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Religious Legal Theory Symposium: Introduction

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SYMPOSIUM
RELIGIOUS LEGAL THEORY

INTRODUCTION

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On November 5, 2010, the St. John's Center for Law and Religion proudly hosted the annual Religious Legal Theory Conference. The event, now in its second year and to be shared among different universities, brought together scholars from around the world to discuss this year's theme, "Religion in Law, Law in Religion." The Center chose this theme in order to include papers on traditional church-state issues—"Religion in Law"—as well as papers addressing the role that law plays in various religious traditions—"Law in Religion." In addition, because contemporary law and religion scholarship has moved beyond strictly domestic-law questions, and takes an increasingly comparative approach, we solicited papers addressing non-American legal systems as well as our own. In all, there were six panels: American Law and Religion; Biblical Law; Comparative Law and Religion; Duties of Judges, Lawmakers, and Citizens; Religious Legal Theory; and Religious Conceptions of Law and Loyalty.

Law and religion is not a new subject in the academy, of course, but it has been drawing increasing interest. Notwithstanding the predictions of the old secularization thesis, religion has not disappeared.[1] In the United States, religious identification remains strong, although rising generations show somewhat less affinity for organized religion than their parents did,[2] and in Western Europe, organized religion's decline has

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[1] *See* MONICA DUFFY TOFT ET AL., GOD'S CENTURY: RESURGENT RELIGION AND GLOBAL POLITICS 1–3 (2011).

[2] *See* ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US 8 (2010) (discussing American religiosity); PEW RESEARCH CTR., RELIGION AMONG THE MILLENNIALS 3 (Feb. 2010), *available at*

slowed a bit and may even be starting to reverse.[3] In the rest of the world, religious identities remain quite strong.[4] Legal scholars thus need both to understand the claims that religions make on believers and address how those claims can best be accommodated within the rule of law.

From among the many excellent papers presented at the conference, the editors of the *Law Review* have selected ten for publication. Most of these papers reflect two recurring subjects that the participants addressed over the course of the day. The first of these is the role of courts in enforcing anti-establishment norms. For example, in his paper, which he delivered at one of the conference's plenary sessions, Steven Smith of the University of San Diego applauds the fact that the United States Supreme Court has begun to use standing doctrine to avoid merits decisions in Establishment Clause cases.[5] For most of American history, he argues, Establishment Clause disputes were handled as a matter of "soft" constitutional law: they were not resolved by courts, but by government institutions, and citizens generally, in light of constitutional commitments.[6] People did not always agree on the content of those commitments—Smith identifies two competing conceptions of the role of religion in American public life, "ecumenical providentialism" and "political secularism"[7]—but they were able to muddle through in a satisfactory way. Since the 1960s, however, the Court has elevated one of these conceptions, political secularism, to the status of "hard," that is, preemptive and judicially enforceable, law.[8] "Though well-intended," he writes, "this elevation in effect unlearned the fundamental lesson of disestablishment that the American experience had taught and transformed what had been a generally healthy contest of interpretations of the American

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http://pewforum.org/uploadedFiles/Topics/Demographics/Age/millennials-report.pdf (discussing religious affiliation among Americans aged 18 to 29).

[3] For example, the Church of England reports a steady growth in weekly attendance at its cathedrals in the past decade. *Cathedral Congregations Continue To Grow*, THE CHURCH OF ENGLAND (May 4, 2011), http://www.churchofengland.org/media-centre/news/2011/05/cathedral-congregations-continue-to-grow.aspx (news release).

[4] *See* TOFT ET AL., *supra* note 1, at 2.

[5] Steven D. Smith, *Nonestablishment, Standing, and the Soft Constitution*, 85 ST. JOHN'S L. REV. 407, 407 (2011).

[6] *Id.* at 414.

[7] *Id.* at 416 (internal quotation marks omitted).

[8] *Id.* at 424.

Republic into a nastier and more divisive conflict."[9] Smith hopes that the Court's recent use of standing doctrine to avoid merits decisions in cases like *Elk Grove United School District v. Newdow*,[10] *Salazar v. Buono*,[11] and *Hein v. Freedom from Religion Foundation*,[12] signals a return to the realm of soft constitutionalism that will take the edge off some of the culture wars.[13]

In his contribution, Keisuke Abe of Seikei University (Tokyo) sees the opposite dynamic occurring in Japan.[14] The 1946 Constitution, adopted during the American occupation, contains a general anti-establishment provision, Paragraph 1 of Article 20, stating that "no religious organization shall receive any privileges from the State,"[15] as well as a specific provision, Article 89, forbidding the use of public money or property "for the . . . benefit or maintenance of any religious institution or association."[16] Notwithstanding its adoption of a test modeled on *Lemon v. Kurtzman*,[17] the Japanese Supreme Court for decades gave these clauses a very narrow reading and avoided holding government aid to religion unconstitutional.[18] In 2010, however, the court abruptly shifted course.[19] In *Kikuya v. Taniuchi*, it held that a municipal government had violated Article 89 by allowing a Shinto shrine on public property without requiring payment.[20] In Smith's terms, *Kikuya* is an example of a turn to hard constitutionalism.[21] Unlike Smith, though, Abe believes this is a sanguine development, as it demonstrates the Japanese

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[9] *Id.* at 408–09.

[10] 542 U.S. 1 (2004).

[11] 130 S. Ct. 1803 (2010).

[12] 551 U.S. 587 (2007).

[13] Smith, *supra* note 5, at 409.

[14] Keisuke Mark Abe, *Separation of Church and State in Japan: What Happened to the Conservative Supreme Court?*, 85 ST. JOHN'S L. REV. 447, 448 (2011).

[15] *Id.* at 452 (quoting NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 20, para. 1 (Japan) (GOV'T PRINTING BUREAU trans.), *available at* http://www.ndl.go.jp/constitution/e/etc/c01.html).

[16] *Id.* (quoting NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 89 (Japan) (GOV'T PRINTING BUREAU trans.), *available at* http://www.ndl.go.jp/constitution/e/etc/c01.html)) (internal quotation marks omitted).

[17] 403 U.S. 602 (1971).

[18] Abe, *supra* note 14.

[19] *Id.*

[20] *Id.* at 458–59.

[21] Smith, *supra* note 5, at 409, 411 (distinguishing between "hard" and "soft" constitutionalism).

judiciary's willingness to hold the government to constitutional norms.[22] Abe attributes this new assertiveness to the global movement in favor of the judicial enforcement of individual rights.[23]

Simeon Ilesanmi of Wake Forest University also discusses the operation of soft constitutional law, this time in the Nigerian context.[24] Section 10 of the Nigerian Constitution provides that " '[t]he Government of the Federation or of a State shall not adopt any religion as State Religion.' "[25] Ilesanmi explains that this clause is generally understood to "confer[ ] a secular status on the Nigerian state and restrict[ ] religion to the private realm."[26] The Nigerian Supreme Court has abdicated its role in enforcing Section 10, however, leading to consequences that Ilesanmi decries.[27] For example, he explains, in the absence of policing by the judiciary, federal and state governments actively support religious pilgrimages by Muslims and Christians; indeed, state governments compete with one another to provide more generous subsidies.[28] According to Ilesanmi, this government largesse has had the effect of corrupting religious practice—"[f]or both Christian and Muslim groups," he writes, "pilgrimage has become less a matter of complying with a religious injunction than an avenue for political patronage"—and treating members of religions that do not promote pilgrimages, and therefore do not share in the public funds, as outsiders in their own country.[29] Unlike Smith, who sees soft constitutionalism as a mechanism for avoiding social discord in the United States, Ilesanmi suggests that the absence of judicial enforcement in Nigeria has led to a situation that "offers a recipe for 'heightened civil strife . . . and oppression of religious minorities.' "[30]

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[22] Abe, *supra* note 14, at 468–69.

[23] *Id.* at 469.

[24] Simeon O. Ilesanmi, *Disestablishment Without Impartiality: A Case-Study Examination of the Religious Clauses in the Nigerian Constitution*, 85 ST. JOHN'S L. REV. 545 (2011).

[25] *Id.* at 550 n.20 (alteration in original) (quoting CONSTITUTION OF NIGERIA (1999), §§ 10, 38(1), *available at* http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm).

[26] *Id.*

[27] *Id.* at 549–50, 552.

[28] *Id.* at 566–67.

[29] *Id.* at 573.

[30] *Id.* at 572 (quoting Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 88 (2002)).

Andrea Pin of the University of Padua offers a comparative study of the religious freedom jurisprudence of the United States Supreme Court and the European Court of Human Rights (the "ECHR").[31] He identifies significant similarities. For example, both courts have fashioned hard law that applies uniformly across multiple jurisdictions—the States of the Union, in the case of the Supreme Court, and the members of the European Convention, in the case of the ECHR.[32] Both courts have adopted controversial readings of relevant legal texts. The ECHR, for example, has announced a "neutrality" principle that, Pin persuasively argues, appears nowhere in the European Convention and that is inconsistent with "the constitutional traditions of many European countries."[33] He points out significant differences as well. For example, American anti-establishment rules derive in large part from the conviction that establishment is a threat to religion.[34] In Europe, Pin argues, the concern is much more the threat that religion poses to the state.[35]

The second major theme that conference participants addressed is the place of religious arguments in secular law. For example, in his paper, Ian Bartrum of the William S. Boyd School of Law at the University of Nevada, Las Vegas critiques John Rawls's famous categorization of religious doctrines as "nonpublic reasons" that should not influence political decisions.[36] Unlike Rawls, Bartrum maintains that nonpublic reasons should be part of political discourse.[37] He argues on consequentialist rather than deontological grounds. Permitting nonpublic reasons to influence political debate, Bartrum contends, allows for the possibility of "paradigm changes" of the sort that occur in scientific theory.[38] Paradigm changes occur when particular insights, inadmissible in conventional theory, alter the scientific community's understanding of natural phenomena—the shift

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[31] Andrea Pin, *(European) Stars or (American) Stripes: Are the European Court of Human Rights' Neutrality and the Supreme Court's Wall of Separation One and the Same?*, 85 ST. JOHN'S L. REV. 627, 627 (2011).

[32] *Id.* at 647.

[33] *Id.* at 640.

[34] *Id.* at 633.

[35] *Id.* at 634.

[36] Ian Bartrum, *Nonpublic Reasons and Political Paradigm Change*, 85 ST. JOHN'S L. REV. 473, 473–74 (2011).

[37] *Id.* at 474.

[38] *Id.* at 482–83.

from a geocentric to a Copernican, heliocentric model of the solar system, for example.[39] Religious arguments can serve a similarly useful function in political science by testing received wisdom and providing a "jolt" that reorients conventional understandings.[40] As an example, Bartrum describes how the nineteenth-century Catholic School movement in the United States shook up the Protestant ascendancy and brought "greater clarity about the ways that our educational system should reflect our democratic ideals."[41]

Similarly, Zachary Calo of Valparaiso University wants to open human rights discourse—or, more correctly, reopen it—to arguments from religious tradition.[42] Although the assumptions of contemporary human rights law are almost exclusively secular, its history lies in Christian theology.[43] And, Calo argues, the secular order is collapsing, its "political and intellectual foundations . . . increasingly imperiled."[44] Room exists for religion to rejoin the discussion about human rights, "for religious ontologies," in his words, "to participate in the process of legal meaning-making."[45] Calo is not triumphalist; he recognizes there are risks in allowing theology to influence human rights policy.[46] Nonetheless, he writes, "[t]he central task for religious legal theory, both as concerns human rights as well as jurisprudence more generally, is to explore this transformative possibility."[47]

Note that Calo asserts that religious legal theory has a role to play, not only in public policy debates of the sort surrounding human rights law, but in "jurisprudence more generally."[48] Nathan Chapman of Stanford University takes up the call to apply theological insights to analytical jurisprudence.[49] Read a certain way, he contends, the creation story in the first two chapters of Genesis offers a valuable insight into the nature of

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[39] *Id.* at 483.
[40] *Id.* at 491.
[41] *Id.*
[42] Zachary R. Calo, *Religion, Human Rights, and Post-Secular Legal Theory*, 85 ST. JOHN'S L. REV. 495, 495–96 (2011).
[43] *Id.* at 497.
[44] *Id.* at 504.
[45] *Id.* at 518.
[46] *Id.*
[47] *Id.* at 519.
[48] *Id.*
[49] Nathan S. Chapman, *Law Asks for Trust*, 85 ST. JOHN'S L. REV. 521 (2011).

law, namely, the need for subjects to trust the lawgiver. In the familiar story, God creates Adam and Eve and issues them a command: do not eat " 'of the tree of the knowledge of good and evil,' " or " 'you shall die.' "[50] God thus acts as a kind of legislator. But God's motives for issuing the command remain opaque. Moreover, Adam and Eve, as humans, differ radically from God; their common humanity "serves as a constant reminder to them that God is . . . fundamentally other."[51] Obeying the command thus requires that Adam and Eve trust God. For Chapman, this biblical story "suggests that law" inherently "entails a request from the lawmaker to the subject for trust."[52]

Joel Nichols of the University of St. Thomas (Minnesota) and James McCarty of Emory University offer a case study of how religious, specifically Christian, arguments influenced the struggle to end apartheid in South Africa.[53] The New Testament, they explain, does not give Christians definitive guidance on how to relate to oppressive governments; it permits various stances depending on time and circumstance, everything from submission to active resistance.[54] The biblical text "is not self-executing," but requires Christians "regularly to perform the challenging task of interpretation."[55] In the apartheid struggle, both sides appealed to scripture.[56] The "Afrikaner Theology" of the Dutch Reformed Church supported the state, but many Christians, white and black, argued that their faith required civil disobedience.[57] "Eventually," Nichols and McCarty write, "the state-supported apartheid system collapsed, in large part because of prominent theological leaders who drew upon [biblical arguments] and argued for specific actions of resistance."[58]

René Reyes of Vermont Law School offers a different sort of case study on the impact of religion on secular law.[59] For the first time in history, the majority of United States Supreme

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[50] *Id.* at 532 (quoting *Genesis* 2:15–17 (New Revised Standard)).

[51] *Id.* at 542.

[52] *Id.* at 525.

[53] Joel A. Nichols & James W. McCarty III, *When the State Is Evil: Biblical Civil (Dis)Obedience in South Africa*, 85 ST. JOHN'S L. REV. 593, 593–94, 596 (2011).

[54] *Id.* at 597.

[55] *Id.* at 623.

[56] *Id.* at 593–94.

[57] *Id.* at 604, 607.

[58] *Id.* at 604.

[59] René Reyes, *The Supreme Court's Catholic Majority: Doctrine, Discretion, and Judicial Decision-Making*, 85 ST. JOHN'S L. REV. 649, 652 (2011).

Court justices today are Catholics.[60] Many commentators—and the justices themselves—maintain that this fact has no relevance to American law, as there is no conflict between the justices' religious beliefs and their official duties.[61] Reyes believes that this conclusion is too easy.[62] The Catholic Church teaches that public actors must use their power "to conform the civil law to the moral law, at least in those cases where fundamental rights are at issue."[63] Thus, Reyes argues, at least in unsettled areas of the law, Catholic teaching may require Catholic Justices to influence the development of secular law to achieve results that are anything but neutral.[64] As a consequence, Catholic nominees should be open to scrutiny about their religious commitments, at least those that bear on judicial philosophy.[65] Such scrutiny would not be disrespectful; it would simply acknowledge that "the Roman Catholic tradition has spoken more vocally and comprehensively about the role of religion in public life than many other faith traditions."[66] Reyes cautions that Catholic identity itself does not necessarily reveal much about a nominee's judicial philosophy; individual Catholics, like individual members of other religions, differ in their understanding of what their faith requires of them.[67] He suggests further empirical research to test whether Catholic judges have influenced American law in particular directions.[68]

The final paper in this collection, by Samuel Levine of the Touro Law Center, addresses a different subject altogether.[69] On the occasion of this second annual conference, Levine pauses to consider whether "Religious Legal Theory," or RLT, qualifies as a movement in the legal academy.[70] He compares RLT with other movements—Critical Legal Studies ("CLS"), Law and Economics, and Empirical Legal Studies—and identifies some similarities.[71]

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[60] *Id.* at 649.
[61] *Id.* at 650–51.
[62] *Id.* at 651.
[63] *Id.* at 672.
[64] *Id.* at 666–67.
[65] *Id.* at 676–77.
[66] *Id.* at 678.
[67] *Id.* at 680.
[68] *Id.* at 680–81.
[69] *See generally* Samuel J. Levine, *RLT: A Preliminary Examination of Religious Legal Theory as a Movement*, 85 ST. JOHN'S L. REV. 579 (2011).
[70] *Id.* at 580–81.
[71] *Id.* at 581–92.

Like CLS, RLT grows out of the sense that certain arguments have been excluded from the mainstream of American legal scholarship—not the same arguments, of course.[72] Like Law and Economics, RLT is a "big tent" that encompasses scholarship across a range of perspectives.[73] Indeed, Levine wonders whether RLT as a movement can successfully mediate this pluralism.[74] He ultimately concludes that RLT can achieve intellectual unity by fencing out at least "those projects that are fundamentally opposed to" its principles, for example, "projects that advocate, without explanation, the exclusion of any reliance on religious argument in the understanding of law and public policy."[75] He understands that RLT scholars may refrain from criticism of other scholarship in the movement, if for no other reason than that RLT scholars will not want to criticize work that comes from a different religious tradition.[76] Nonetheless, he cautions, RLT scholars must feel free to criticize others' work, in order to avoid "becoming a 'self-reinforcing mutual-admiration society.' "[77]

Whether RLT will develop into a movement in the legal academy, and whether that would be a good thing, remain to be seen. What is clear, however, is that both religion and law are deeply embedded in human experience—some would say, in human nature—and will continue to interact. Indeed, as we enter what some are calling the "post-secular" world of the twenty-first century, the relationship between law and religion seems likely to become even more important. In contributing to a better understanding of that relationship, and suggesting paths for future research, the papers presented here make a signal contribution.

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[72] *Id.* at 582.

[73] *Id.* at 585–87.

[74] *Id.* at 587.

[75] *Id.* at 589–90.

[76] *Id.* at 589.

[77] *Id.* at 591 (quoting Brian Leiter, *On So-Called "Empirical Legal Studies" and Its Problems*, BRIAN LEITER'S L. SCH. REPORTS (July 6, 2010), http://leiterlawschool.typepad.com/leiter/2010/07/on-socalled-empirical-legal-studies.html).