MUST THEOLOGY ALWAYS SIT IN THE BACK OF THE SECULAR BUS?:
THE FEDERAL COURTS’ VIEW OF RELIGION AND ITS STATUS AS KNOWLEDGE

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Imagine that you are watching a hearing of the U.S. Senate Judiciary Committee on television. Each member of the Committee is asking questions of, and in some cases interrogating, the president’s most recent nominee to the United States Supreme Court. She is an accomplished attorney with not only a law degree from an elite institution but also a doctorate in biochemistry and specialization in private practice on issues over which science and law overlap and intersect. For several years she has served on the federal bench on the D.C. circuit and has done so admirably, showing professional competence and jurisprudential insight that has become the envy of her peers, some of whom disagree with her conservative judicial philosophy. Over the years, she has published well-received articles in numerous law reviews and peer-reviewed science publications dealing with issues as wide ranging as the Daubert standard,¹ the reliability of DNA testing in capital murder cases, and whether the Supreme Court’s holdings in its reproductive rights cases provide support for a constitutional right to clone oneself.

She is also a devout Roman Catholic and has published several law review articles critical of the Supreme Court’s reproductive rights jurisprudence, and in particular, the Court’s reluctance to make an argument on the question of when human life begins. In fact, in one article in particular, she offers her own argument by which she defends the Catholic view of the human person as a defeater to the right to abortion.

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As the hearings proceed, the senators ask her a variety of questions about the most important court cases concerning equal protection, substantive due process, and criminal procedure. Several senators ask her questions about issues overlapping law and science and how some of them may play a part in future cases the Supreme Court may hear. She smartly and prudently declines to offer any answers about specific legal disputes, though in the process of her modest reluctance, she reveals a deep and sophisticated understanding of the sciences in which she was trained and has done research. The senators are impressed.

They now move on to questions about her views on abortion and how they are informed by her religious beliefs. And then the requisite inquiry is posed: Are you going to allow your deeply held personal religious beliefs to influence your judgments on the bench? Such a question, of course, is not asked of the nominee’s beliefs about biochemistry or the issues in which law and science intersect on which she has opined, even though on those beliefs and issues, as in the question of abortion, there are a wide variety of informed and thoughtful perspectives. And yet none of these beliefs and issues are described as “deeply held personal beliefs,” as if they were irreducibly subjective opinions about which rational deliberation is not possible. It seems safe to say that it would never cross a senator’s mind to ask the question of whether the nominee’s background in science would influence her judicial opinions on the Supreme Court. And it would not really matter if she had instead possessed identical expertise in history, political science, psychiatry, or zoology. For a sitting senator would be thought foolish to imply that there was something amiss with a judge who brought the resources of her education, training, and knowledge to bear

2. Columnist Charles Krauthammer provides an example for a real live U.S. Senate Judiciary Committee hearing:

[William] Pryor has more recently been attacked from a different quarter. Senate Democrats have blocked his nomination to the 11th U.S. Circuit Court of Appeals on the grounds of his personal beliefs. “His beliefs are so well known, so deeply held,” charged his chief antagonist, Sen. Charles Schumer [D-NY], “that it’s very hard to believe—very hard to believe—that they’re not going to deeply influence the way he comes about saying, ‘I will follow the law.’”

An amazing litmus test: Deeply held beliefs are a disqualification for high judicial office. Only people of shallow beliefs (like Schumer?) need apply.

Of course, Schumer’s real concern is with the content of Pryor’s beliefs. Schumer says that he would object to “anybody who had very, very deeply held views.” Anybody? If someone had deeply held views in favor of abortion rights, you can be sure that Schumer would not be blocking his nomination. Pryor is being pilloried because he openly states (1) that Roe v. Wade was a constitutional abomination, and (2) that abortion itself is a moral abomination.

on her opinions in appropriate cases, whose end we all agree should be justice.

This sort of thinking—exhibited by the fictional senator in this story—is ubiquitous in federal court opinions that address the nature of religious beliefs as well as those views and beliefs that are informed and shaped by a citizen’s religious tradition. This thinking is also found in the works of legal and political philosophers who argue that political views and policy proposals that have their source in a citizen’s or a government official’s theological tradition should be excluded from political or legal consideration unless the religious believer has a public justification that could in principle be accepted by those whose liberty the policy is intended to limit. They argue that such views and proposals, because of their source, are inconsistent with liberal democracy’s commitment to state neutrality on matters theological. Some, in fact, have maintained that this understanding of liberal democracy serves as the philosophical justification of the establishment clause of the First Amendment.

Although this understanding is widely embraced, I want to argue in this paper that there are good reasons to call it into question. However, because I cannot adequately present in the space allotted me the full-orbed assessment that this point of view deserves, my case is merely suggestive of the conclusion that I believe is correct, namely, that there is no sufficient reason to exclude theologically informed public policy proposals and that the federal courts err in offering a flawed understanding of the epistemological standing of religious belief. To make my case, I first address two questions—(1) What does theological knowledge look like?; (2) What do the federal courts say about theological claims? I then offer a brief analysis of one issue over which the question of theological knowledge has been raised in both the literature and the public square; (3) the permissibility and federal funding of embryonic stem cell research. I also use this issue as a point of departure to briefly discuss what I believe is an unjustified privileging of non-theistic understandings of knowledge.

WHAT DOES THEOLOGICAL KNOWLEDGE LOOK LIKE?

Theological beliefs, contrary to how they are sometimes portrayed in the literature, are not merely the written or spoken assertions found in a believer’s Scripture or uttered by her religious authority. They are far more complex than that and are often integrated with beliefs that are both extra-scriptural and the deliverances of other disciplines. Nor are they the result of blind faith, though there is no doubt that faith, properly understood and not blind, is essential for the life of the authentic


Tushnet’s arguments, moreover, tend to undermine his general criticism of the liberal privileging of rationality. If he wants to convince readers that rationality should be replaced or supplemented by noncognitive capacities, the noncognitive deliberative process should be described in a sympathetic manner. Defining noncognitive appeals by reference to rhetoric or art, for example, is a persuasive illustration that an exclusive focus on rationality is misplaced. Tushnet’s own description of the intuitive faculty of practical reason is promising:

[It] is not exercised by deductive reasoning from premises or by clearly articulated analogical reasoning from similar circumstances; it is exercised more directly, by responding to situations without the intervention of those modes of reason we now call logical or analytical.

But such things as divine revelation and biblical literalism are irrational superstitious nonsense; if that is what Tushnet means by noncognitive capacities, then I—and probably many other readers—would encourage the liberal tradition of excluding nonrational modes of discourse.


See also Sullivan, supra n. 5; Suzanna Sherry, The Sleep of Reason, 84 Geo. L.J. 453 (Feb. 1996);


7. On the relationship between faith and understanding, the Catholic Catechism teaches:

What moves us to believe is not the fact that revealed truths appear as true and intelligible in the light of our natural reason: we believe “because of the authority of God himself who reveals them, who can neither deceive nor be deceived.” So “that the submission of our faith might nevertheless be in accordance with reason, God willed that external proofs of his Revelation should be joined to the internal helps of the Holy Spirit.” Thus the miracles of Christ and the saints, prophecies, the Church’s growth and holiness, and her fruitfulness and stability “are the most certain signs of divine Revelation, adapted to the intelligence of all”; they are “motives of credibility” (motiva credibilitatis), which show that the assent of faith is “by no means a blind impulse of the mind.”

Faith is certain. It is more certain than all human knowledge because it is founded on the very word of God who cannot lie. To be sure, revealed truths can seem obscure to human reason and experience, but “the certainty that the divine light gives is greater than that which the light of natural reason gives.” “Ten thousand difficulties do not make one doubt.”

“Faith seeks understanding”: it is intrinsic to faith that a believer desires to know better the One in whom he has put his faith and to understand better what He has revealed; a more penetrating knowledge will in turn call forth a greater faith, increasingly set afire by love. The grace of faith opens “the eyes of your hearts” to a lively understanding of the contents of Revelation: that is, of the totality of God’s plan and the mysteries of faith, of their connection with each other and with Christ, the center of the revealed
believer.

To employ my own theological tradition as an example, the Christian faith is a philosophical tapestry of interdependent ideas, principles, and metaphysical claims that are derived from the Hebrew-Christian Scriptures as well as the creeds, theologies, communities, ethical norms, and institutions that have flourished under the authority of these writings. These beliefs are not mere utterances of private religious devotion, though they are, of course, integral to Christian spirituality. They are propositions that their proponents claim accurately instruct us on the nature of the universe, human persons, our relationship with God, human communities, and the moral life. And these beliefs are the consequence of centuries of debate, deliberation, reflection, and reasoned discourse. In the Catholic faith that I embrace, as the late John Henry Cardinal Newman eloquently argued, the Church employs the deliverance of special revelation and the powers of reason so that they may work in concert to arrive at deeper and more full understandings of theological knowledge that may develop over time as new challenges arise both inside and outside the Church. For example, the fifth-century Chalcedonian formulation of Christ’s two natures—not inconsistent with Scripture or prior Church doctrine—offered to the Body of Christ a more coherent picture of what it means for the Son of God, one person, to be both fully God and fully man. This formulation required sophisticated philosophical arguments that could withstand the challenges of Chalcedon’s heterodox and heretical adversaries.

Over the centuries, the Church also gradually developed an integrated cluster of beliefs about a variety of subjects such as the nature mystery. "The same Holy Spirit constantly perfects faith by his gifts, so that Revelation may be more and more profoundly understood." In the words of St. Augustine, "I believe, in order to understand; and I understand, the better to believe." 

Faith and science: "Though faith is above reason, there can never be any real discrepancy between faith and reason. Since the same God who reveals mysteries and infuses faith has bestowed the light of reason on the human mind, God cannot deny himself, nor can truth ever contradict truth." "Consequently, methodical research in all branches of knowledge, provided it is carried out in a truly scientific manner and does not override moral laws, can never conflict with the faith, because the things of the world and the things of faith derive from the same God. The humble and persevering investigator of the secrets of nature is being led, as it were, by the hand of God in spite of himself, for it is God, the conserver of all things, who made them what they are." 


of human beings, marriage, the life of the mind, faith and reason, and the relationship between church and state. These beliefs are the fruit of the Church’s bishops careful work in sifting through Scripture, a wide variety of philosophical and theological arguments, the conclusions of extra-theological disciplines (such as history and the hard sciences), and the thinking of its most esteemed doctors. For this reason, in some cases, the Church has adjusted its understanding in light of new insights and discoveries. For example, Thomas Aquinas, relying almost exclusively on Aristotle’s view of biology, held that the human fetus did not receive its rational soul until several weeks after conception. But as the science of embryology discovered more about human development, and biology rejected Aristotle’s views, the Church, though never discarding Aquinas’ metaphysics, embraced full human personhood from conception.

WHAT DO THE FEDERAL COURTS SAY ABOUT THEOLOGICAL CLAIMS?

Historian James Hitchcock, after assessing many federal court opinions in church-state cases, concludes that “the incoherence of the modern jurisprudence of the Religion Clauses is the inescapable result of the Court’s positing of religion as essentially irrational, . . .”

Aquinas . . . did not know that the matter out of which the human body is generated is already highly organized at conception and endowed with the efficient and formal causality necessary to organize itself into a system in which, as it matures, the brain becomes the principal adult organ. Hence he was forced to resort to the hypothesis that the male semen remains in the womb, gradually organizing the menstrual blood, first to the level of vegetative life and then to the level of animal life, so as to be capable of the further self-development needed for ensoulment. But he also supposed that this entire process from its initiation was teleologically (final cause) predetermined to produce a human person, not a vegetable, an infra-human animal, or a mere embryonic collection of independent cells. That is why the Catholic Church has always taught that even if it were true that personal ensoulment takes place sometime after conception, nevertheless abortion at any stage is a very grave sin against the dignity of a human person.
Id. at 200.
13. See id.
16. Hitchcock presents numerous examples of such presentations. Id. at 128. What follows
As one example, in *U.S. v. Ballard* (1944), Justice William O. Douglas writes:

Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.\(^{18}\)

More recently, in a 1976 case, Justice William Brennan suggested that "it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria."\(^{19}\) He then added that "[c]onstitutional concepts of due process, involving secular notions of 'fundamental fairness' . . . are therefore hardly relevant to such matters of ecclesiastical cognizance[,]"\(^{20}\) which would come as a surprise to Moses.\(^{21}\)

Hitchcock also cites Justice Tom C. Clark, who wrote in *Abington School District v. Schempp* (1963), \(^{22}\) "[t]he place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind."\(^{23}\) Although Abington is an Establishment Clause school prayer case in which religious practice initiated by school officials rather than religious beliefs themselves are the object of scrutiny, the opinion's

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\(^{18}\) *Id.* at 86-87.


\(^{20}\) *Id.* at 715.

\(^{21}\) "These things shall be a statute and ordinance for you throughout your generations wherever you live. If anyone kills another, the murderer shall be put to death on the evidence of witnesses; but no one shall be put to death on the testimony of a single witness. Moreover you shall accept no ransom for the life of a murderer who is subject to the death penalty; a murderer must be put to death." Num 35: 29-31 (All Biblical citations are taken from the NRSV.).


\(^{23}\) *Id.* at 226.
understanding of religious belief as personal and private seems to exclude it as a legitimate object of reason.

Most strikingly, we might cite Justice John Paul Stevens’ concurring opinion in the 1977 case, Wolman v. Walter. Justice Stevens writes:

The distinction between the religious and the secular is a fundamental one. To quote from Clarence Darrow’s argument in the Scopes case:

The realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve.

As a principle of religious free exercise, the Justices’ comments make sense, for the freedom of belief, as the Founders envisioned it, is an ultima facie right since it is a matter of conscience. But that is not where the real action is in contemporary church-state jurisprudence. Rather, it is in cases in which religious citizens try to shape policy while their critics claim that if these citizens were to be successful it would violate the establishment clause and/or the principles of liberal democracy. It is in those cases in which the Supreme Court’s assumption of religion’s irrationality has been subtly smuggled.

But such a universal judgment of the rationality of all religious claims—that they are all by nature irrational—is a philosophical project for which the judiciary is not trained or is especially competent. After all, religious claims, or those claims closely associated with them (e.g., moral claims), are wide-ranging in their content and thus in their status as possible knowledge. There is no “one size fits all” when it comes to such claims, just as there is no “one size fits all” when it comes to claims in disciplines as different as chemistry, English literature, physics, stamp collecting, or the martial arts. For a court to claim otherwise is for it to denigrate, without the appropriate arguments or reasons, the epistemological status of all religious claims. And yet, courts have done precisely that.

Take, for example, the 2002 Ninth Circuit case concerning the constitutionality of the recitation of the Pledge of Allegiance in California public schools,\textsuperscript{27} \textit{Newdow v. Elk Grove School District}. In that case, the court assumed that if the subject under scrutiny could be shown to be "religious," the policy in question violates the establishment clause.\textsuperscript{28} But it seemed to have not occurred to the court that if the so-called "religious" claim were rationally defensible, then the court would be in the odd position of forbidding California public schools to teach what seems to many citizens to be a belief for which one may marshal reasons many citizens would find compelling.\textsuperscript{29}

Judge Goodwin writes in the court's opinion:

The text of the official Pledge, codified in federal law, impermissibly takes a position with respect to the purely religious question of the existence and identity of God. A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion.\textsuperscript{30}

By saying that the "under God" portion of the Pledge is "purely religious," Judge Goodwin did not need to go any further in assessing whether it is rationally defensible for the government to suggest to its citizens that America is in fact "under God."\textsuperscript{31} What I mean by this is the view embraced by the American Founders that the government they put in place presupposed a cluster of rights that its citizens have by nature, that thus have their source in the divine. Government's obligation is to recognize and protect those rights. This is clearly spelled out in such work as the Declaration of Independence\textsuperscript{32} and the

\textsuperscript{27} \textit{Newdow v. Elk Grove Sch. Dist.}, 292 F. 3d 597 (2002), rev'd by \textit{Elk Grove Sch. Dist. v. Newdow} 542 U.S. 1 (2004). It should be noted that the student on whose behalf Mr. Newdow sued the school district, his daughter, could have opted out of the public recitation of the Pledge: Newdow does not allege that his daughter's teacher or school district requires his daughter to participate in reciting the Pledge. Rather, he claims that his daughter is injured when she is compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's [sic] is 'one nation under God.'" Newdow, 292 F. 3d 597, at 601.

\textsuperscript{28} Id.


\textsuperscript{30} Newdow, 292 F. 3d 597, 607-608 (emphasis added).

\textsuperscript{31} See Beckwith, supra n. 14, at 446-458.

\textsuperscript{32} "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and
writings of Alexander Hamilton. This seems to be the precise understanding held by the 1954 Congress that inserted the phrase "under God" in the Pledge of Allegiance:

At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

It may surprise some who are unacquainted with the discipline of philosophy, but the understanding of the 1954 Congress, that human rights have their source in God, has been a conclusion drawn in the arguments of many philosophers over the past several decades. Of course, this does not mean that no rational person may reject these arguments. But it does mean that a claim of theology can be the subject of rational assessment, and even convince many that it is in fact a pursuit of Happiness.” Declaration of Independence (1776).

33. “[T]he Sacred Rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature, by the hand of the divinity itself; and can never be erased or obscured by mortal power.” Alexander Hamilton, The Farmer Refuted Ch. 3 Doc. 5 (Feb. 23, 1775), http://press-pubs.uchicago.edu/founders/documents/vlch3s5.html (accessed Jan. 6, 2009).


deliverance of reason, as philosophically well-supported as John Rawls’s theory of justice,36 Ludwig Wittgenstein’s philosophy of language,37 or even H.L.A. Hart’s legal positivism.38 All of these views have been contested and challenged by philosophers and legal scholars no less rational and no less equipped with sophisticated arguments than were Rawls, Wittgenstein, or Hart. And yet, no one would say that the contested nature of these debated questions means that some or all of the participants are irrational for embracing the view they hold.

Nevertheless, as we have seen, the Supreme Court has declared that religion is by its very nature “in the individual heart,” “not rational,” “what men cannot prove,” and “where knowledge leaves off.”39 This is why Judge Goodwin in his Newdow opinion can reel off the names of several religious figures—Vishnu, Jesus, Zeus, and the elusive “no God”—and claim that if the government were to say it was “under” any of them, it would violate religious “neutrality.”40 This indeed would make sense if all religious claims were equally irrational, for in that case “God” may indeed be replaced with any other name associated with an irrational belief without violating any of the government’s obligations to conduct its business within the confines of reason. This, however, is hardly a neutral position, for it assumes, without argument, that all religious claims are by nature irrational, and thus the role God plays in “under God” is interchangeable with any religious or anti-religious figure or claim. In other words, a court is not acting in a neutral fashion in regard to religion if it issues a judgment on the epistemological status of all religious claims and then uses that judgment as an immutable standard by which to exclude a priori all religious claims from serious consideration in policy disputes. To be sure, the Establishment Clause of the First Amendment was intended to separate church and state,41 but it hardly follows from this that it was intended as an epistemological guide by which a court may separate faith from knowledge.

40. Newdow, 292 F. 3d at 607-608.
41. Of course, the Establishment Clause was initially applied to only the federal government until the Supreme Court incorporated the First Amendment through the 14th Amendment. See Everson v. Bd. of Educ., 330 U.S. 1 (1947).
THE CASE OF EMBRYONIC STEM CELL RESEARCH

In order to better appreciate the problem that the courts’ view of theological knowledge brings to bear on our public conversation, I will critically look at an issue over which many citizens strongly disagree: the permissibility and federal funding of embryonic stem cell research. Stem cells are found in all animals, including human beings. In adults, stem cells serve the function of repairing damaged tissue. For example, “hematopoietic stem cells” are “a type of cell found in the blood.” Their purpose is to repair the tissue of a damaged part of the organ of which they are a part, for adult stem cells are differentiated. However, stem cells found in the early embryo (or totipotent cells)—before its cells differentiate into the cells of particular organs—"retain the special ability to develop into nearly any cell type." The embryo’s germ cells, “which originate from the primordial reproductive cells of the developing fetus,” possess similar properties.

Few doubt the potential of human stem cell research and the possibilities it offers for finding cures for numerous diseases such as Parkinson’s and Alzheimer’s. But the real issue that animates opponents of this research, and raises deep ethical questions, is how these cells are obtained and from what entity they are derived. According to the National Bioethics Advisory Commission’s (NBAC) 1999 report, these stem cells can be derived four sources:

*human fetal tissue following elective abortion (EG cells)
Embryonic germ cells,

*human embryos that are created by in vitro fertilization (IVF) and that are no longer needed by couples being treated for infertility (ES cells) [Embryonic stem cells],

45. Id.
46. Id.
47. Id.
48. National Institutes of Health, Stem Cell Information, Stem Cell Basics, What are the potential uses of human stem cells and the obstacles that must be overcome before these potential uses will be realized?, http://stemcells.nih.gov/info/basics/basics6 (accessed Feb. 14, 2009).
*human embryos that are created by IVF with gametes donated for the sole purpose of providing research material (ES cells), and

*potentially, human (or hybrid) embryos generated asexually by somatic cell nuclear transfer or similar cloning techniques in which the nucleus of an adult human cell is introduced into an enucleated human or animal ovum (ES cells). 49

Because, since the publication of the 1999 report, research on adult stem cells has shown much more promise in the research for which embryonic stem cells were procured, 50 we can now add a fifth source of stem cells for research. However, with the exception of the first and fifth sources (which do not result in the death of an embryo), the acquisition of stem cells can only be accomplished at the cost of killing a human embryo. This is why many citizens who otherwise support stem cell research oppose both embryonic stem cell research as well as the federal funding of it. 51 For, according to these citizens, embryos are full-fledged members of the human community and thus the government at least ought not to underwrite their demise for the sake of another's good. Moreover, these citizens' belief about the nature of embryos is shaped significantly by theological traditions that are the result of an understanding of Scripture in symbiotic relationship with a particular philosophical anthropology. 52

For this reason, supporters of embryonic stem cell research and its government funding have drawn attention to the theological roots of the bioethical views of these citizens and have concluded that their policy proposals are in violation of the First Amendment's establishment clause. Take, for example, the comments of Rutgers law professor, Sherry F. Colb:

Religious freedom is an essential right in this country. Religion and religious organizations have often provided compassion and support to those in need. Observant members of religious groups have a fundamental constitutional right to practice their respective

49. Id. at i, ii (author emphasis added).
religions—a right enumerated explicitly in the First Amendment.... But as strongly as our Constitution protects religion, it forbids our government from becoming a religious one....

....[T]he idea that full-fledged human life begins at conception—is a religious notion, and it is one to which some, but not all, religions subscribe.

The idea of "ensoulment" is, of course, a purely religious concept. The notion that life begins at conception is counterintuitive if understood in secular terms.

In a secular world, because an embryo lacks the capacity to think, to experience joy, and to suffer pain or distress, it accordingly lacks legal entitlements that could possibly trump or even equal the interest in saving lives and curing disease through research. A secular perspective, then, would unequivocally approve of stem cell research....

Only a religious view would equate a clump of undifferentiated cells the size of a pinprick with a fully formed human being—deeming both equivalent "life." Proceeding on the basis of this equation, ... wrongfully imposes a religious perspective on all citizens, regardless of their religious belief or lack thereof.53

The sort of analysis that Professor Colb offers is ubiquitous in both the professional and popular literature on the subject.54 And like some of those other works, she seems to commit two mistakes: (1) She privileges, without adequate justification, what she calls the secular perspective; and (2) she mistakenly presents the so-called secular and religious perspectives as two different subjects rather than two different answers about the same subject.

In order to better understand why Professor Colb's case fails, I will conscript for my purposes a speech delivered by 2008 presidential candidate Senator Barack Obama (D-IL). In a June 28, 2006 keynote address to a group called "Call to Renewal," Senator Obama offered among his many comments the following thoughts on the relationship


between politics and religion: "Democracy demands that the religiously motivated translate their concerns into universal, rather than religion-specific, values. It requires that their proposals be subject to argument, and amenable to reason."55

Elsewhere in his talk, the Senator opines on the challenges that face Christian believers, especially evangelicals, in a society such as ours that contains a variety of different perspectives on a wide range of controversial issues. He states:

Now this is going to be difficult for some who believe in the inerrancy of the Bible, as many evangelicals do. But in a pluralistic democracy, we have no choice. Politics depends on our ability to persuade each other of common aims based on a common reality. It involves the compromise, the art of what's possible. At some fundamental level, religion does not allow for compromise. It's the art of the impossible. If God has spoken, then followers are expected to live up to God's edicts, regardless of the consequences. To base one's life on such uncompromising commitments may be sublime, but to base our policy making on such commitments would be a dangerous thing.56

It seems to me that the first quote is inconsistent with the second one. The senator states, "Democracy demands that the religiously motivated translate their concerns into universal, rather than religion-specific, values." Then he asserts,

At some fundamental level, religion does not allow for compromise... To base one's life on such uncompromising commitments may be sublime, but to base our policy making on such commitments would be a dangerous thing.

But Senator Obama in fact is claiming that his policy is based on the uncompromising commitment of what "democracy demands" of its religious citizens. Thus, Senator Obama, on his own reasoning, is suggesting a "dangerous thing."

On the other hand, if he is willing to concede that even what he believes about what "democracy demands" may be legitimately called into question by thoughtful religious citizens, then he cannot, on his own grounds, require that these citizens embrace his view unless he can provide to them unassailable reasons. If, according to Senator Obama, democracy "requires" that the policy proposals of religious citizens "be

56. Id.
subject to argument, and amenable to reason,” we should expect the same from him. But he does not provide such reasons or arguments. He merely stipulates.

It seems to me that religious citizens should have no quibble with the first quotation, if all that Senator Obama is saying is that religious citizens who want to persuade their non-religious neighbors on a particular issue, should, as a matter of prudence and wisdom, offer arguments that the latter may find persuasive. But that’s not what the Senator seems to be saying. He seems to be telling us that in order for religious citizens to fully participate in our liberal democratic regime, they must use the language of those who are hostile or indifferent to their faith. And yet liberal democracy does not demand that the secularist translate his policy proposals into the language of theology so that his religious neighbors could be appropriately convinced and thus not be marginalized from the public conversation. Thus, it is a one-way street: the religious citizen must acquiesce at every turn to the rules provided to him by the secularist. And if he objects to this arrangement, he must offer arguments in the language and grammar of the secularist.

But there’s another way to look at Senator Obama’s case that has affinity with a certain line of argument offered by those who defend what is called justificatory liberalism. Given the obvious limitations of a political speech, and given the senator’s background in Constitutional Law and jurisprudence, I suspect that he holds to some form of justificatory liberalism. So let us imagine that Senator Obama is

57. Christopher Eberle defines justificatory liberalism on the question of religious convictions and coercive laws: “[A] responsible citizen may support a coercive law on the basis of his religious convictions, but not on the basis of his religious convictions alone.” Eberle, supra n. 3, at 48. And this principle is based on this

justificatory liberal’s commitment to public justification: the claim that respect for his compatriots forbids a citizen to support a coercive law for which he can’t discern a public justification provides a principled basis for the claim that a citizen ought not support a coercive law on the basis of religious conviction alone.

Eberle, supra n. 3, at 48.

And the principle of public justification depends on the principle of respect for person:

Respect for his compatriots as persons obliges a citizen to ensure that his favored coercive laws are justifiable from the points of view of those compatriots. When a citizen deploys his modicum of political clout to authorize the state to coerce his compatriots, as he surely may in a liberal democracy, respect for his compatriots requires that he provide them with reasons they can accept in support of the claim that his favored coercive policies are warranted. Respect for others requires public justification of coercion: that is clarion call of justificatory liberalism.

Eberle, supra n. 3, at 48, 53-54.

There are, of course, many disagreements among justificatory liberals on the meaning of public justification, coercion, respect for persons, etc. Needless to say, an exploration and analysis of these different points of view falls outside the modest goal of this article.
defending a version of this point of view, which would go something like this: because religious citizens have an *evidential set*\(^{58}\)—sources of authority, background beliefs and reasons—not shared by their neighbors, they should restrain from employing those sources as the basis for the reasons why they enact laws that limit the liberty of their fellow citizens who do not share those sources of authority.

But it's not clear why the religious citizen should accept this rule if she has fulfilled all her epistemic duties and believes that she has good grounds for the coercive laws she supports. Surely it is correct that each of us comes to the public conversation with a cluster of beliefs that we hold for a variety of reasons, many of which are based both on arguments we have carefully assessed, and authorities that we believe are reliable and have no reason to distrust. But in that case, the typical non-religious citizen enters the public square in precisely the same position as the typical religious one. And in both cases, each likely supports laws that she thinks are reasonable and necessary but that in some cases have the consequence of limiting the liberties of others, even though each is not likely to see that consequence has a net harm, since each will see it as an advancement of justice and the public good. Consider the following example.

In Massachusetts, soon after the state's Supreme Judicial Court in 2003 required that the state issue marriage licenses to same-sex couples,\(^{59}\) Catholic Charities, which was at the time in the child adoption business, was told by the state that it could no longer exclude same-sex couples as adoptive parents, even though the Catholic Church maintains that same-sex unions are deeply disordered and sinful. Because it did not want to compromise its moral theology, Catholic Charities ceased putting children up for adoption.\(^{60}\)

From the perspective of the Catholic citizen who opposes same-sex marriage, this state of affairs limits her liberty and that of her Church based on sources of authority (e.g., arguments for same-sex marriage

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58. I am borrowing the phrase "evidential set" from Eberle, who defines it in this way:
[A] citizen who conscientiously attempts to determine whether a given belief B merits his adherence must rely on a fund of beliefs and experiences he assumes to be true or reliable while evaluating B. Call that fund of beliefs and experiences his *evidential set*. Whether it's rational for a citizen to assent to B (or accept a given argument for B) depends, in addition to the manner in which he forms his beliefs [i.e., he is willing to subject his views to criticism, go where the evidence and arguments may lead, and is properly disposed to be intellectually virtuous], on the contents of his evidential set.

Eberle, *supra* n. 3, at 61-62.


that its advocates find persuasive, a philosophical anthropology and view of human sexuality that same-sex marriage proponents find intuitively obvious, etc.) that she does not share with those who support same-sex marriage, including Massachusetts's Supreme Judicial Court. On the other hand, the proponents of same-sex marriage, including many gay citizens, see this state of affairs as an advancement of justice and the common good. For that reason, they find same-sex marriage as an almost logical entailment of what they think the ends of liberal democracy should be. For, in their minds, the state is unjust if it denies its citizens the opportunity to marry whomever they choose based on an understanding of human sexuality inexorably tied to a source of authority that gay citizens reject. On the other hand, opponents of same-sex marriage see the injustice in the state's actions coercing them to embrace a policy that their sources of authority maintain is deleterious to social justice and the public good.

My point is this: if we interpret Senator Obama's position as suggesting that one cannot support a law that limits another's liberty if one's reason for the law is based on an authority not shared by one's fellow citizens, neither side in the same-sex marriage debate can escape the scope of that prohibition. One way to avoid this problem offered by some same-sex marriage advocates is to claim that liberal democracy by its very nature entails a particular view of the human person that requires that the government allow same-sex marriage.

But this just begs the question, and also seems to violate justificatory liberalism; for it privileges, without argument, a controversial view of the human person over which reasonable citizens disagree against which they offer sophisticated and thoughtful arguments. And its plausibility depends on sources of authority that the opponents of same-sex marriage reject.

Returning to the issue of embryonic stem cell research, Professor Colb seems to commit the same mistake, for she privileges, without argument, a controversial view of the human person that depends on sources of authority not shared by her opponents. Calling this view the "secular perspective," Colb claims that it requires the law to protect only those human beings with interests that arise when they possess certain mental and physical capacities. Because the embryo apparently lacks

61. See e.g. Marvin M. Ellison, Should the Traditional Understanding of Marriage as the One-Flesh Union of a Man and a Woman Be Abandoned?, 7 Philosophica Christi (2005); Ronald E. Long, In Support of Same-Sex Marriage, 7 Philosophica Christi 29 (2005).

62. In a secular world, because an embryo lacks the capacity to think, to experience joy, and to suffer pain or distress, it accordingly lacks legal entitlements that could possibly trump or even equal the interest in saving lives and curing disease through research.
these capacities, he or she has no interests that the law ought to safeguard, in the "secular" view, in her opinion. Although this is a widely-held point of view defended by some of the finest minds in the academy, it is not clear why we should embrace it as the secular perspective. After all, Aristotle, whose views many Christians, including Thomas Aquinas, have found congenial to their theological projects, offered "secular" theories of ensoulment and philosophical anthropology that rely on empirical observation, philosophical reflection and arguments to the best explanation. His conclusions are inconsistent with what Professor Colb calls the secular perspective.

Thus, the contemporary Christian or non-Christian Aristotelean can raise the question: why should I accept this understanding of human beings and their interests? After all, there is a sense in which embryos do have these interest-making capacities from the moment they come into being. From its genesis, the embryo possesses the capacity to acquire powers and properties, its being and its constituent parts are intrinsically ordered to work in concert to bring these powers and properties to maturation. For this reason, Professor Colb is simply mistaken when she describes the embryo as "a clump of undifferentiated cells." Even when the embryo's cells are undifferentiated (i.e., the cells are totipotent and thus have the capacity to develop into any organ), the early embryo, as several scholars have pointed out, functions as a substantial unity whose parts work in concert with one another for the growth, development, and continued existence of the secular perspective, then, would unequivocally approve of stem cell research.

Colb, supra n. 53.

63. See e.g. David Boonin, A Defense of Abortion (Cambridge U. Press 2003).


66. See George & Tollesfen, Embryo, supra n. 51; Beckwith, Defending Life, supra n. 65, at ch. 4 & 6.

67. Colb, supra n. 53.

According to developmental biologist, Michael Buratovich, the blastosmeres [the undifferentiated, totipotent, cells of the early embryo] are held together by tight junctions and gap junctions, which allow cells to communicate with each other. By the eight-cell stage the cells are very tightly bound to each other. These cells are talking to each other in complex and wonderful ways. They are totipotent because they need to be—how else are they going to make everything from skin to sperm?

With these clarifications, Professor Colb may now want to make the counter-argument that excluding the early embryo from legal protection is still justified, but not because it lacks certain ultimate capacities for the actualization of certain powers, actions and experiences, for the typical embryo surely does not lack those capacities. Rather, she may want to argue that it is the present and immediate exercisability of those capacities that distinguishes protectable persons from early embryos, since the latter do indeed lack that power. This is clearly a more defensible position than Professor Colb’s initial salvo. Yet, like her first argument, this revised one has its sophisticated detractors as well.

Nevertheless, no matter which argumentative strategy she procures for her case, it is clear from the above analysis she can no longer present the embryonic stem cell debate as if it were a dispute between two different subjects—religious and secular understandings of embryonic stem cell research—rather than what it really is about, two different answers to the same question: What should be our public policy on embryonic stem cell research? Instead of confronting the arguments for the position she labels “religious,” Professor Colb seems to believe that if a position on a policy question can be labeled religious, it is no longer a position that may legitimately have a bearing on the public’s

69. An often cited exception is the phenomenon of monozygotic twinning, which can occur within the first two weeks after conception. But even if every early embryo were to possess an intrinsically-directed potential for twinning—that may be triggered by some external stimulus—it would not follow that the early embryo is not a unified organism. It would only mean that the human being, early in her existence, possesses a current capacity that becomes latent after a certain level of development, just as some latent capacities become current later in the human being’s existence (e.g., the ability to philosophize).

70. E-mail from Michael Buratovich, developmental biologist and associate professor of biochemistry, Spring Arbor University, to author (June 12, 2003) (on file with author).

deliberation on the issue. But that’s putting the cart before the horse. For unless Professor Colb first shows that no argument in principle can provide warrant for a view of embryonic personhood connected to a theological tradition, justice requires that we treat so-called religious and secular understandings of embryonic personhood as different answers to the same question.

After all, Professor Colb offers an answer to a question of philosophical anthropology that religious traditions have also offered an answer. She makes her case by suggesting that because the early embryo lacks certain capacities (or in our revised version of her argument, certain present and immediately exercisable capacities), the early embryo does not have interests that require that the law protect it. But by doing this, Professor Colb is offering an account of the human being, a philosophical anthropology if you will, in order to exclude early embryos from the realm of moral subjects. Not surprisingly, those who oppose Professor Colb’s position, mostly Christians, present arguments and counter-arguments in order to first show that the early embryo is a moral subject and then from there show that killing that entity in the way that Professor Colb suggests is unjustified. She responds to their position by calling it “religious,” even though its advocates offer real arguments with real conclusions and real reasons. Of course, these arguments and the beliefs they support are, for many of their advocates, religious, but they are also offered as rational argument. In fact, for many of these believers, there may be no bright line demarcating “faith” and “reason,” as if they were incommensurable categories that reside in the same soul side by side while never touching. Rather, these believers may view faith and reason, as St. Augustine viewed them, as natural human faculties designed by God for our acquisition of knowledge. When ordered to the right end, they work together in cooperation for the good of the whole person. As St. Augustine put it, “I believe, in order to understand; and I understand, the better to believe.” Nevertheless, the arguments of these believers should be assessed on their merits as arguments.

72. Colb, supra n. 53.
74. St. Augustine, Sermon 43, 7, 9, in Catechism of the Catholic Church, supra n. 7, at 158.
CONCLUSION

This paper’s title is in the form of question: Must theology sit in the back of the secular bus? It should be obvious by now that my answer to that question is “no.” However, one should not think that I am suggesting that the religious citizen should enter the political fray, and the rough and tumble world of public advocacy, with no restraints whatsoever. Remember that the target of my critique has been the case for so-called secular limits on the religious citizen, not theological ones. After all, if one believes, as many of us do, that theology is a knowledge tradition, then the same resources to which the religious citizen may legitimately appeal in the public square may require his obedience in other spheres as well. In my own tradition, Catholic Christianity, we have among many authorities the words of St. Peter the Apostle, who tells us in his first epistle that in this world we are “aliens and exiles[,]” and that we ought to “[c]onduct [ourselves] honorably among the Gentiles [i.e., unbelievers], so that, though they malign [us] as evildoers, they may see [our] honorable deeds and glorify God when he comes to judge.”

He goes on to write:

For the Lord’s sake accept the authority of every human institution, whether of the emperor as supreme, or of governors, as sent by him to punish those who do wrong and to praise those who do right. For it is God’s will that by doing right you should silence the ignorance of the foolish. As servants of God, live as free people, yet do not use your freedom as a pretext for evil. Honor everyone. Love the family of believers. Fear God. Honor the emperor.

So, the Christian must use her freedom wisely and be honorable to her unbelieving neighbors as well as accepting and respecting the rule of law and the authorities put in place to protect it, all for the sake of the common good.

75. 1 Pet 2:11-12.
76. 1 Pet 2:13-17.
77. A special thank you to Baylor University’s Institute for the Studies of Religion, and its director Byron Johnson, for providing me a summer 2008 fellowship so that I may complete and revise this paper. I would like to also thank Michael Beaty, my department chair at Baylor University. Because of Mike’s encouragement and advocacy, I was able to take a research leave from Baylor and secure a visiting faculty appointment at the Notre Dame Center for Ethics & Culture at the University of Notre Dame for the 2008-09 school year so that I might work on a larger project of which this paper is a part. Thanks also to the center’s director, W. David Solomon, and its associate director, Elizabeth Kirk, for providing a wonderful environment in which to do my work.