One remaining option for Greene would be to discriminate among religions based on criteria such as relative accessibility or open-mindedness. This would cure the overbreadth problem but of course could raise new and significant constitutional and political problems. For two provocative articles exploring this thesis, see Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J.L. & RELIGION 1 (1993-94); Daniel O. Conkle, *Religious Purpose, Inerrancy, and the Establishment Clause*, 67 IND. L.J. 1 (1991).

Next, Greene repeatedly implies that religious argumentation does not incorporate or refer to the same sources of knowledge and analysis which comprise his so-called human experience. Secular premises, even "nonrational" ones, operate through logic and through "amassing evidence based on human experience . . . ."[40] Religious premises apparently do not. Nothing could be further from the truth, of course, and it is hard to imagine that Greene genuinely believes that religious ethical paradigms do not incorporate "facts about human behavior and conclusions reached about the causes and effects of such behavior,"[41] but rather rely entirely on blind leaps of faith toward extrahuman sources of authority. And however much Greene deserves the benefit of the doubt, it should be noted that he makes no effort to ward off this reasonable interpretation and in fact makes the implication several times. It is difficult therefore to respond to such a claim other than to point out, first, that it demeans the intellectual dimension of historical and contemporary religion, and second, that it once again strongly suggests *The Political Balance* is not really balanced at all—whether factually, logically, or ideologically.

Moving away from overbreadth, Greene's conception of access is also underbroad to the extent it unjustifiably leaves unscathed almost the entire realm of belief and argumentation which we might call nonreligious, even though that realm is frequently indistinguishable from religion. Greene fails, in other words, to subject nonreligion to the same criteria to which he subjects religion, thus leaving the former relatively unaffected by the grave political and constitutional consequences of his thesis. Contrary to Greene's perspective, for example, it is far from apparent that secular first principles—that is, fundamental and indivisible claims of truth or meaning[42]—are in fact any more provable or accessible than religious first principles. The initial capacity to embrace religious sources of authority in their fullness may indeed require a "leap of faith,"[43] but in what way are leaps of faith unique to first principles of the religious variety? Is it not true that we all ultimately rely on certain "personal bases for decision," such as personal perceptions, intuitions, feelings, commitments, and deferences to the judgments of others, "that cannot be justified, in the force they are given, in terms of publicly accessible reasons"?[44]

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40. Greene, *supra* note 1, at 1620.

41. *Id.* at 1619.

42. *See, e.g.*, ANGELES, *supra* note 33, at 103 (defining *first principles* as: "1. Statements (laws, reasons, rules) that are . . . fundamental to the explanation of a system and upon which the system depends for consistency and coherence. They are thought to need no explanation. . . . 3. The rudimentary and ultimate truths which serve as the foundation of moral action.").

43. Greene, *supra* note 1, at 1614.

44. KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 156 (1988); *see also* Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763 (1993); Norman Malcolm, *The Groundlessness of Belief*, *in* REASON AND RELIGION 143 (Stuart C. Brown ed., 1977); Marshall, *supra* note 31, at 846.

For the purposes of illustration, consider the presumptive equality or intrinsic worth of all human beings—the very cornerstone of modern civil rights. As a normative starting point, this presumption is widely shared and largely not open to debate for a majority of people in the United States today. Yet, can such a starting point actually be derived from "human experience" alone? The answer is emphatically no. At some point, one or more nonprovable normative propositions must enter the calculus.[45] No matter how much data one collects, no matter how much deductive logic one performs, the answer is still no. But, Greene might reply, a study of history reveals the evil which results from not holding such a presumption, and therefore we should err on the side of holding the presumption rather than denying it. Would not our decision then be a product of human experience? The problem with this pseudosyllogism, like the analogous abortion example which Greene himself gives and which I critique below,[46] is that of the hidden premise—in this case, that we call the effects of racism "evil" precisely either because we already accept the presumption of equality or because we have come to the table with a preformed paradigm of what is good and evil for the human being. And the same will be true of every other intrinsically normative claim one chooses to make: it simply cannot rest on empirical data alone, but rather must involve an unstated presumption or leap of faith, however small, on the claimant's part.[47] In turn, the resultant claim can no longer be considered inherently accessible to any other claimant—unless, of course, she too should "come to share the faith . . . ."[48]

Most interestingly, Greene seems to recognize this fact. He notes in passing, for example, that "nonrational secular premises" are "perhaps not strictly provable"[49] but for some unarticulated reason does not consider such a concession significant, let alone fatal. It is just that, however, for without this initial distinction between religious and

45. For a discussion of the problems associated with using history and experience to provide a prescriptive framework, see Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 440-43 (1990).

46. *See infra* notes 53-59 and accompanying text.

47. *See infra* note 59 and accompanying text. Of course, ethical systems do exist that argue it is possible to derive moral principles solely on the basis of intuition and experience. *See, e.g.*, Jonathan Dancy, *An Ethic of Prima Facie Duties, in* A COMPANION TO ETHICS 219, 223-24 (Peter Singer ed., 1991); Jonathan Dancy, *Intuitionism, in* A COMPANION TO ETHICS, *supra*, at 411. However, in addition to the fact that these systems are vulnerable to serious criticism (*see id.* at 413-19), Greene does not expressly align himself with any such system, thus leaving the reader to speculate as to how he arrived at his provocative theory of morality.

48. Greene, *supra* note 1, at 1619.

49. *Id.* at 1620. Presumably, Greene's use of the word *nonrational* is intended to draw a distinction between *rational* and *nonrational* secular premises, the idea being that the latter, by virtue of their "nonrationality," are somehow akin to religious premises. At no point in the text, however, does he explicitly draw, let alone explain, this distinction, suggesting perhaps the difficulty of supporting such a distinction in the first place. The entire idea of first principles, to be sure, is not that they are rational or nonrational or even irrational, but rather that they form the indivisible, indispensable core of one's worldview—those things taken for granted, if you will—whether or not they make reference to the supernatural.

secular belief, Greene's thesis necessarily falls apart. As he himself points out, "[u]nless religious belief is different from secular belief in a relevant way, we cannot logically exclude religious premises from grounding law unless we wish to exclude secular premises as well."[50] It is surely no surprise, then, that Greene chooses to avoid comprehensively defining *human experience*,[51] just as he avoids defining the meaning of *access*,[52] for to confront them definitionally is to realize that the world is not nearly as black and white as the political balance needs the world to be.

The primary reason Greene is able to invoke dichotomies which ultimately prove false is that his underlying comparative analysis of religion and nonreligion is fraught with logical fallacies. When directly comparing religious and nonreligious types of argumentation, for example, Greene actually uses a different form or level of argument to illustrate each type, thus generating a categorical error by comparing two unlike things. Recall the example he provides to distinguish between nonreligious and religious argumentation, that of "legislators arguing for the banning of abortions 'because they're immoral.' "[53] Whereas Greene's nonreligious legislators calmly and thoughtfully "explain that they (a) have observed human suffering, (b) distinguish human beings from animals because of the language abilities of the former, (c) are concerned about slippery slopes, and (d) resolve close questions in favor of preserving life,"[54] his religious legislators dogmatically proclaim that "[w]e believe in Christ as Lord, and His scriptures say that life is sacred, and therefore abortion is wrong."[55] Greene then proceeds to explain why these arguments are "quite different" from one another.[56] Well, Greene is surely correct that they are different, but hardly for the reason that one is accessible and one is not. To the contrary, they are different (and hence cannot be validly compared) by virtue of how Greene has designed them. First and most obvious, he employs different tones or styles of rhetoric to depict each type of legislator—the calm and thoughtful nonreligious type versus the blunt and dogmatic religious type. Not only is this comparison inherently pejorative, it is also loaded and thus amounts to a commission of the so-called straw man fallacy, if not also the fallacy of appealing to prejudice and the fallacy of slanting.[57] To

50. *Id.* at 1616.

51. Greene seems to come closest to defining *human experience* when he speaks of "facts about human behavior and conclusions reached about the causes and effects of such behavior." *Id.* at 1619. Needless to say, this is not a helpful definition and suggests that human experience is simply another way of describing the natural and social sciences.

52. *See supra* text accompanying notes 22-25.

53. Greene, *supra* note 1, at 1622.

54. *Id.*

55. *Id.*

56. *Id.*

57. *See* ANGELES, *supra* note 33, at 95, 99; WILLIAM L. REESE, DICTIONARY OF PHILOSOPHY AND RELIGION 167 (1980).

see this, one need only consider how easily the two types could be switched or manipulated to produce the opposite effect.[58] Needless to say, an appropriate interpretation of the Constitution would hopefully rest on something more than mere word play.

Second, and by far more significant, Greene leaves out the expressly normative component of the nonreligious legislators' position at the same time that he makes it a prominent part of the religious legislators' position, again committing the fallacy of slanting. Specifically, Greene has omitted from the former a premise to the effect that "human suffering is 'bad' and/or should be prevented or relieved," because without the implied existence of such a normative claim, the banning of abortions would simply not follow from the argument he does present. And although this might seem like a rather uncontroversial premise—surely less controversial than an overt claim concerning theistic morality—any lack of controversy is due primarily to our collective Western ethical acculturation and not because the premise is universally self-evident or somehow adducible from human experience alone. To the contrary, such a proposition invariably requires an unprovable normative leap, and Greene is able to base an illustration upon it only because (1) he keeps it concealed, and (2) he can rely on the fact that it *already* is a widely accepted premise, one for which most readers have already taken the necessary leap of faith. This second point is especially important because it highlights an otherwise nominal difference between religious and nonreligious argumentation which Greene exploits to the detriment of religion. Specifically, Greene takes advantage of the fact that many religious citizens make continued and explicit reference to their first principles (as well as to human experience), but nonreligious citizens rarely make such reference and may not even be aware of the contours of their ontological framework. The proposition "We should love one another as it is God's will" hardly differs from "We should love one another," either in terms of prescriptive content or in terms of provability, but the former proposition most definitely differs from the latter insofar as its underlying first principles are express and overt. Greene latches onto that express extrahuman reference, plays up its nonprovability, and then labels the entire proposition inaccessible, all the while ignoring the absence of a provable normative basis in the nontheistic analogue. In turn, Greene is able to give the appearance of bolstering his position in at least two ways. First, he is able to rely

58. In *support* of abortion rights, for example, the nonreligious legislators could dogmatically proclaim that "women have an inalienable right to do whatever they want with their bodies, including abort their fetuses (which of course could not be human)," while the religious legislators could calmly and thoughtfully explain that they "(a) believe that free will is a gift to humanity, (b) believe that it is unjust to interfere with another's exercise of free will, particularly when no sin or harm clearly results, (c) are unsure as to whether abortion is harmful or sinful, and (d) therefore believe that voluntary abortion should be permitted."

upon a seemingly immense and easily ascertainable division between religion and nonreligion—the latter being accessible, the former inaccessible—when in fact no clear division may exist. And second, by keeping his scrutiny of nonreligious argumentation at a relatively shallow level, he is able to bypass the very strong argument that reference to human experience is alone insufficient to produce values which will decide questions of law and public policy. He avoids, in other words, the fundamental philosophical problem that empirical claims, by themselves, seldom yield uncontroversial or nonarbitrary normative claims.[59]

The upshot of all these criticisms is that Greene's conception of religious belief and his related conceptual dichotomy between religion and nonreligion are simply too crude to support a constitutional interpretation as significant as the one he offers, even if the prima facie free exercise offset he proposes were to prove beneficial to religious citizens in the long run. The world is not nearly as black and white as *The Political Balance* suggests, and the complex difficulties engendered by the religion clauses and by a religiously diverse society will not be solved by models of constitutional or political theory which in one way or another brush them under the rug. Religious ways of belief, knowledge, and argumentation, like so many other cultural-historical phenomena, are highly intricate and variable, and we should resist the temptation to accept seemingly simple dichotomies between religion and nonreligion—such as inaccessible/accessible—even if we must transcend popular sentiment and our collective intuition to do so.

B. The Nature of the Political Process

Although Greene's conception of access is the most troubling component of his thesis, his conception of the nature of the political or lawmaking process requires no less serious attention. Indeed, some portion of my difficulty with his use of the notion of access no doubt stems specifically from this second conceptual obstacle. Essentially, Greene seems to understand the lawmaking process, or the citizenry's participation in that process, as consisting of a series of debates among participants regarding the truth or persuasiveness of each participant's underlying normative principles. In turn, meaningful participation in that process is measured in part by each participant's capacity to ac-

59. *See generally* Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229. This is often called the is/ought problem: the 'is' does not become the 'ought' merely by adding several 'is's' together, or by mustering a vast consensus as to the truth of the 'is,' or by simply not disclosing the covert 'oughts' which tend to sneak into one's analysis along the way. *See* ANGELES, *supra* note 33, at 84, 138. The is/ought dichotomy—like its increasingly disfavored cousin, the fact/value split—may be passé at the edges, see ALASDAIR MACINTYRE, AFTER VIRTUE 57-59 (2d ed. 1984), but by and large it has yet to give way at the core. Until it does, Greene cannot simply pass over it like bad produce at the market.

cept or contest the merits of others' fundamental normative positions. Recall Greene's dire list of alternatives for the nonreligious:

> (a) converting to the relevant faith and thus gaining access to the source of values animating the law, (b) arguing with the religious believers about whether they have properly construed the commandments of their faith, or (c) persuading those believers that their faith is "false." Unless they come to share the faith, dissenters cannot meaningfully compete in the debate over how conclusions from religious faith should be enacted into law.[60]

As one might expect, Greene seems to find each one unrealistic—regarding option (a), conversion cannot be forced upon the dissenter; regarding options (b) and (c), the tone of Greene's text as well as the absence of serious treatment of these options suggest that Greene believes them to be generally futile, unduly burdensome, or both. With no options remaining, then, the political process must be considered dysfunctional precisely because citizens are unable to tap into each other's sources of normative authority.

To the extent Greene is simply suggesting that this high level of debate is rendered improbable if not impossible by the coexistence of countless divergent sources of normative authority (as in the United States today), he is almost certainly correct. Perhaps such debate was possible among members of, say, the Oneida Community[61] or the Massachusetts Bay Colony,[62] but it is largely inconceivable today given our present cultural milieu, which is often defined by its unprecedented pluralism. For that very reason, however, it is difficult to maintain or to suggest, as does Greene, that our contemporary policy-making process is actually understood to operate at that level of discourse. Precisely because we lack a consensus over fundamental normative principles, it is unlikely that many people truly embrace Greene's vision of lawmaking. Who, after all, genuinely enters political or legal debate with the purpose or expectation of achieving ontological harmony, or in the absence of such harmony, of either undergoing some sort of value transformation or exacting such a transformation from another participant in the debate?

More realistically, our system of formulating and enacting legal rules and principles is predicated not upon philosophical consonance among participants, but rather upon compromise among competing

60. Greene, *supra* note 1, at 1619.

61. *See, e.g.*, WILLIAM M. KEPHART, EXTRAORDINARY GROUPS: THE SOCIOLOGY OF UNCONVENTIONAL LIFE-STYLES 52-103 (1976); ONEIDA COMMUNITY: AN AUTOBIOGRAPHY, 1851-1876 (Constance N. Robertson ed., 1970).

62. *See, e.g.*, DARRETT B. RUTMAN, WINTHROP'S BOSTON: A PORTRAIT OF A PURITAN TOWN, 1630-1649 (1965); Emil Oberholzer, Jr., *The Church in New England Society*, *in* SEVENTEENTH-CENTURY AMERICA 143 (James M. Smith ed., 1959). And of course one could be expelled from the Colony if one's views were even mildly divergent from those of the other members. *See, e.g.*, Robert T. Miller, *Religious Conscience in Colonial New England*, 1 J. CHURCH & ST. 19, 25-30 (1959).

factions, each with its own agenda representing divergent sources of value.[63] In turn, the soundness of law or public policy is measured not by the universal accessibility of the values in which it is expressly grounded, but rather by the palatability of its form and by the nature of its consequences (although congruence between the values of the law and one's own values is surely one measure of palatability).[64] Indeed, if the Constitution contains a political balance, it exists in the structural dimensions of Articles I through VII, and not in the religion clauses of the First Amendment. The latter exist not to displace *in toto* that structural design when religious citizens and their representatives convene to enact legislation, but simply to place outer limits—"no law respecting an establishment of religion, or prohibiting the free exercise thereof"[65]—on the substantive operation and implementation of that design.

Ironically, Greene recognizes the importance of structural politics and constitutionalism when he addresses the subject of governmental legitimacy. The symmetry of his political balance, to be sure, is itself substantially structural, resting on social contractarian notions of political consent and participation. According to the balance, it is precisely because the legitimacy of law requires the opportunity to participate politically, and precisely because religious persons through their legislators cannot do so expressly, that religious persons should not have to comply fully with the resulting laws.[66] What Greene is missing, of course, is any real likelihood of consent by those whom his model effectively disenfranchises. Can Greene seriously maintain, for example, that a majority of citizens (the vast majority of whom have always been formally religious) would now assent, or would ever have

63. This kind of political arrangement has been observed or sketched out in a variety of forms. *See generally* THEODORE J. LOWI, THE END OF LIBERALISM (2d ed. 1979); THE FEDERALIST Nos. 10, 51 (James Madison); Frederick M. Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 695 (1992). For a normative assessment of this view, see JOHN RAWLS, POLITICAL LIBERALISM (1993); John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987).

64. In adopting this model of legal or political decision making, by no means am I rejecting the primacy of liberal virtues such as open-mindedness about the possible incorrectness of one's underlying values, a willingness to remain flexible as to one's particular policy stances, and an openness to the goodness and potentiality inherent in intelligent, honest deliberation. I am saying, however, that these virtues do not accurately define legislative lawmaking at any level, such as the state and federal legislatures, where a true community of shared values is absent. And even to the extent such virtues remain aspirations for these larger, more diverse levels, they hardly call for the extreme form of open-mindedness, if not value-less skepticism, which Greene seems to argue ought to be part and parcel of our lawmaking processes.

65. U.S. CONST. amend. I.

66. *See* Greene, *supra* note 1, at 1613. Alternatively, one could express a similar idea in common-law terms: a lack of full capacity by one party at the time of contracting (such as minority of age) renders the contract unilaterally voidable by that party, subject at the outer limits to public policy considerations. *See* E. ALLAN FARNSWORTH, CONTRACTS §§ 4.2 to 4.4 (2d ed. 1990).

assented, to a scheme resembling his?[67] In fact, the reasonable answer seems to be that the deal which Greene envisions as having been struck in those clauses (the political balance) would likely not have been entered into in the first place, particularly if the parties were in possession of anything close to perfect information. Recall once again what the deal effectively says to religious people: "If you agree not to shape legislation on expressly religious grounds, then legislation will likely not apply to you when it conflicts with your religious tenets. You sign away some of your civil rights, and we may remove some of your civic responsibilities. We say 'may' because there are no guarantees, but we will give you a 'prima facie exemption.' " Note the extent to which this treats religion like alienage: those burdened will not enjoy the full benefits of citizenship (e.g., they must forego certain rights of political participation), but neither will they incur the full costs of citizenship (e.g., they may be able to avoid certain liabilities such as conscription or the duty to pay taxes).

I am not contending, of course, that such consent actually needs to occur or to have occurred; the hypothetical social compact will suffice. But even social contractarians would not permit the construction of a hypothetical compact that is so incongruent with the reasoned or rational preferences of its hypothetical parties that those parties, if ever given the opportunity to assent, would likely not do so.[68] And the alternative of involuntarily excluding entire classes of citizens, by whatever means and to whatever degree, from participation in the political processes is no more justifiable if only because it flies in the face of our modern constitutional commitment to equality.[69] Neither

67. The Court's Establishment Clause cases, to be sure, are consistently among the least publicly accepted of all the Court's decisions of which the public has any awareness. *See* CARTER, *supra* note 6, at 108 (noting that the Supreme Court's cases striking down the recital of organized prayer in the public school classroom "for three decades have ranked (in surveys) as among the most unpopular in our history"). And Greene cannot seriously maintain that there would have been meaningfully greater public support for his model at some time earlier than the present era. Incidentally, even without his invocation of social contract theory, as a matter of internal consistency Greene would still have to address the role of public opinion, because he uses that criterion to support various other portions of his thesis. *See, e.g.*, Greene, *supra* note 1, at 1617 (basing his definition of religion on the consensus of "most people"); *id.* at 1613 (basing his conception of legitimate lawmaking on what is "widely accepted").

68. For an example of what a realistic contemporary compact on religion and government might look like, see THE WILLIAMSBURG CHARTER (1988), *reprinted in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 127 (James D. Hunter & Os Guinness eds., 1990). The Williamsburg Charter was drafted by members of a wide variety of faiths, including secularist faiths, and was designed "to celebrate the uniqueness of the First Amendment religious liberty clauses; . . . to set out the place of religious liberty within American public life; and to define the guiding principles by which people with deep differences can contend robustly but civilly in the public arena." ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY, *supra*, at 125.

69. *Cf.* Marshall, *supra* note 31, at 847 (noting the principle of equality of ideas implicit in the Free Speech Clause). Under the rubric of equal protection, this core constitutional principle recently provided the basis for invalidating the much-publicized Colorado constitutional amendment prohibiting state and local government entities from conferring protected status specifically

logic, nor our political traditions, nor the Establishment Clause in any way commands such grossly disparate treatment between religious citizens or legislators and their nonreligious counterparts, and surely it is fanciful to invoke some unwritten, overarching social contract in lieu of these other conventional grounds of legal legitimacy.

C. *The Meaning of the Establishment Clause*

Greene's third and final conceptual claim warranting close scrutiny is his contention that political alienation, resulting incidentally from express legislative reliance on religious argumentation, by itself amounts to a cognizable "Establishment Clause injury." Being logically related to the so-called endorsement test, this particular vision finds some indirect support both in the case law[70] and among the pages of academic journals[71] and admittedly has a kind of intuitive appeal. Nevertheless, several serious problems arise with this expansive vision of nonestablishment—whether couched in terms of endorsement or mere political alienation[72]—which ultimately argue against its adoption.

First, a political alienation criterion is simply unworkable as a practical matter, suffering either from potential boundlessness (and thus from the likelihood of absurd or unanticipated results) or from undue vagueness (and thus from the likelihood of absurd or inconsistent judicial application).[73] How are judges to carry out their tradi-

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on people of homosexual or bisexual orientation. *See* Evans v. Romer, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

70. *E.g.*, County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 594 (1989) (asserting that an establishment may be found where "government . . . [appears] to take a position on questions of religious belief or . . . '[makes] adherence to a religion relevant in any way to a person's standing in the political community' ") (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). Note, however, that the emergence of an endorsement approach to nonestablishment largely occurred *after* the Warren and Burger Courts, the jurisprudence of which Greene purports to defend. *See supra* note 5. Futhermore, although Justice O'Connor has said in *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring), that the concept of nonendorsement is merely an alternative way of capturing the principles of Lemon v. Kurtzman, 403 U.S. 602 (1971), her claim seems to be more an example of common-law reasoning and legitimation by stare decisis than an accurate description of how those earlier Courts actually understood the tripartite test of *Lemon*.

71. *Cf.* Neal R. Feigenson, *Political Standing and Government Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 41 DEPAUL L. REV. 53 (1990) (evaluating the Court's endorsement analysis and essentially advocating the use of a subjective nonalienation test); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1115, 1166-69 (1988) (arguing that the governmental endorsement of religious or irreligious beliefs is inherently exclusionary and that such exclusion is harmful both to individuals and to our ability to maintain a strong political community).

72. The specific doctrinal foundations of Greene's nonalienation model of nonestablishment are somewhat uncertain. Given his singular emphasis on the perceptions of nonbelievers, one would think that, of all the nonestablishment tests articulated by the Court, the endorsement test would provide the strongest foundation. Yet, Greene refuses either to embrace or to reject endorsement as the doctrinal basis of his model, and in one equivocal passage seems both to reject and to accept the test's utility. *See* Greene, *supra* note 1, at 1621 n.36.

73. Not surprisingly, these are some of the same ills which afflict its doctrinal cousin, the endorsement test. *See generally* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59

tional line-drawing function, for example, when the sole criterion enumerated is the political alienation of religious nonadherents and when the alienation is to be evaluated subjectively from the nonadherents' point of view?[74] Was the Burger Court off the mark in the 1978 case of *McDaniel v. Paty*[75] when it held that states may not prohibit members of the clergy from holding public office? Hopefully not—but if mere legislative reference to ambient religious values is inherently alienating (and thus impermissible under Greene's model), then surely the actual occupancy of a legislative seat by an ordained religious teacher would also be sufficient to alienate at least one sensitive nonadherent. As a practical matter, then, subjective alienation simply cannot be the measure of impermissible establishment, lest we truly will create "a system in which each conscience is a law unto itself."[76] Unfortunately, an *objective* standard would fair no better and would be as vague or absurd as a subjective standard is boundless. Who would be the objectively reasonable political participant, for example? And to what degree would her characteristics need to be adjusted to reflect both her status as religious nonadherent and her likelihood of alienation—thus yielding a "reasonably alienated nonreligious political participant" standard? These are difficult questions, of course, in large part because the intrinsically complex experience of political alienation, whether examined subjectively or objectively, is not readily translatable into any type of concrete, judicially accessible rule of law.

Second, to the extent Greene actually intends to rely on the Court's endorsement test (which, incidentally, is hardly a cornerstone of Establishment Clause jurisprudence), he substantially misconstrues the doctrinal contours of that test. The Court has not expanded its use of an endorsement test beyond public symbolism cases, such as seasonal crèches and menorahs,[77] or beyond cases involving primary or

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U. CHI. L. REV. 115, 147-57 (1992); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 210-18 (1991) [hereinafter Smith, *Rise and Fall*]; Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987); Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 711-12 (1986).

74. *See* Smith, *Rise and Fall*, *supra* note 73, at 211-12, 216-17. So concerned is Greene with the subjective perceptions of nonadherents, in fact, that he would outlaw only the *appearance* of express religious reference by the legislature; actual legislative reliance on religious values could theoretically pass muster. According to Greene,

> if religious believers can translate their "true" religious reasons successfully enough to make it appear to nonbelievers that secular reasons are the real ones, then from the nonbelievers' perspective, their political participation is meaningful. . . . [M]y Establishment Clause argument . . . turns not on the underlying reasons for laws, but rather on the reasons that are apparent in the political process.

Greene, *supra* note 1, at 1623.

75. 435 U.S. 618 (1978); *see also* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding state legislative prayer).

76. Employment Div. v. Smith, 494 U.S. 872, 890 (1990), *quoted in* Greene, *supra* note 1, at 1611.

77. *See, e.g.*, County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989); *cf.* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (first propos-

secondary public education.[78] As a consequence, Greene's wholesale importation of a political alienation criterion into the legislative realm is simply unsupported by the Court's pronouncements. In addition, he chooses as his relevant observer—the one making the perception of alleged endorsement—a nonreligious outsider of apparently heightened sensitivities, even though the Court itself has given little indication as to what the relevant observer's characteristics actually should be.[79] Once again, ideology and not Supreme Court precedent is the seemingly determinative factor in Greene's conception of nonestablishment.

Third and finally, an alienation criterion may often yield nothing more than zero-sum results: the de facto alienation which is lifted from nonbelievers may simply be converted into the de jure alienation of believers, whose particular values can no longer inform public policy in meaningful ways.[80] The provision of an offset, moreover, will likely do little to remove the negative effects of this de jure exclusion. Giving a prima facie exemption to those effectively disenfranchised through Greene's model may make government legitimate in some abstract sense, but it hardly means that religious citizens, once disenfranchised, will not experience the same kind of alienation which Greene's model was designed to reduce. At some point the purity and symmetry of theories must be subordinated to, or at least balanced against, the real lives of real people. And at some point there must be

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ing the use of an endorsement test). In fact, none of the Court's most recent Establishment Clause cases—Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 1994 WL 279673 (U.S. June 27, 1994) (Nos. 93-517, 93-527, 93-539), Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993), Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993), and Lee v. Weisman, 112 S. Ct. 2649 (1992)—expressly turned on the issue of endorsement as previously set out by the Court. Significantly, the relative desuetude of endorsement may indicate not only the Court's desire to limit its factual reach, but may also indicate a desire by several justices to jettison it from the Court's nonestablishment jurisprudence altogether.

78. *See, e.g.*, Westside Community Sch. Bd. of Educ. v. Mergens, 496 U.S. 226, 249-50 (1990); Edwards v. Aguillard, 482 U.S. 578, 587 (1987); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 389-90 (1985).

79. The Court has merely noted that the observer must be "reasonable," *County of Allegheny*, 492 U.S. at 620, although in the same passage it also cited Professor Tribe's proposal of the "reasonable non-adherent." *Id.* (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-15, at 1296 (2d ed. 1988)).

80. *Cf.* Conkle, *supra* note 71, at 1166-69, 1176-79 (arguing that the judicial invalidation of governmental actions under *Lemon* may enhance the sense of political inclusion experienced by nonreligious or nonmainstream religious groups, but may also cause mainstream religious groups to feel increasingly excluded); Frederick M. Gedicks, *Some Political Implications of Religious Belief*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419, 432-39 (1990) (contending that the "exclusion of religiously based arguments from politics excludes the most authentic part of a religious individual's personality from public life" and therefore may cause her to "feel separated, illegitimate, and inferior"). Additionally, the resulting governmental restriction of expression or ideas raises serious Free Speech Clause problems. *See generally* William P. Marshall, *The Concept of Offensiveness in Establishment Clause Jurisprudence*, 66 IND. L.J. 351 (1991). Professor Marshall makes a strong case against the restriction of religious expressive activity based merely on its potentially offensive or alienating nature. It would be interesting to ascertain Greene's impressions of Marshall's thesis, particularly because Greene otherwise relies so heavily on Marshall's work and because alienation is essentially the fulcrum of Greene's political balance.

a recognition that the gradual but formal removal of religion from public life may produce a cumulative alienation of religious citizens much more harmful than the de facto alienation which such removal was originally designed to prevent.[81]

Lest I be misunderstood as endorsing an impotent version of nonestablishment, I should note that I do in fact advocate, albeit to a limited degree, the prevention of political alienation as *an* Establishment Clause value. The political alienation of nonbelievers is no doubt lessened by almost any vigorous nonestablishment jurisprudence, and in several respects this sort of incidental effect is clearly beneficial. But it does not follow from such a relationship that the reduction of political alienation should actually become *the* core value or central purpose of the Establishment Clause. That, however, is precisely what Greene has done in *The Political Balance*, elevating this single and otherwise relatively minor criterion to new heights and then using it to support a grand theory which once and for all delineates "*the* proper role of religion in politics."[82] This strategic move alone should cast serious doubt on the independent strength of Greene's thesis. Coupled with the failure of his other conceptual premises, it indicates that *The Political Balance* has been constructed not from the dictates of logic, political principle, and law, but rather has been cut from the whole cloth of an ideology ultimately interested in the de jure removal of religion from public life.[83]

III. CONCLUSION

It is often much easier to criticize than to construct, and my response to Professor Greene's article admittedly has taken advantage of this truism. It is even easier to criticize, however, when the object or thesis created is sufficiently without foundation as to call into question the propriety of its initial construction. Professor Greene, following numerous others, has invested a great deal of scholarly capital into constructing a model which coherently reconciles the presence of religion with our political and constitutional traditions—with the ultimate expungement of religion from public life being merely an unfortunate,

81. *See generally* FREDERICK M. GEDICKS & ROGER HENDRIX, CHOOSING THE DREAM: THE FUTURE OF RELIGION IN AMERICAN PUBLIC LIFE (1991); *see also* CARTER, *supra* note 6, at 55-56; Harold J. Berman, *The Interaction of Law and Religion*, 31 MERCER L. REV. 405, 409 (1980).

82. Greene, *supra* note 1, at 1612 (emphasis added).

83. Greene basically concedes as much when he says, in a freestanding sentence: "Unless religious belief is different from secular belief in a relevant way, we cannot logically exclude religious premises from grounding law unless we wish to exclude secular premises as well." *Id.* at 1616. Needless to say, these words do not bespeak a neutral effort to reconcile the religion clauses so much as they reveal Greene's genuine concern—namely, that religious discourse be excluded under some theory which both appears authoritative and yet will not backfire so as to exclude nonreligious discourse as well. For a critical analysis of the tendency to use constitutional scholarship as a conduit for unstated ideological advocacy, see Paul F. Campos, *Advocacy and Scholarship*, 81 CAL. L. REV. 817 (1993).

incidental consequence of the model in question. Time and again, however, such undertakings tend to betray a kind of "Ptolemaic secularism," beginning with often unstated conclusions about the intrinsic goodness of secular government and ultimately ending up with jerry-built models of religious involvement in law and politics which are in fact designed to bring that vision of government about.[84] Indeed, Greene's article in large part fails precisely because it ignores the fact that coherent and relevant models of public discourse simply cannot result from attempts which begin with conclusory assertions about religious thinking or the meaning of the Constitution, or which take too seriously the Supreme Court's ever-shifting and severely disjointed religion jurisprudence.[85] Greene's political balance has a certain seductive symmetry, to be sure, but legal aesthetics alone are presumably of little import in this Realist or Post-Realist age.

To his credit, Professor Greene at least attempts to salvage religious liberty at the same time he effectively endorses the removal of religion from the public square. This final move, though, is but a Pyrrhic victory as far as the role of religion in the political arena is concerned. (Indeed, the word *victory* might even be too cheery for religious citizens, because most of them stand to lose from Greene's political balance.[86]) There are few civic transgressions worse than de jure political disenfranchisement, and there are few citizens who would willingly and intelligently trade away the right of political participation for disenfranchisement coupled with an exemption, particularly because most citizens would never have needed such an exemption. Worse yet, the exemption is merely prima facie, so there is absolutely no guarantee that one's religiously motivated conduct will in fact be protected, especially when one's conduct would probably not have received judicial or legislative support in the first place.[87]

84. *See* Idleman, *supra* note 17, at 447 n.48. It is striking that Greene never addresses any costs associated with the loss of religion or alternatively addresses any benefits associated with its presence. It is as if he were talking about a small tumor, something which should be removed because it presents significant risks while at the same time conferring no obvious benefit to the host.

85. Recall that one of Greene's two express rationales for his thesis is to provide a defense of the religion jurisprudence of the Warren and Burger Courts. *See supra* note 5. That Greene is unable to extend this defense to the jurisprudence of the Rehnquist Court is presumably a result of the Court's latest jurisprudential shift in Employment Div. v. Smith, 494 U.S. 872 (1990). *See* Gedicks, *supra* note 63, at 673 & n.11.

86. Greene's likely configuration of winners and losers—if any of the former exist—is most curious. Majority religious values stand to lose the most (because as a political matter they once could, but no longer can, provide the normative basis of law), while minority religious values stand to gain the most (because they could not have provided the basis of law anyway and because they will presumably benefit the most from exemptions).

87. This phenomenon can be seen in the legal treatment of parents who deny conventional medical care to their children on religious grounds. In response to a traditional judicial hostility toward protecting this conduct, many legislatures have created statutory exemptions from child neglect or abuse laws. *See* Paula A. Monopoli, *Allocating the Costs of Parental Free Exercise: Striking a New Balance Between Sincere Religious Belief and a Child's Right to Medical Treatment*, 18 PEPP. L. REV. 319, 320 nn.4-5, 329 (1991); Janet J. Anderson, Note, *Capital Punishment*

In the end, it is truly surprising that all of these consequences should arise merely from Greene's simple desire to "take religion seriously as special . . . ."[88] In fact, Greene has taken religion either too seriously or not seriously enough. The majority of religious citizens are likely not interested in the alienation of nonbelievers; there is too much difficult political work to be done in this country, they might contend, to be constitutionally preoccupied with the sensitivities of those who hold politically disfavored ontologies. At the same time, it is doubtful that the majority of religious citizens would be very amused by the political balance's effective disenfranchisement of their worldviews, particularly when predicated on implausible social contractarian fiction. Greene is correct in at least one respect: ascertaining a proper niche for religion in lawmaking will surely require a political balance. Let us hope, however, that such a balance rests not on ideological bias and constitutional machination, but rather on the legitimating forces of logic and principle and on a sophisticated understanding of religion as an indelible and complex element of the human condition.

of Kids: When Courts Permit Parents to Act on Their Religious Beliefs at the Expense of Their Children's Lives, 46 VAND. L. REV. 755, 755 n.1 (1993). Several courts, however, have simply construed these exemption provisions narrowly, often without any textual or legislative basis for doing so, and have thus effectively returned the situation to the status quo ante. *See, e.g.*, People in Interest of D.L.E., 645 P.2d 271 (Colo. 1982).

88. Greene, *supra* note 1, at 1635.