

Journal of Civil Rights and Economic Development

Volume 22
Issue 2 *Volume 22, Fall 2007, Issue 2*

Article 1

Religion and Morality in the Public Square: Excerpts from Keynote Address

Noah Feldman

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

**SYMPOSIUM:
RELIGION AND MORALITY IN THE PUBLIC
SQUARE**

**RELIGION AND MORALITY IN THE PUBLIC
SQUARE: EXCERPTS FROM KEYNOTE
ADDRESS**

NOAH FELDMAN

The symposium topic, as you know, is Religion and Morality in the Public Square, which as I count gives us three concepts: religion, morality, and the public square. There are of course three different methodological approaches and they are just little ones: philosophy, history and law. So I am going to try to touch on all six of these things and their interrelationships, but I think if you multiply permutations of these you get numbers so great that it will not be a success if I try to use all three of these approaches to address all three of these concepts. I will take the lawyer's prerogative and use the methodology that is essentially a bad mix of philosophy, history and law and wait for the experts in all of the substantive areas to correct me.

I will begin with the idea of a public square. What is this idea of the public square here, for us, in this context? I think it alludes to several ideas that are closely connected to the notion of participatory democratic governance. I want to suggest to you that the problem of religion and morality is distinctively inflected by the fact that we are in a participatory democracy, or what we would like to be a participatory democracy. To hear a little bit of historical context can, I think, help clarify why this is so.

In Europe in the modern era, the state emerged as a powerful and effective form of governance. A basic settlement was reached in two treaties, Augsburg and Westphalia, according to which the religion of a state would be determined by the religion of the sovereign of that state. It is a long and complex story as to how this was reached—it was not necessarily the way the relationship between religion and state had existed in the pre-modern era. But in the modern era this became a kind of standard solution to the problem—each prince or to each locale, its own religion.

Now, when the founders of the American Republic embraced the ideal of popular sovereignty, and specifically the version of popular sovereignty that no longer said that there was a monarch who was sovereign, the idea that the state should follow the religion of the sovereign immediately became a problem. I would say prior to that there were debates and disputes over what religion the sovereign should follow, and sometimes over who the sovereign should be. There is a long history of British constitutional dispute about what happens if the sovereign becomes a new sovereign, whose religion is different, but the idea of religion and state emerges, I think, just at that moment when the sovereign becomes popular.

Why? Because the popular sovereign, that is to say, we the people, do not belong to a single religion. So, what you might call the modern solution to the problem of church and state, namely religion of the state following the religion of the sovereign, immediately becomes unworkable, unless it were to be the case that every element of the popular sovereign, that is to say every citizen, belongs to the same religion, an eventuality which could happen in some places in some times, but certainly was never the case in the United States. Even though at the time of the American Revolution roughly 97% of the American population was Protestant, one of the features of Protestantism then and

subsequently, is that the members of the Protestant American community did not think of themselves as belonging to exactly the same religion. They were well aware of the diversity among themselves, and had fought hard over it in recent memory, and so needed to come up with what they thought might be a solution to this problem, the problem again of the sovereign belonging to many religions.

Our founding fathers thought that by taking religion out of the federal sphere, by guaranteeing the free exercise of religion, and simultaneously prohibiting the federal government from establishing a religion, they had solved this problem once and for all. As we know, they were wrong. Otherwise, some of us around here would be out of business, so we should probably be grateful for that fact. Much of the history of church-state relations in the United States—at the state level, between the drafting of the Constitution and the end of the second World War, and at the federal level over the last 50 or 60 years—is the history of the unfolding of the failure to solve permanently the relationship between religion and government through this model of free exercise and non-establishment.

Now why was the founders' solution incomplete? I am going to oversimplify in trying to answer that question. I want to propose a two part answer. The first part has to do with the public square, and the second part has to do with religion and morality.

The reason I think the solution failed with respect to the public square, is that the ideal of the public square—that is to say, some sort of an ideal of participatory, discursive, democratic actions—itsself never lays out or defines the boundaries for discourse. It does not include within itself the idea that certain topics are permissible and certain topics are not. To see why this is so, you might think of our free speech doctrine and think of the words “public square” and their magic meaning in our free speech doctrine.

In the public square there are meant to be almost no limitations, and with respect to content, no limitation on the content of free speech. The reason for that is not that we have some affirmative theory of how great it is for all sorts of discourse to be in the public square, we sometimes hear about marketplace of ideas, but I do not think that is what is doing the work. What is doing the work is that we have no good answers to the question

of *which* speech should be prohibited in the public square. We do not have an account of what are the right kinds of limitations—I mean substantive limitations—that could possibly be put upon free speech in the public square. So the doors are thrown wide open.

Now, the wide-openness of those doors to discourse is at odds with the ideal of participatory democratic politics conceived in one way rather than another. Let me explain what I mean. There are, broadly speaking, and this is an over-simplification, two different visions of participatory democracy. One is what is sometimes called the republican conception, according to which the purpose of discourse in the democracy is to reach common agreement on a policy to be pursued.

Now republicanism includes more than that. It often also includes the idea that it is through the virtue of the participant's discussion, and through their listening respectfully and carefully to each other's arguments, that this sort of consensus will be reached. But the element that I am most interested in is the suggestion that in republican discourse our goal, the reason we are talking to each other, is to agree at the end of the day.

The idealized image would be—and of course it never happens this way—Athenians in their participatory democratic institutions, or Roman senators in the glorious republican days of Rome, discussing an idea or a policy and aiming to reach some sort of agreement at the end of the day. That is the perception of participatory democracy.

Another competing perception of participatory democracy is sometimes called the pluralist conception. On that conception, the reason we have electoral institutions and the reason we talk within them, is not that we think that we are going to agree, but that in a world of competing interests, competing ideals, and competing values, we need some non-violent way of solving our problems. If we thought we could not speak, we might come to blows. Speech almost has the function of taking the lid off a boiling pot of competing interests in society. In a liberal society, speech is thought to be the most effective way of doing that. Hence—our familiar adage—wrong speech or bad speech should be fought with more speech. Notice the metaphor of fighting in that context.

At the end of the day, in this pluralist model of participatory democracy, the way we resolve things is not by agreeing, it is by voting. The idea of voting here is that the reason we have to vote is because we do *not* reach consensus. What makes a participatory democracy great from our perspective is that at the end of the day, we vote. The voting does not resolve our differences with respect to changing our substantive views, it just solves the problems by choosing one course of action that we all agree we will participate in and follow, because the next day we might win the debate. The next day we might change the demographics and win the vote.

Notice that these two competing conceptions of participatory democracy—the republican conception and the pluralist conception—have utterly different views of what is supposed to happen in the public square. According to one, the public square is a place to convince each other of a common course of action with our end goal being a common course of action that we agree upon substantively. According to the pluralist model, the end state goal is just for the thousand flowers to have bloomed, for us not to use violence against each other, and more or less to decide on a common course of action, not because we agree to it collectively, but because somebody has voted and somebody has won.

So, the public square itself is deeply contested with respect to its purpose. The limitations that we might want to put on the public square are further limited by the question of which of these visions we would want to use. To a republican, there might be perhaps some limits to what we can say in the public square so that we know what the common form of discourse is that will enable us to reach a common decision. To the pluralist, though, it seems it would be a terrible mistake to allow limitations on what is being said in the public square, because in any case we are going to vote at the end of the day. There is more to be said about these different visions of the public square, but I want to put that aside now, and perhaps return to it a little later, because I want to turn to the question of religion and morality.

The dual phrase religion and morality is itself fascinating in the American context. Why do we say, as we always do, “religion *and* morality” in the public square? What is the relationship between religion and morality? Here again, I think it is fair to

say that in American history there are two competing conceptions of the proper relationship between religion and morality.

The first view is a skeptical view of the relationship between religion and morality that was characteristic of many of the founding fathers. The view here is that the purpose of religion in the world is to provide institutional support for the principles of morality without which society cannot get along. A nice quote that expressed this idea is George Washington's, sometimes repeated in the modern era. Washington said: "Let us not lightly entertain the supposition that morality may long be maintained without religion." That is the view of somebody who thinks that religion is not really the essence of morality (we will come to that view in a moment), but rather that religion is a set of institutional practices, cultural folkways, perhaps teachings for the simple-minded—Washington might not have put it that crudely, but it may well have been in his mind—without which good morals cannot be maintained. And on the view of the right relationship between religion and morality, morality is what really matters.

A more theologically sophisticated version of this idea might be seen, for example, in the writing of Horace Mann, the famous educator and Unitarian who helped develop the modern American idea of public education in Massachusetts in the early part of the 19th century. To Mann as well, it was necessary to teach morality in the public square because morality was necessary for maintaining society. The way to teach morality, he thought (in common with other 19th century Americans), was to make sure that there was religion. But the religion he imagined was not to be particularly substantive. It was meant to be passages from the Bible, or rather a subset of passages from the Gospels, that were thought to maintain good moral character. Now this view, that the point of religion is to provide an institutional support or buttress for substantive morality, was not born in the United States. It has earlier Erastian roots and indeed it can even be found in the classical sources. But it *is* an idea that had tremendous weight and strength in much American thinking about the right relationship between religion and government, and again it depends on this idea that morality

is what we are really after, and that religion serves the purpose of morality.

Now let me contrast this with an almost exactly opposed view. According to the opposed view, morality is simply a set of ideals or values, the substance of which is dictated by the teachings of religion. Now, I am oversimplifying that a bit as well because many religious traditions—here at St. John's it is certainly appropriate to mention the natural law tradition—do believe in the existence of some principles of universal morality. These are not precisely identical or not precisely derived from the contents of revealed religion, but their content overlaps with the content of revealed religion at least when everything is working well. More importantly, religion is often, in this way of seeing things, seen as the crucial source of moral values.

On this view, when people have moral values, it would be almost meaningless for them to have those moral values without there being some religious basis from which those morals derived. This is extremely significant for people who believe, as almost all Americans have believed for most of our history, that morality ought to play some role in the decisions that I spoke of a moment ago in the public square (I am going to discuss in just a moment the view that morality should play no role in that context, but let me say right away that that is a very unusual view). Typically the view of most Americans has been that morality plays some crucial role in our decisions regarding the public square. Now if one thinks that morality is significant for making public decisions, it matters a great deal whether one thinks that morality is a thing which is the value in itself and just subserved by religion, or whether alternatively one believes that morality is just the result, the superstructural result, of the core substructure that is religion itself.

Let me try to illustrate this with a concrete example. If one were to consider the question of same sex marriage, a profoundly controversial issue in the United States today, and one in which the issues of morality and religion are profoundly intertwined; and one thought that the state ought to be in business of governing marriage – it is possible to have an alternative view, but most Americans seem to think we should not abolish family law, and the state should have some role in determining marriage; and if one furthermore thinks that marriage, however

it is defined, will be connected to morality; then one must ask: What are the kinds of arguments with respect to morality that ought to count when we discuss what moral values should go into our making the decision of what sorts of marriages should be permitted or authorized by the state?

Now, if one believes that freestanding morality itself is the most important element of this, and that religion just exists as a sort of institutional support to assure that people have good morals, then one might be perfectly happy to discuss this question outside of contact with the substance of religious values. One might think: What is morality? What does religion do? Religion just gives us a sense that it is important to treat people equally; that it is important to treat people as human beings. But, the substantive teachings that religion may have with respect to same sex relationships are not relevant to this public discussion, because this public discussion is about morals. If on the other hand, one has the view that what really matters is religion, and that morality just reflects the substantive values derived from religion, then it would be very strange indeed to have a public debate and to make public decisions about questions such as same sex marriage without invoking the substantive values that religion provides on this subject.

This is a practical, concrete, deeply felt example of the two alternative conceptions of how the relationship between religion and morality ought to play itself out in a debate in the public square. Now, just to complicate this already complex model one last drop, and to bring the two parts of my comments so far together, remember that I also talked about two different conceptions of what should happen in the public square—a republican conception and a pluralist conception. Now, here is where I actually wish I had a blackboard. Imagine if you will a 2 x 2 matrix here. If one had a republican conception of what ought to happen in the public square—that is, one that the point of the debate over, for example, same sex marriage, was to reach some agreement as a society about what is right, one could nevertheless adopt either the view that religion is just a support for morality or the view that religion is the substantive source of morality. And one could use either of these arguments to argue about same sex marriage. It is very abstract so again I am going to make it very concrete. Imagine a debate between a secular,

liberal egalitarian on the one hand, and a deeply committed evangelical Christian on the other hand, on same sex marriage. Let us assume that both the egalitarian liberal and the evangelical have a republican ideal of what should happen in the public square—that is they both think the reason for debate in the public square is to come to an agreement about what is correct. So, in this debate the egalitarian liberal will say, “It is just true as a matter of substantive moral values that all human beings are of equal worth and have a fundamental autonomy right to choose whom they would like to form their lives with. So, I am just right for the reason I have just given when I say that the state must allow the authorization of same sex marriages in the same way it allows and authorizes opposite sex marriages.”

The other person, the evangelical Christian, says, “I agree with you that the purpose of our discussion is to find the right answer, I disagree with you about the right relationship between religion and morality. I think that the morality of same sex marriage is dictated by my substantive religious beliefs on the topic. For those, I look to scripture, and I interpret scripture to prohibit same sex relationships much less same sex marriage. I therefore conclude, for the reasons that I have given, that we ought, as a state, to settle upon a right answer to this question, my right answer to this question.”

This debate is entirely within the republican conception of what happens in the public square, but we have got two different views about the right relationship between religion and morality expressed here. Note again that both of these participants think morality is important. Neither is saying, and I think this is a crucial point that is often missed—certainly by many liberals—that religion alone ought to dictate results in the public square. Almost nobody says that in American life—there are Dominionists and others, but it is very rare. Both figures in my hypothetical are saying that morality should control, but they have different ideas about the relationship between religion and morality. For the evangelical, the content of morality is determined substantively by the content of his religion. He is still arguing about morals, but the rules are derived from religion. For the liberal in that context, it is also about morality, but the substantive values of morality are not themselves derived from religion. Now, that person does not think we should shut

down religious education in America; quite the contrary, that person may well attend a liberal Christian church and quite possibly believe very deeply that religion teaches and ought to teach something about substantive morality, indeed perhaps the equality of persons and the permissibility of same sex marriage. It is just that the egalitarian in my hypothetical example believes that the point of religion is not to give you the content of morality, but just to help you to validate and understand the morality with which you began.

Now let us have the same two people participating in the debate, but let us imagine that neither is a republican in the sense that the point of our debate is to reach an agreement. Let us imagine that they think the point of our debate is simply to avoid violence in our society. They are pluralists. They think would put it to a vote at the end of the day. They make the same arguments, but they do not make the arguments with the aspiration, the realistic aspiration, of convincing the other person. The egalitarian says, "Look I am not so naïve as to think that I am going to convince you to abandon your interpretation of scripture, at least not today. That will take many generations and probably lots of television programs and other cultural factors that might in the long run affect your religious beliefs."

The evangelical says, "No, my morality is derived from my religion and my religion gives me specific teachings on these questions." But then at the end of the day, each says, "We are going to vote." That is participatory democratic politics.

Now, which of these two visions corresponds more closely to the vision of what American life should look like? That is the normative question. Which of these visions is a more appealing vision of the way that American discourse in politics should look like?

Now, let me say first from a historical perspective, neither of these prevails. One cannot say definitely that American history, if there is such a thing, definitely tells us that we have more of a republican style of debate or more of a participatory pluralistic style of debate. There are ups and downs, there are times when one seems predominant, but at almost any point in American history you can find, if you are careful and a good historian, examples of people making those sorts of arguments for either side—the "let us all reach a decision" and the "let us all vote."

So, history is not going to resolve these questions for us normatively speaking, and indeed it is not even clear that history could resolve this problem for us historically speaking. I think history here does excellent and crucial work in clarifying the problem. I myself believe that this is a problem that you cannot make heads or tails of without historical background, but history is not going to tell you where to go on its own terms.

What can law do to resolve these problems normatively? Well, law itself is hopelessly uncertain in America about whether it wants to be the law of a republic or the law of a participatory/pluralistic democracy. The most obvious example of this debate is the question of judicial review. Judicial review, in which certain substantive outcomes are removed from the political process, can be seen as an instantiation of republican ideology, because it can be seen as the notion that it will be up to some appointed institutional body to get the right answers derived from the Constitution for these questions. Legislative action—which is, after all, where most of the action in law happens most of the time—relies upon and depends upon some notion of pluralistic politics, not because it may necessarily believe in it. There may be state legislatures, or senators, or congressmen in Washington who believe they are there to be Roman senators. But at the end of the day you will notice they always vote, they always use techniques of pure pluralist, political decision-making, because that is just the way the system empowers them to behave. The law itself is unclear about these approaches.

Last but not least, there is philosophy, and let us take this in the broadest sense of both moral philosophy and political philosophy. Moral and political philosophy offer more hope for providing normative solutions to these problems because from within those realms one can make arguments about what would be the right way to resolve and treat our system. There is definitely the material there, and one does not need to go far to meet political and moral philosophers, who will tell you not only that there is a right answer to the question of how we ought to decide substantive moral problems, but also that there is a right answer as to how we can best organize our polity to get the right answer.

To get these substantive moral problems is appealing in philosophy; in fact there is no consensus on these questions. So, these philosophical questions themselves, precisely because they are susceptible to multiple answers, defer the problem outside the realm of philosophy back to the lawyers, back to the practical institutional people out there in the world. Philosophers end up providing material for these kinds of debates, but they do not end the debate, they do not produce the bottom line answers that people might like to see.

So, where does that leave us with respect to a contentious problem like same sex marriage? It leaves us profoundly unresolved. And to look at the emerging body of case law on same sex marriage, is to see us as a people profoundly divided along all of the different dimensions that I have mentioned: along the dimension of two different conceptions of what we ought to be doing in the public square, and along the dimensions of the right relationship between religion and morality.

Look at the Massachusetts case on same sex marriage, the Goodridge Case. In that case, the majority took the position that there was no rational basis for state law to limit marriage to a man and a woman. The dissenters provided a series of reasons that they thought would qualify as a rational basis. The majority went through each of them and rejected each one saying they were not rational bases. What is most extraordinary about that decision is what is absent. What is absent in Goodridge, and this is really astonishing, is any recognition by the majority or by the dissenters that the main reason for opposition in the state of Massachusetts to same sex marriage is that there are people who believe ultimately that the content of public morality ought to be determined by the religious beliefs of the people who vote for that public morality. Nobody talks about that. It is not proffered as a reason.

It is not surprising that when you read this case, that when students read this case, their reaction to this case is that it has come out this way because these are not very good reasons that they have been given. Marriage is for procreation, but what about all those marriages that are not procreative. It looks like an easy case, because it never addresses the actual rationale that lay behind not only the initial definition of marriage, but the subsequent political movements, not only in Massachusetts but

elsewhere, for preserving marriage as a relationship between two people of opposite sexes. As we go to other states, this story is far from over. We are only at the very early stages of this story. We are seeing a patchwork quilt around the country of different answers to these types of problems and questions, and in some cases we are getting more of an overt recognition of the role of religion here in this shaping of morality for many people, but we are almost never getting it in the judicial context. We are almost always getting it at the legislative level or the public participatory democratic level.

I do not think that is a necessary connection, it does not have to work that way for the reasons that I said a moment or two ago. But it does lead us to the following question: What are we to make of the system, a national system, where we think we have a Constitution that ought to help us resolve questions like this, where we want to live together in some sort of harmony, whether it is a republican harmony or pluralist harmony, and where nevertheless, we just do not have a single way of dealing with these problems?

Now, one thing I have learned in working on constitutional politics in Iraq is that people, both in the United States and elsewhere, like to believe that they do have constitutional solutions to problems. Yet, our constitution, on some of the most crucial and basic questions—religion and politics being the most obvious—is profoundly unresolved. Yet we manage somehow to operate and get along. One objectively fair answer is to say that we do not need to resolve these kinds of questions definitively, provided that we operate within some sort of structure that actually functions. But I have to tell you, that is too easy an out. Nothing would be better than to end my remarks on that front. I would be very happy to say, “You see, the bottom line is at least nowadays we are not in the streets killing each other, and so our system after all works pretty well, and we can pat ourselves on the back, emphasize American exceptionalism, and be done with it.” It is just a profoundly dissatisfying answer to say that.

The reason it is dissatisfying is that at every juncture, but especially in our history and especially at junctures like this one, where the divisions on the questions I have been discussing are profound and visible and intensely felt, there is a continuing risk that we will fall into much deeper division as a society. I do not

mean tomorrow we will start flogging each other in the streets. But I do not think it is the kind of thing we can plausibly treat as inconceivable. I think there are points in our history when we have had violence along these grounds.

So, what I want to end with is not a congratulatory comment on our ability to get along, but a kind of plea. The plea is for us not to forget, that in order to preserve an order in which we cannot decide even some of the most basic fundamental questions, because we do not necessarily share a common set of solutions to them, or even a framework for these solutions, we have to be constantly aware of the need to work on these problems. We cannot put them off to the side. We cannot pretend that they will disappear. We cannot pretend that they are solved. We cannot pretend that we do not have to deal with them. I think that the point of a symposium like this one—and the reason I am grateful for being asked to participate, and excited for the rest of the day—is that these kinds of discussions and conversations are crucially part of our work of holding ourselves together as a nation. That is what we are doing here, and I hope we manage to do it well.