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Review Essay

What Does "Religion" Mean in the Public Square?


Reviewed by Marci A. Hamilton†

Jeffrey Stout has addressed an important and pressing contemporary question: how can religious believers participate in the public square? Or, in the obverse, can religious belief be a legitimate ground for constructing public policy? In his words, he hopes to "reopen the entire question of the role of religious reasoning in public life." He is responding to the thesis that has been put forth by many now that the only legitimate speech between citizens in a democracy is that which springs from common ground—I will call this theory the common-ground theory. And if common ground is required for public reasoning, differences in belief must be shuttled to the sidelines. The theory was in part an instinctive response to the increasing heterogeneity of the United States, including differences based on religion, national origin, and local culture. If there were all these differences and no shared viewpoint, how could public discourse address any topic with any coherence? Not a bad question at all. The communitarians tried to answer it in the concrete while the common-ground theorists did so in the abstract. Either way, they share the assumption that there must be a homogeneous base of values to solve the problem posed by

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1. JEFFREY STOUT, DEMOCRACY & TRADITION (2004). Stout is the acting chair of the Department of Religion at Princeton University.
2. *Id.* at 77.
pluralism. In the end, the communitarians and common-ground theorists simply moved the discourse back to where it started—a need for sameness where it does not exist. Stout proposes an answer that does not insist on homogeneity as a precursor to solving social problems.

The common-ground thesis shuts out religious believers, making them second-class citizens because of their beliefs. That has led religious believers, who have permitted themselves to believe that the theory describes reality, to feel disenfranchised and second-class. That has typically played into an argument that somehow the culture is discriminating against them. As a political reality, they are not being discriminated against, but rather being forced to accept into the political fold a wide variety of religions beyond their own. Setting aside for now the political reality, the result of the secularization thesis has been that the Christian right, among others, has embarked on an offensive against American “secular” culture. They have criticized school districts that will not permit Christianity to be the only faith celebrating the holidays, and they have worked assiduously to introduce the Ten Commandments as the single legitimate source of American law. Their actions are impassioned and in fact quite dangerous to the United States, because they portend theocracy in the midst of enormous religious diversity. Hence, what Stout intends to address is something of a social emergency.

He says that the plurality of religious views need not be excluded. He calls his answer “conversation.” By this he means “an exchange of views in which the respective parties express their premises in as much detail as they see fit and in whatever idiom they wish, try to make sense of each other’s perspectives, and expose their own commitments to the possibility of criticism.” In other words, any justification or expla-


5. Stout, supra note 1, at 10.

6. Id.

7. Id. at 10–11.
nation can enter the public square legitimately. It is not necessary that all citizens share common ground to reach public policy, and indeed it is not possible that such a diverse culture could operate that way. That does not mean all ideas are created equally—quite to the contrary, some will be more effective in addressing social problems than others.

Democracy & Tradition is intended to answer the social critics who have repeatedly responded to the common-ground theory by saying that it leads to secularization, that the entire culture has been secularized, and therefore religion has been marginalized and trivialized. This theme has dominated the public discourse about major Supreme Court cases interpreting the Establishment Clause, including those dealing with vouchers for religious schools,\(^8\) the Pledge of Allegiance,\(^9\) and the Ten Commandments.\(^10\) The foremost legal scholar to have furthered this view among the public is Yale's Stephen L. Carter, whose The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion\(^11\) was widely read in the academy and in the political sphere. It would be difficult to overestimate its impact on the thinking of politicians. For example, in the portrait of President William Jefferson Clinton that hangs at Yale Law School he is holding the book.\(^12\) As Stout makes clear, it is a viewpoint that has been fostered by the likes of John Rawls's political philosophy,\(^13\) among others, but it cannot capture the reality of what happens in fact in the marketplace of politics and expression.

Stout's astute approach is to agree with the religious critics that there is secularism in the public square, but then to assert that religious expression coexists: "Modern democratic reason-

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13. *See STOUT, supra note 1, at 294–95.*
ing is secularized, but not in a sense that rules out the expression of religious premises or the entitlement of individuals to accept religious assumptions."¹⁴ It is a benign and open secularism, which consists in "discursive presuppositions, not necessarily the worldview or state of consciousness of participants in the" conversation,¹⁵ rather than a closed forum. Thus, he refuses to accept the widely accepted belief that the realm of expression in the United States must be either secular or religious. This refusal to think dichotomously leads to a fresh and more nuanced characterization of what is happening in the public square in fact. Indeed, he corrals many of the dichotomies of our day and brings them under one theory: Democracy vs. Tradition; Narcissism vs. Society; Theocracy vs. Secularism; Monotheism vs. Pluralism; Believers vs. Atheists. By rejecting the bipolar questions, he crafts a philosophy that lets every American citizen into the conversation as a legitimate participant: "Vague references to God from the crepe-lined podium cannot finally disguise the vast array of theistic and nontheistic religions Americans embrace. Need I add that dissenters, free thinkers, atheists, and agnostics are citizens, too?"¹⁶

From a factual perspective, this is a refreshing book. The hyper-abstraction of Rawls's approach left out not only the fact of religion, but also the fuller apprehension of the varieties of religion and belief that Stout brings to the project. Rawls constructed principles of justice based upon an "original position" in which rational actors were required to make decisions behind a "veil of ignorance," where "[t]hey do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations. . . . If a knowledge of particulars is allowed, then the outcome is biased by arbitrary contingencies."¹⁷ In other words, public decision making depended on a suspension of one's personal beliefs, which makes religious convictions peripheral to public exchange.

Stout's incisive answer to Rawls is worth repeating: "Rawls seems to be saying that while the right to express our religious commitments freely is guaranteed twice over in the Bill of Rights, this is not a right of which we ought to make essential use in the center of the political arena, where the most impor-

¹⁴.  Id. at 11.
¹⁵.  Id. at 175.
¹⁶.  Id. at 1.
tant questions are decided."\textsuperscript{18} In addition to his observation that Rawls's theory makes First Amendment rights irrelevant, he also points out that Rawls is placing artificial restraints on the scope of the answers available for the hard social issues. He quite rightly asks, "Why limit oneself in the Rawlsian way to the quest for a \textit{common} basis, given the possibility that a common basis will not cover all essential matters?"\textsuperscript{19} What Stout has done is to put into words an intuition that many of us have had since the first time we were introduced to Rawls's work: it is an ideal, an abstraction that may well be worth the mental exercise, but that does not echo our own shared experience in the public square. The ideal sounds good, as it could resolve any given political controversy on the basis of reasons that none of us could reasonably reject. But it has not been demonstrated that all important controversies can be resolved on this sort of basis, so it seems unwise to treat the idea of public reason as if it entailed an all-purpose principle of restraint.\textsuperscript{20}

He could not have better characterized what is amiss in Rawls's account of public deliberation, which is the theoretical base on which the myth of marginalization and secularization has been constructed.

The theory here, though, is not that all religious reasons will float in the political sphere. Some will sink quickly, and even impede further debate. Stout does not advocate complete validation for any religious view spoken at any political moment, or that religious individuals should raise religious reasons for their public policy positions at every turn, but rather acknowledges that "there are moral as well as strategic reasons for self-restraint. Fairness and respectful treatment of others are central moral concerns."\textsuperscript{21}

He concedes, as he must, that religious discourse may at times be a "conversation-stopper," but not always.\textsuperscript{22} He knows that it can be both beneficial and an impediment because he has observed the conversational practices in this culture.\textsuperscript{23} This is an ethicist who has resolutely refused to lock himself into the ivory tower to construct the theory that "explains it all," and instead, by walking among his fellow citizens, has identified a

\begin{itemize}
\item \textsuperscript{18} Stout, \textit{supra} note 1, at 68.
\item \textsuperscript{19} \textit{Id.} at 73.
\item \textsuperscript{20} \textit{Id.} at 75.
\item \textsuperscript{21} \textit{Id.} at 65.
\item \textsuperscript{22} \textit{Id.} at 85-86.
\item \textsuperscript{23} \textit{Id.} at 10-11, 85-91.
\end{itemize}
complex discourse, incapable of being captured by an either/or formula. It is not either secular or religious, but rather both and more. There can be no question that he is right about this factual claim. No matter how finely spun the theories that require reason and reason alone to ground public policy are, there has never been a time in the United States when religion has not been a driving force behind social policy, let alone altogether excluded. In some ways, then, Stout's theory is unmasking what is a settled American practice. It is a fascinating move whereby the philosopher-theologian is reintroducing the concrete into the abstract.

Stout has given voice and shape to inchoate ideas in U.S. culture that needed expression, because the widely held assumption that the United States stands on a precipice and must choose religion or secularism has led to a standoff that is not justified. Religious entities that have bought into the "secularization" thesis have been sold a bill of goods, and it is urgent that they come to understand that their views are not being and should not be excluded. He has initiated an open-ended conversation with all of us and with the leading theologians and ethicists of our day, and he has brought to the discussion the American philosophers and pragmatists, Ralph Waldo Emerson and John Dewey. This is a brilliant book, well worth reading and contemplating.

This Review Essay will focus on two terms that are at the base of Stout's thesis, "religion" and "democracy," and ask what they mean in the text and what they might mean. I raise neither question to condemn the work, but rather to suggest a need for further elaboration.

I. WHAT DOES "RELIGION" MEAN?

The central thesis of Democracy & Tradition is that religious discourse can indeed participate productively and constructively in the public square. Stout has thereby broken through the liberal taboo that demotes religious speech to ineffective and even inexpressible speech. That is an enormous move that deserves everyone's attention. He has not, however, broken through the conservative taboo that forbids saying that religious entities can (and often do) work against the public interest.

24. Id. at 1-13.
What is this "religious" discourse that he would validate in the public conversation? I will delineate what Stout seems to mean and then offer a critique that is not intended to scuttle the theory, but rather is a plea for further elaboration.

He starts Part II, where he focuses on this question most closely, by defining the freedom of religion. It has two components. It is first, in Stout's view, the right to choose answers to "religious questions," such as "whether God exists, how God should be conceived, and what responsibilities, if any, human beings have in response to God's actions with regard to them." This characterization taps directly into the Constitution's absolute right to believe as one chooses.

Second, there is, in Stout's words, the "right to act in ways that seem appropriate, given one's answers to religious questions—provided that one does not cause harm to other people or interfere with their rights." Once again, he is echoing the Supreme Court's free exercise jurisprudence, which I have recently explained rests on the principle of "no harm." This might have been the moment where he inched toward the conservative taboo, but he pulls back almost immediately.

His next statement is that "the expressive acts obviously protected by this right are rituals and other devotional practices performed in solitude, in the context of one's family, or in association with others similarly disposed." When one adds this description to his examples of the beliefs one might hold, which in the main tend to be monotheistic, the picture of the religion that will operate within his theoretical universe is becoming clearer, and not quite as factual as one might have hoped. Religion, on this account, seems to be closer to Sunday school religion than the teeming marketplace of religion in the United States.

There are many aspects of religious observance in this pluralistic religious culture that are not benign. For example, the faith-healing family that lets a child die from a medically

25. Id. at 63.
26. Id.
27. Id.
29. STOUT, supra note 1, at 63 (emphasis added).
treatable ailment has followed its "devotional practices," but has engaged in socially unacceptable conduct. The parents who would sacrifice their children for their religion are intending to engage in what they may have believed were "devotional practices," but they are not obviously protected under any reading of the First Amendment—especially where they are not mentally stable. The law must protect those children even when religion is invoked. This same principle of social incompatibility can also be illustrated by the Ku Klux Klan's burning of crosses in African Americans' yards, the church that beats teenagers during services, or the church that causes an autistic child to die during an "exorcism," which no doubt is a devotional practice.

Stout has not wholly bought into the social myth of the perpetual goodness of religious actors, though, and his vision does encompass more than simply the Christian tradition. He does acknowledge religion's capacity for hubris and untruth, but that is about as troubling as religion gets in Democracy & Tradition. What he acknowledges involves immoral behavior, but it does not encompass the religious conduct that cannot be squared with the larger public good.

While Stout has moved the level of abstraction toward the earth, it is still not as firmly grounded as the facts demand. If


31. See, e.g., Virginia v. Black, 538 U.S. 343, 361–62 (2003). When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.

Id. (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)).


33. See, e.g., Derrick Nunally, Minister Gets 30 Months in Boy's Death, MILWAUKEE J. SENTINEL, Aug. 18, 2004, at 1B.

34. See STOUT, supra note 1, at 112.

35. See id. at 84, 112.
religion is not always a force for good and is indeed sometimes positively evil, then how does a republican democracy handle it in the public square? I do not ask this question simply to be perverse. Rather, the United States is sorely lacking in political, sociological, theological, and philosophical theories that address and incorporate the full range of religious speech and conduct—good and bad.

Having opened the door to a discussion of religious entities operating against public interest, it is worthwhile to now examine what has really been at stake in the cultural war over the alleged “marginalization” of religion or the “secularization” of culture, to which he is responding. Although not explicit, there is a brilliant subtext to his theory. He has shown that there has not been a thoroughgoing secularization of culture at all, but rather a pluralization of religion, and that these two social phenomena are not equivalent. That is to say, what Christians have been calling “secularization” is the displacement of their assumed theocracy with a menu of religious beliefs. There is secularism, but it is not anti-religious secularism. It is a secularism that invites in all religious faiths. This public sphere where Christianity does not automatically rule includes a wide diversity of faiths, as opposed to a rejection of religion.

The mark of secularization [is] the fact that participants in a given discursive practice are not in a position to take for granted that their interlocutors are making the same religious assumptions they are. This is the sense in which public discourse in modern democracies tends to be secularized.36

Thus, the Christian perspective held by some, which assumes that it has been “the American” perspective, must now share space in the public policy debate with Jews, Muslims, Buddhists, Sikhs, Wiccans, and Rastafarians. “[M]odern democratic discourse tends not to be ‘framed by a theological perspective,’ but this does not prevent any of the individuals participating in it from adopting a theological perspective.”37 The word carrying most of the theoretical baggage in this sentence is “framed,” which means the power to set the agenda. The power to set the national agenda is the prize in this heated cultural dispute. Thus, the argument that “Christ” is being taken out of Christmas and that Christianity is being taken out of the culture is misplaced. Christians are being asked to make room for other faiths, not to vacate the public stage.

36. Id. at 97.
37. Id.
Stout’s thesis is well worth elaboration. There are three levels of meaning occurring simultaneously within the secularization debate. The first two have created a war over values that is based on a false understanding of what reasons have been operative in the public sphere. The third, Stout’s, corrects that factual mistake.

First, there is the simplistic claim that the whole culture has been secularized, which is the equivalent of saying it has gone to hell in a handbasket. What is usually meant by this claim is that Christianity has lost its control of the social agenda. It is inflammatory and is neither accurate nor constructive.

Second, there is the Rawlsian argument that secularization, which requires religious reasons to stand aside, is the best that we can do; therefore, those who would complain about it are simply antidemocratic or theocratic. This, too, is inflammatory and is neither wholly accurate nor constructive.

Third, there is Stout’s account of secularization—culture is not being secularized in the sense that religion has been excised, but rather a dominant religious viewpoint has been forced to make room at the table for other religious viewpoints.

Our society is religiously plural, and has remained so for several centuries despite constant efforts on the part of its religious members to appeal to their fellow citizens with reasons for converting to a single theology. . . . There is no point in trying to wish the social reality of religious diversity away, or in resenting this diversity as long as it lasts. Until it does go away, our public discourse will be secularized. . . . whether we want it to be or not.39

Therein lies the pain of secularization for some contemporary Christians in particular, and the motivation for some of them to now embrace a single faith tradition in the face of this teeming, pluralistic democratic polity. It is not that they oppose democracy (understood as the people’s will) as a theoretical matter; rather, they oppose the way in which democracy has displaced them from their privileged position. While “[t]hey are free to frame their contributions to [the public conversation] in whatever vocabulary they please[,] w[hat] they cannot reasonably do is expect a single theological perspective to be shared by all of their interlocutors.”40 Neither religious belief nor God need be excised from this public conversation. “It is simply a

38. See id. at 68.
39. Id. at 100.
40. Id. at 97.
matter of what can be presupposed in a discussion with other people who happen to have different theological commitments and interpretive dispositions." Of course, it is not quite simple at all. What Stout is touching upon cannot be reduced to reasoned discourse between citizens, but rather the struggle for power over values in the United States. It is hand-to-hand combat for control, and it would seem there is likely a connection between the increasing charges of "secularization" by some Christians and the fact that the number of Protestants (taking all denominations together) is beginning to dip below a majority of the population in the United States.2

Stout's theory invites further elaboration on the realities of the secularization debate as well. Despite the rhetoric, "secularization" has not necessarily meant that religious entities—even Christian—have been undermined in the public sphere. There may well be good reason that some Christians (and other faiths) have embraced this description, despite its negative assessment of their power. It may have served their political ends.

The secularization thesis is not an unalloyed evil for religious entities in the public sphere. Indeed, it has been quite useful at times. There is rich irony in the fact that religious entities in the United States have willingly taken on the cloak of political powerlessness at the same time that they have exercised enormous power over public policy. Three examples make my point: (1) the federally induced state exemptions for medical neglect of children during the Nixon administration; (2) the enactment of the Religious Freedom Restoration Act (RFRA), the Religious Land Use and Institutionalized Persons Act (RLUIPA), and the Religious Liberty and Charitable Donation Protection Act during the Clinton administration; and (3) the faith-based initiatives in the administration of President George W. Bush. And these are just a few of the many initia-

41. Id.
42. Peter Smith, Protestants Are Close to Losing Majority Status, COURIER-J. (Louisville, Ky.), Jul. 21, 2004, at 1A.
43. See infra notes 48–49 and accompanying text.
47. E.g., Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001) (creating the Office of Faith-Based and Community Initiatives); Press Release,
tives that religious entities turned into law during the so-called "secularization" era.

During the Nixon administration in the 1970s, Harry Robbins "Bob" Haldeman, who served as White House chief of staff, and John Ehrlichman, Nixon's domestic policy advisor, both Christian Scientists, pushed for a condition to be placed on state receipt of federal Medicare funds. To obtain Medicare funding, states were required—through an interpretation of the statute by the Department of Health and Human Services—to enact an exemption for faith-healing parents from the medical neglect laws. The Nixon administration thereby forced the states to accept a highly contestable public policy decision at the price of Medicare funding.

In effect, the federal Medicare law was a vehicle to make religious parents less accountable for their children's medical care. And it worked—over thirty states and the District of Columbia followed suit. Once children's advocates compre-

Health Res. & Servs. Admin., U.S. Dep't of Health & Human Servs., HRSA Awards $31 Million in New Grants to Support Abstinence Education (Jul. 12, 2004), http://newsroom.hrsa.gov/releases/2004/Abed2004.htm (last visited Jan. 17, 2005) (announcing that $31 million was awarded to abstinence-only health education programs, including many faith-based organizations); News Release, Substance Abuse & Mental Health Servs. Admin., U.S. Dep't of Health & Human Servs., New Program Promotes Choice, Accountability in Substance Abuse Treatment (Mar. 3, 2004), http://atr.samhsa.gov/news/NewsReleases/040303nr_atr.htm (last visited Jan. 17, 2005) (announcing that $100 million was awarded in fiscal year 2004 to states and tribal organizations to extend drug treatment to more Americans, allowing them a choice of drug treatment providers, including faith-based organizations); Admin. for Children & Families, U.S. Dep't of Health & Human Servs., Family and Youth Services Bureau: Mentoring Children of Prisoners Program, at http://www.acf.dhhs.gov/programs/fyshb/mcp.htm (last modified Mar. 10, 2004) (describing a program to provide 100,000 mentors to children with parent(s) in prison and including faith-based organizations); see also David Saperstein, Public Accountability and Faith-Based Organizations: A Problem Best Avoided, 116 HARV. L. REV. 1353, 1361-63 (2003) (suggesting that "proponents of new public-religious partnerships may be motivated by something other than a desire better to meet the social service needs of the country," and asserting that the initiatives benefited evangelical churches because they also had great political sway).


50. HAMILTON, GOD VS. THE GAVEL, supra note 28 (manuscript at 31, on file with author).
hended what had happened, the jig was up, and the condition was repealed, but there are still many states that have such exemptions. This is quite a successful grab for power by a relatively small religious organization. Where is the marginalization, trivialization, and secularization in public policy here? It is hard to identify.

The Clinton administration was one of the top three in U.S. history in terms of granting religious requests, the other two being President Grant's administration, which in 1869 paid out $2 million to "Christianize the Indians," and President George W. Bush's administration, discussed below. Among other laws benefiting religious interests, President Clinton signed both RFRA and RLUIPA, and quite enthusiastically. Both laws pro-

51. The regulation was corrected in 1983 when HHS removed the requirement for states to have an exemption. See Child Abuse and Neglect Prevention and Treatment Program, 48 Fed. Reg. 3698, 3700 (Jan. 26, 1983) (codified at 45 C.F.R. § 1340.2(d)(2)(ii)) (stating that "States are free to recognize or not recognize a religious exception without that choice having any effect on eligibility for a State child abuse grant"). Furthermore, the Child Abuse Prevention and Treatment and Adoption Reform Program, 42 U.S.C. § 5106i(a) (2000) provides:

Nothing in this [Act] . . . shall be construed . . . to require that a State find, or to prohibit a State from finding, abuse or neglect in cases in which a parent or legal guardian relies solely or partially upon spiritual means rather than medical treatment, in accordance with the religious beliefs of the parent or legal guardian.


vided religious entities benefits under the law that they had never received before. This is not the place for an extended analysis or explanation of RFRA, but suffice it to say that RFRA imposed on the government the obligation to prove that its laws burdening religious conduct were passed for a "compelling interest" and tailored to that particular believer's needs. Never before had all religious entities in all situations under all laws had the right to invoke such strict scrutiny of neutral laws or to demand such close accommodation from the courts. Justice Stevens rightly characterized it as "a legal weapon that no atheist or agnostic can obtain." Moreover, RFRA was under consideration in Congress from 1990 until 1993, with passage in 1993, during the height of the "marginalization" era. Carter's The Culture of Disbelief: How American Law and Politics Trivialized Devotion was published in the very same year that RFRA was enacted.

There is no question that Professor Carter's thesis was sincerely held or that believers did not feel themselves to be set aside in the political processes. They did. But RFRA belies the reality. Indeed, religious entities' ability to argue that they were being socially marginalized helped them obtain RFRA's expansive benefits. During the vast majority of the time that RFRA was being debated in Congress, not a single member of Congress publicly wondered whether giving such power to religious entities might harm the public good. They seem to have believed themselves to be assisting benign and politically powerless agents for the public weal, and therefore dodged the hard questions that might have put the brakes on such a law.

After RFRA was held unconstitutional, religious entities

56. For further explanation, see HAMILTON, GOD VS. THE GAVEL, supra note 28 (manuscript at 225-37, on file with author).

57. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(b) (2000) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").


59. HAMILTON, GOD VS. THE GAVEL, supra note 28 (manuscript at 225-27, on file with author).

60. CARTER, supra note 11.

61. Some argue that the Court held RFRA unconstitutional only as applied to state law. Marci A. Hamilton, The Religious Freedom Restoration Act Is Unconstitutional, Period, 1 U. PA. J. CONST. L. 1, 1 (1998). I, however, take the position that it is unconstitutional as applied to federal law as well be-
quickly returned to Congress and succeeded in obtaining the introduction of the Religious Liberty Protection Act\(^\text{62}\) by 1999. When members of Congress became less than enthusiastic about another across-the-board statute (in response to lobbying by children's advocates and city and local governments), two arenas of law were excised from the universe of all laws and conjoined in RLUIPA, which imposed strict scrutiny on those two arenas. Once again, the claim of marginalization carries little force, because RLUIPA radically transforms the law of free exercise in favor of religious entities in both spheres. Before RFRA and then RLUIPA, religious entities were subjected to land use determinations just like any other homeowner (except they received tax exempt status),\(^\text{63}\) and prison regulations were subject to intermediate scrutiny at most, certainly not strict.\(^\text{64}\) RLUIPA changed the law to strongly benefit religious entities, once again disproving the notion that religious entities have been politically marginalized.

Clinton also signed the Religious Liberty and Charitable Donation Protection Act of 1998, which protected believers' tithes to their religious organizations from being recaptured for the bankruptcy estate when they declared bankruptcy.\(^\text{65}\) Nor-


\(^{\text{63}}\) See Darren E. Carnell, Zoning Churches: Washington State Constitutional Limitations on the Application of Land Use Regulations to Religious Buildings, 25 SEATTLE U. L. REV. 699, 701–02 (2002) (discussing how, for the larger part of the twentieth century, courts deferred to municipal zoning decisions when land use regulations were challenged); Terry Rice, Re-Evaluating the Balance Between Zoning Regulations and Religious and Educational Uses, 8 PACE L. REV. 1, 10 (1988) (discussing how federal courts are much more deferential to municipal zoning decisions than New York state courts when land use regulation of religious institutions is involved, and also suggesting that the analysis of federal courts effectively excludes zoning regulations from free exercise protection because the zoning burdens on the religious practices do not warrant such protection).

\(^{\text{64}}\) See, e.g., O'Lone v. Estate of Shabazz, 482 U.S. 342, 348–50, 353 (1987) (requiring deference to prison authorities' judgments in balancing legitimate penological interests against the religious practices of inmates); Turner v. Safley, 482 U.S. 78, 89–91 (1987) (holding that prison regulations stand if prison authorities succeed in showing that the regulation serves "legitimate penological interests").

\(^{\text{65}}\) See The Religious Liberty and Charitable Donation Protection Act of
mally, certain payments made by a debtor within one year of declaring bankruptcy can be returned to the estate.66 Once again, religious entities were hardly being cast aside by the political process.

In terms of aiding religion from the federal podium, there is not a great deal of difference between the Clinton and Bush eras. Indeed, Bush's faith-based initiative originated during Clinton's tenure, but there has been a more obvious play on the part of the Bush administration to appeal to religiously motivated voters. The administration has spread federal money from secular social services into a number of religious social service providers, despite the fact that there are strong arguments under the Establishment Clause to question such programs and therefore they will be subject to repeated litigation.67 The publicly-groomed perception of incapacity or powerlessness spurred the faith-based initiative—there was a widespread perception that religious groups were being discriminated against because the government did not give them funds for social services while it funded secular services.68 That talk of discrimination permitted them to gloss over the otherwise clear Establishment Clause problems in a government program that funds religious mission. In a move that made the discrimination claim even more compelling, it was argued that they deserved the funding because they could do a better job redressing social concerns than secular organizations.69


68. See President George W. Bush, State of the Union Address (Jan. 20, 2004), http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html (last visited Feb. 9, 2005) (“By executive order, I have opened billions of dollars in grant money to competition that includes faith-based charities. Tonight I ask you to codify this into law, so people of faith can know that law will never discriminate against them again.”).

69. President Bush has made numerous statements espousing these faith-based initiatives. E.g., President George W. Bush, Address at the Downtown Marriott Hotel, Philadelphia, Pa. (Dec. 12, 2002), http://www.whitehouse.gov/news/releases/2002/12/20021212-3.html (last visited Jan. 15, 2005) (“No government policy can put hope in people’s hearts or a sense of purpose in peo-
The faith-based initiative is even more fascinating in light of the fact that it rests on an assumption that many religious organizations stand ready to provide social services. In reality, religious organizations in the United States dedicate only a very small portion of their income to such causes. Thus, again, one must tease out the truth from the mythology in the religious freedom debate. It is not only a debate about religious belief, but also about how religious believers (as well as nonbelievers) manipulate the public arena.

Stout’s focus on conversation does not address the play of power that determines how views are cast into the public square. One wonders how this element might be incorporated into his theory. There seems to be an assumption that all religious speech—and perhaps all speech—in this conversation is sincere and without hidden agenda. Perhaps Stout could fairly defend himself on the ground that he is just sketching the theory for the first time, so it is not fair to criticize him for what is not there. Fair enough, but quite a bit is at stake in accurately capturing how this conversation goes forward and its elements. Perhaps unfortunately, the United States’ public conversation is not even close to being a well-mannered exchange of sincerely held views in many circumstances, and therefore, there is a question in my mind, at least, about how political reality would or should alter his calculus. Perhaps he would say that he intends to include all such speech, sincere or devious, politically motivated or not. If so, his theory would encompass the possibility—which already exists in fact—that the players in

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the political game are going to get dirty, which means religion may push agendas that are not always admirable and therefore may deserve to be treated to less than a totally respectful stance. But if that is his theory, his definitions of religion, religious liberty, and religious reasons need further reticulation.

While Stout acknowledges the inevitable conflicts between religious beliefs in the public sphere when he refers to “the role of free public reason in a political culture that includes conflicting religious conceptions of the good,” it is often as though he is describing only constructive exchanges between wholesome viewpoints. The use of “conceptions of the good” has too much the flavor of a Platonic theory of religious ideas, which would be wholly inadequate to capture the positive and negative energy of religious belief and practice in the United States. It would be more accurate to say that there is often a clash of positions—each of which may be derived from religious belief—regarding public policy.

This reader at least asks, where in his thesis is the explicit acknowledgment of the evil that religions can perpetrate in the political process? To be fair, there are glancing blows when he quickly states, usually indirectly, that religious entities might be “prideful” or might not be fully honest, but this is at most a deep subtext. It needs to be more explicitly explained and fitted into the general structure of his approach. He is starting from his concrete observations of this culture, and there are plenty of examples that could be used to catalyze a richer description of the political conversation. For example, the Catholic Church has lobbied quite publicly to exempt clergy from state laws requiring the reporting of child abuse to protect the secrecy of the confessional. While this is no doubt a factor, there is good reason to believe that it has been fighting mandatory reporting statutes to protect what it knows full well is an ugly history of hiding childhood sexual abuse by its own priests. Thus, their public stance has been a cover to engage in antisocial behavior. What about the Christian Scientists and their success in the 1970s in getting the federal government to require states to exempt faith-healing parents from the children’s medical neglect

71. STOUT, supra note 1, at 2.
72. See, e.g., Jo Becker & Caryle Murphy, McCarrick Decrees Md. Child Abuse Bill, WASH. POST, Feb. 22, 2003, at B1; Conrad deFriebre, Sex-Abuse Reporting Bill Finds Opposition, STAR TRIB. (Minneapolis), Apr. 8, 2002, at 1A.
laws to obtain Medicare funding? The federal government's power was turned to enlarging the power of parents to permit their children to suffer for the parents' religious principles, and some of them to die. Where is the ethic or virtue there? But it is indisputably religion in the public sphere. What about the Aryan Brotherhood in the prisons or the Ku Klux Klan inside and out?

Stout says our "substantive" norms "commit us to ideals of equal voice and equal consideration for all citizens, to take two examples of normative commitments that distinguish us from our unapologetically hierarchical ancestors." The problem with this proposition is that what he means by "equal" and "us" is amorphous. If he means that Americans in general believe in equality of access to the public square, he may be right as a general matter, but he needs to square that claim with the fact that a significant number of faiths reject these values. There are plenty of religious arrangements that do not institute or encourage it, and therefore are not part of the "us" to which he refers. There are many norms among religious communities that do not honor equal voice or equal consideration. What about the children's voices on all issues, including whether medical treatment can be refused on the basis of the religious beliefs of their parents? What about the religious households, often fundamentalist, where the man is in charge of that which is outside the home, while the woman is limited to being in the home and therefore does not have equal access to the public square? If "equal access and consideration" means that individuals bring to the public debate their independently reached beliefs and not simply a repetition of what they have been told to say (and I do think this is assumed in various places in the book), examples abound in the religious universe where the opposite value is held: believers are to choose what the religious organization dictates. For example, church order in the Catholic Church, which at least for now is the largest single Christian denomination in the United States, still follows a hierarchical, paternalistic pattern that dictates public policy choices to its members. It is simply a fact that there are religious entities that challenge the notion of individualized and independent participation in the public square. Stout's equality ground

73. See supra notes 48–53 and accompanying text.
74. STOUT, supra note 1, at 3.
rule for the conversation, therefore, is in tension with enough faiths that further explanation is needed.

And there is a further complication: plenty of members do not follow their religious organization's dictates. There are two distinct sources of public policy coming from a religious source: (1) the religious entities that claim to be speaking for their many members, and (2) the individuals who may or may not toe the religious entity's line. For example, 88% of Catholic Church members favor the use of birth control, which is strictly prohibited by doctrine the Church has repeatedly reaffirmed.\(^7\) To reflect this reality, Stout's hypothesis would have to be expanded to include in the conversation not only individual citizens, but also their organizations. Stout's hypothesis would then have to be further refined by recognizing that although religious organizations claim to speak for their members, they sometimes, and perhaps often, do not. All of that is religious conversation.

There is yet another layer as well. Does "religious" always mean a view that is expressed because the speaker believes in it as a matter of faith? He states that not all claims about religion in the public square are faith claims, but this element of the discussion seems rather opaque and deserving of further delineation. There are many levels of religious talk, from straightforward devotion to a religious doctrine (or one's individual interpretation of that doctrine within one's own faith) to the most abstract conception of theology. *Democracy & Tradition* employs Augustine's and other theologians' views to anchor history. But I would like to draw attention to another kind of religious talk—the use of religious ideas to serve secular purposes. In other words, ideas that arise in the religious context can be retooled so that its religious content is jettisoned, but its usefulness continues.

\(\text{\footnotesize 75. See Megan Hartman, } \textit{Humanae Vitae: Thirty Years of Discord and Dissent, CONSCIENCE, Autumn 1998, http://www.catholicsforchoice.org/contraception/thirty.htm (last visited Jan. 15, 2005) (citing N.Y. Times/CBS News poll, Apr. 21-23, 1994, subsample of 446 Catholics, margin of error ±5%). Approximately half of Catholics identify as pro-choice or believe that abortion should be legal. Catholic Voters Support Legal Abortion, RELIGIOUS CONSULTATION, July 2, 2004, at http://www.religiousconsultation.org/News_Tracker/Catholic_voters_support_legal_abortion.htm (last visited Jan. 15, 2005) (reporting that 53% of Catholics identify as pro-choice and that 61% believe abortion should be legal); see also Americans Polled on Fetal Rights, NAT'L CATH. REP., June 20, 2003, at 11 (reporting that 47% of Catholics are pro-choice).}\)
There is a great deal of slippage in the current debate over whether this is a “Christian country.” Those asserting the claim hold that Christians founded the country, and therefore their values undergird the country, so it is a Christian country. If they are correct, the secularization thesis would be insulting. They have assumed the answer to their question because they have failed to ask whether the theological views they claim founded the country were then put to religious or secular purposes. I would argue the latter, but that does not make such “religious speech” less religious or less valuable to the public debate. (All of which is to say that the complexity of what Stout is identifying can be a bit daunting once one focuses.)

Theological ideas are there for the taking in the political sphere, and they are borrowed all the time for secular purposes, starting with the Framers. For example, when the Framers arrived in Philadelphia, they faced an emergency. The government under the Articles of Confederation was a complete failure, and the states were starting to come apart. They drew on every tool they could to craft a system that could bring the states back together in a common enterprise. Those tools included their studies of classic Greece and Rome, Corinth, European governments, political philosophers, and their knowledge of Christian theology, and in particular Calvinism, ideas which were important bases for the construction of the experimental form of government devised at the Convention. Indeed, the form of democracy that defines the context of the conversation Stout is analyzing is the form crafted largely through Calvinist principles at the Convention.

II. WHAT IS “DEMOCRACY”?

The Framers chose representative democracy, and consciously rejected direct democracy. The choice has tremendous impact on the necessity of and the purpose of the public conversation. There is good reason to ask what Stout means by “democracy.” The term is such a loaded one in many disciplines that it is surprising to see it without qualification in an other-

77. Id.
78. See id. at 412–14, 426–51, 453.
79. Id.
80. See id. at 428–51; see also STOUT, supra note 1, at 167–68.
81. See Hamilton, supra note 76, at 452–56.
wise finely crafted philosophical work. He seems to be using it as a stand-in for the principle of antitradition, and he does so because he is in the midst of a profound discourse with so many other ethicists and theologians. From within that discourse, its use makes some sense. But from without, with his theory standing on its own, it can lead the theory astray.

For Stout, democracy is the classic Hegelian synthesis: it is antitradition and tradition existing at the same time in an ongoing, dialectical relationship. Indeed, he draws on Georg Wilhelm Friedrich Hegel and Immanuel Kant, though his explicit focus is on the Americans: John Rawls, Alasdair MacIntyre, Stanley Hauerwas, John Dewey and Ralph Waldo Emerson, and to a lesser extent David Thoreau.

To know what "democracy" means, a modifier must be added: direct or representative. For Stout, it is quite plain that he does not really mean the former. In an endnote that deserved textual placement, he cautions the reader, "Notice that I do not define modern democracy simply as rule by the people. Nor do I place emphasis primarily on the electoral process."  

What he describes, and rightly so if his focus is on the United States, is representative democracy, which is a radically different social order from pure democracy. He envisions the government as follows: "A congress or parliament ... serves at the people's pleasure, and is expected to deliberate 'not on its own behalf but in response to a wider context of deliberation, open to all, to which it must be attending carefully.'"  

This is classic republicanism, with elected representatives contemplating a larger horizon than any single citizen, and responsible to the public good. Moreover, citizens have only two means of influencing public policy, as I argued a decade ago: the right to choose representatives and the power to express their views through the two-way stream of communication the Constitution constructs between the people and their representatives.  

82. STOUT, supra note 1, at 309 n.3.  
83. Id. at 4 (quoting OLIVER O'DONOVAN, THE DESIRE OF THE NATIONS: REDISCOVERING THE ROOTS OF POLITICAL THEOLOGY 270 (1996)).  
84. A decade ago I wrote:  
A two-way communication process, along with the power to elect and to refuse to reelect, forges the necessary link between the people and their representatives in a free society. This link is forged by mutual challenge, however, rather than blind trust. The attorneyship model reinforces the historical presumption that the people should challenge the legislator's decisions as well as the exercise of her delegated powers. Freedom of expression and the press serve that goal.
"a form of government in which the adult members of the society being governed all have some share in electing rulers and are free to speak their minds in a wide-ranging discussion that rulers are bound to take seriously." It is curious that he did not choose "representative democracy" in favor of "democracy," with all of its imprecision. But it is this attenuated, representative side of democracy that he means. The conversation does not exist so the people may make the law, but rather so they can influence it. That is a dramatic difference, which is often glossed over in the United States. Although it is quite clear he means representative democracy, clearer reference to it would have enriched his theory.

The genius of Stout's approach is that he has taken Hegel's dialectic and synthesized it with the best of republican theory and American pragmatism. He rejects the notion that we must enter into a contract before entering into society for society to operate. That is too formalistic to describe how citizens interact under the law.

Hegel's ... dialectical story implies that contractarianism is incorrect in thinking that something like the social contract is needed as the basis of social cooperation. Our normative concepts are not instituted at the contractual level and then applied on the basis of the constitutive contract. They are instituted in the process of mutual recognition in which individuals hold one another responsible and implicitly impute to others the authority to keep normative track of one another's attitudes. This process does not need the social contract to get going or to get along.

There are significant synchronicities between his theory and the legal and political notion of republican democracy that would have been quite conducive to his conclusions. He is not always talking about conversation by itself, but more than once talks about how this conversation holds others accountable to the culture. This notion of accountability to others, beyond one's own solipsist self, is vintage republicanism.


85. STOUT, supra note 1, at 4.
86. Id. at 82.
Republican democracy, in its U.S. iteration, rejects rule by the people because the Framers did not trust the people to rule. And that elevates the importance of the conversation Stout is describing. For the people to have any influence beyond the voting booth, they must participate in the public square’s exchange of views. It is for that reason that the secularization thesis has had such bite—for a citizen to lose the capacity to participate in public debate is to give up one of only two means by which the people can influence public policy. So the stakes are high in this debate. It is crucial that the qualities of the system be accurately identified because only then can one begin to diagnose faults in the system and the treatments that would redress them.

While I would endorse much of what Stout has done, I do think he has sold his dialectical theory short when he states that “secularization has deposed political theology from the social role it became accustomed to performing in Christendom. There is thus a sense in which the political community appears to have been desacralized . . .” I question whether there was ever a time when Christendom controlled, by itself, public justice. As early as the twelfth century in Britain, King Henry II introduced the notion of the common law when he urged that all criminals be tried in civil (royal) courts and the abolition of the ecclesiastical courts, which meted out lesser criminal penal-

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87. See, e.g., THE FEDERALIST NO. 15, at 110 (Alexander Hamilton) (“[T]he passions of men will not conform to the dictates of reason and justice without constraint.”); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 50 (Max Farrand ed., 1966) (Pierce Butler) (stating that direct democracy was “impracticable”); id. at 132-33 (James Wilson) (“Representation is made necessary only because it is impossible for the people to act collectively.”); id. at 134-36 (James Madison) (discussing the benefits of representative over direct democracy); id. at 151-52 (James Madison) (discussing the evils of direct democracy); see also JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 44 (1990) (stating that Madison believed “revision of the Confederation could cure the mischief of popular government within the states”). See generally Hamilton, supra note 76 (describing the turbulent pre-Constitution experience and Calvinist theology as inspirations for the Framers’ distrust of direct democracy).

James Madison expressed the following concern with rule by the people: Complaints are everywhere heard . . . that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.

THE FEDERALIST NO. 10, at 77 (James Madison).

88. STOUT, supra note 1, at 103.
ties for identical actions simply because the defendant was a clergymen.89 Thus, there was a concept even then of a justice that transcended religion. So to say that in the twenty-first century there is a public square where secular and religious ideas mix, may not be much of an innovation at all, even if it is a brilliant insight past contemporary mythology into current practices.

CONCLUSION

The payoff for Stout's thesis that the public square is and should be open to religious discourse is significant. He transforms "ethical deliberation and political debate"90 into a complex exchange, which takes place in the context of pluralism and many beliefs and voices. The signal contribution of Democracy & Tradition is that it draws into the public square all citizens, but not as a formalistic matter alone. He is observing their presence and building a working theory around their already entrenched presence. One can only hope that his acknowledgment of religious entities' already thick participation in the public square will still the claims of antireligious secularization, and move the discussion to the more constructive question of how one chooses between so many different worldviews to reach sensible public policy. Perhaps the answer is as pragmatic as the theory: it happens all the time. This project may well be a thoroughgoing hermeneutic.

Stout has at least two roads to take here, and he need not necessarily choose between these. Either the sheer variety of the ideas in the marketplace provides such a wealth of possibilities and permutations that their very copresence generates new ideas. In other words, the multiplicity itself engenders a synergy of ideas, generating new ideas. They compete with each other, provide context, and in the end the best idea for the times (remember, it is a dialectic that has not just started today and will not end today) can be chosen. When it proves deficient, the process repeats itself with the contemporary mix of ideas at hand.

Or, perhaps, this variety of viewpoints, many of them religious, will find some common ethos, which may not even be

89. See HAMILTON, GOD VS. THE GA"EL, supra note 28 (manuscript at 243-46, on file with author); Hamilton, Religious Institutions, supra note 28, at 1123-27.
90. STOUT, supra note 1, at 293.
comprehended yet. It is not that they all must start from the same position, or that they share the same values, but rather that the ideas being floated may well jibe with other ideas, and produce a consensus through mutual recognition. Perhaps both of these options are descriptive of the process, and as he further develops the theory, Stout will explain more fully how solutions to difficult social issues can be distilled from what is in fact a pluralistic base.