THE LIMITS OF RELIGIOUS VALUES IN JUDICIAL DECISIONMAKING

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Judge Wendell Griffen, in *The Case for Religious Values in Judicial Decision-Making*,[1] has thoughtfully and forcefully explained why religious considerations ought not to be excluded from the decisional processes of judges. Articulated at relatively general level, his normative thesis strikes this author as compelling, and he is surely correct to look with wariness upon the idea that religious values should or can be categorically banished from judicial decisionmaking.[2] Yet sometimes the devil can be in the details, so to speak, and the initial force of a thesis may diminish once its terms and scope are more thoroughly developed and more carefully examined. The concern here is that while Judge Griffen has given us much in the way of a general outline, and has even fleshed out certain aspects of his thesis, there remain important details which necessarily invite both further development and further scrutiny.[3]

Accordingly, rather than directly critique Judge Griffen's presentation, these comments will attempt to build upon his basic normative position by addressing some of these points of detail. Two matters, in particular, will be explored. First, what foundational premises ought to inform the use of religious values by judges—what is the meaning of religion, for example, or what is the nature of the

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1. Wendell L. Griffen, *The Case for Religious Values in Judicial Decision-Making*, 81 MARQ. L. REV. 513 (1998).

2. In fact, his position is substantially congruent with my own. *See* Scott C. Idleman, Note, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433 (1993).

3. Professor Daniel Conkle, for example, has suggested that Judge Griffen's most important points, though quite agreeable in the abstract, cannot possibly be applied without qualification. *See* Daniel O. Conkle, *Religiously Devout Judges: Issues of Personal Integrity and Public Benefit*, 81 MARQ. L. REV. 523 (1998).

judicial decisional process? Second, what are the operative limits on the judicial use of religious values—what are the constraints imposed by the federal Constitution, for example, or by our political-philosophical commitments or by various prudential considerations? It is this author's motivating aspiration that, by addressing questions such as these, the judicial use of religious values might attain the coherence and legitimacy that are necessary to render this use meaningful.

I. FOUNDATIONAL PREMISES

Conceptualization and definition are critical processes within the American system of law and legal reasoning, in large part because that system relies heavily upon the manipulation of cultural and linguistic materials.[4] At any given place and time, there will obviously be contextual limits on the capacity of legal thinkers to advance certain interpretations of concepts or terms. Religious values, for example, do not include a preference for grapefruit over honeydew melon; nor is it thought that the judicial reasoning process should entail the reading of tarot cards. The potential for divergent interpretation remains substantial, however, particularly given that the interpretive process may itself alter the status of the concepts or terms interpreted.[5] Surely this potential for interpretive divergence is relevant to the role of religious values in judicial decisionmaking, and much of the disagreement over their role is likely traceable to antecedent disagreement over various conceptual or definitional aspects of the inquiry.

At the very least, then, an analysis of the role of religion in judging warrants the consideration of three foundational premises—one definitional, one conceptual, and one empirical. The definitional premise concerns the meaning of religion, or of religious values. The conceptual premise concerns the nature of judicial decisionmaking or, more generally, of the judicial process. And the empirical premise concerns the reality of religion's place within the actual world of judging, that is, whether and to what extent judges necessarily rely on religious values as a matter of fact. Each of these will be addressed in order.

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4. *See generally* DAVID MELLINKOFF, THE LANGUAGE OF THE LAW (1963).

5. *Cf. generally* Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989).

A. The Definition of Religion or Religious Values

It should virtually go without saying that the definition of religion is one of the most important analytical starting points, and yet within the literature on the role of religion in law or politics there is relatively little treatment of the issue.[6] Whether inadvertent or not, such avoidance is certainly explicable given the large intellectual cost involved, the correlated lack of expectation by many readers that the definitional question need be treated, and the seemingly small marginal benefit that might result from treatment of the question. But the question—which, after all, may be the definitive threshold inquiry—is far too significant to avoid.

Generating much of this significance is the simple fact that, the broader one's definition of religion or religious values, the greater the consequences of either allowing or disallowing judges to invoke religious values in their decisionmaking. And generating much of the salience of the inquiry is the fact that our legal system has already adopted a relatively generous definition in various statutory[7] and constitutional[8] contexts—and that, from the perspectives of some

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6. Importantly, Judge Griffen is an exception. At one point in his article, for example, he employs the theology of Paul Tillich in broadly conceptualizing the meaning of religious values. *See* Griffen, *supra* note 1, at 515 & n.11 (citing PAUL TILLICH, SYSTEMATIC THEOLOGY 11-15 (1967)). Another notable exception, drawn from the same conference, is Mark Modak-Truran, *The Religious Dimension of Judicial Decision Making and the De Facto Disestablishment*, 81 MARQ. L. REV. 255, 262-63 (1998) (discussing SCHUBERT M. OGDEN, IS THERE ONLY ONE TRUE RELIGION OR ARE THERE MANY? 5-7 (1992)).

7. *See* United States v. Seeger, 380 U.S. 163, 176 (1965) (holding that "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption" is sufficient to satisfy the conscientious objection exemption to the federal conscription statute, 50 U.S.C. app. § 456(j) (1996)); *see also* Welsh v. United States, 398 U.S. 333 (1970) (expanding on the *Seeger* approach under the federal conscription statute); United States v. Levy, 419 F.2d 360, 365 (8th Cir. 1969) (adopting the *Seeger* approach under the federal conscription statute); United States v. Haughton, 413 F.2d 736, 739-42 (9th Cir. 1969); Decker v. Wheeler, 331 F. Supp. 347, 349-50 (D. Minn. 1970); Thomas v. Salatich, 328 F. Supp. 18, 21-22 (E.D. La. 1971); Weber v. Inacker, 317 F. Supp. 651, 656-57 (E.D. Pa. 1970). Although these are not constitutional interpretations, see United States v. Meyers, 906 F. Supp. 1494, 1500 (D. Wyo. 1995) (concluding that the functional approach invoked in the Selective Service Act cases does not carry over into the constitutional realm) (citing Wisconsin v. Yoder, 406 U.S. 205, 216 (1972)), *aff'd*, 95 F.3d 1475 (10th Cir. 1996), they may have constitutional significance to the extent that the Court's broad construction was ultimately necessary to avoid a problem under the Establishment Clause. *See* Jesse H. Choper, *Congressional Power To Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299, 336-37 (1982).

8. *See* International Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 440 (2d Cir. 1981) (employing, in part, an ultimate concern approach in the free exercise context); Malnak v. Yogi, 592 F.2d 197, 207-08 (3d Cir. 1979) (employing, in part, an ultimate

observers, even this definition is not sufficiently encompassing.[9] The now-classic example of this broadened definition is known typically as the functional or parallel belief analysis: "'[r]eligious beliefs' ... are those that stem from a person's 'moral, ethical, or religious beliefs about what is right and wrong' and are 'held with the strength of traditional religious convictions.'"[10] Under such an analysis even "secular humanism," that foe of many religious traditionalists, could be religious in some legal sense.[11]

It is conceivable, of course, that this broad definition of religion need not be imported into the judicial decisionmaking context. It does bear noting, however, that some of the same considerations that might lead one to be concerned about the judicial use of religious values—a commitment to certain rule of law tenets, to the secular nature of government, and to the need for pluralistic inclusion—could very well compel one to embrace the broad definition crafted in these statutory and constitutional contexts. In turn, unless we can distinguish in a principled way these other cases and contexts from the judicial use of religious values, we ought to be extremely reluctant to advocate restricting such use outright, lest the breadth of our definition might cause the judicial process either to be stripped of all meaningful moral influence or (more likely) to degenerate into a medium in which religious values are simply invoked in an ad hoc and selective manner.

Not only is it important, then, to address the definition of religion, but the demands of consistency may make this an ideologically unpalatable task. And the unpalatability, perhaps fortunately, is not confined to just one end of the ideological spectrum. In terms of the traditionalist advocate who, for example, attempts to expunge from public education the influences of, say, witchcraft, by labeling such influences as religious and thereby invoking the Establishment Clause,[12]

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concern approach in the establishment context).

9. *See, e.g.*, Winnifred Fallers Sullivan, *Judging Religion*, 81 MARQ. L. REV. 441 (1998).

10. United States v. Ward, 989 F.2d 1015, 1018 (9th Cir. 1992) (quoting Welsh v. United States, 398 U.S. 333, 340 (1970)). Professor Esbeck sums up the current definitional approach as "broad and indeterminate, including naturalistic, nontheistic, and anthropocentric religions." Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 613 (1995) (footnote omitted).

11. *See* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (recognizing "Secular Humanism" as a religion); Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1534 (9th Cir. 1985) (stating that "[s]ecular humanism may be a religion"), *cert. denied*, 474 U.S. 826 (1985).

12. *See, e.g.*, Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373, 1378 (9th Cir. 1994) (assuming for the purpose of analysis that Wicca is a religion).

there may then be great difficulty in allowing the judicial use of only those values that are religious in a traditional, narrow sense. Likewise, in terms of the nontraditionalist advocate who, for example, attempts to expand the meaning of religion under the Free Exercise Clause or Title VII of the Civil Rights Act to protect, say, practitioners of witchcraft,[13] there may be great difficulty in disallowing the judicial use of only those values that are religious in a traditional, narrow sense. The point here, of course, is not to disparage such ideological efforts, but simply to note the problem of inconsistency that may arise by seeking both a broad definition in one context and a narrow definition in another.[14]

B. The Conception of Judicial Decisionmaking

Less contentious perhaps than the meaning of religion, the second foundational premise centers on the conceptualization of the judicial process, for surely the propriety of adverting to religious values will vary depending on the perceived nature of that process. One of the key focal points of conceptualization in this regard concerns the function of judicial reasoning, particularly as expressed through the written opinion. The classic division, sometimes cast as the struggle between formalism (or positivism) and realism,[15] is whether the reasons

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13. *See, e.g.*, Van Koten v. Family Health Mgmt., Inc., 955 F. Supp. 898 (N.D. Ill. 1997). *Van Koten* held that Wicca can be a religion under Title VII, relying in part on the broad, functional definition of religion provided in the EEOC guidelines. *See id.*; 29 C.F.R. § 1605.1 (1990) (Religion includes "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views ... . The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee."), *cited in Van Koten*, 955 F. Supp. at 902.

14. Regarding efforts to seek differential definitions between the Free Exercise Clause and the Establishment Clause, a presumptively questionable undertaking, see Esbeck, *supra* note 10, at 589 & nn.25-26; Idleman, *supra* note 2, at 461 & n.92, 462 n.94. At least one court, subordinating the principle of consistency to the imperative of practicality, has accepted the differential approach. *See Grove*, 753 F.2d at 1537 ("To borrow the ultimate concern test from the free exercise context and use it with present establishment clause doctrines would be to invite attack on all programs that further the ultimate concerns of individuals or entangle the government with such concerns.") (quoting Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1084 (1978)).

15. *See* Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 501 (1996) (reviewing NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995)). Two clarifying points are in order here. First, positivism as such need not rely on a deductive, explanatory model of judging—what is sometimes called "mechanical jurisprudence"—although such a model does cohere nicely with the notion that judicial decisions flow logically from positive law as applied to particular cases. *See* Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054 (1995) (distinguishing between classical positivism and the formalism challenged by realism). Second, it would be

expressed largely represent a pre-decisional process of deduction (thus explained by the opinion) or whether they largely represent a post-decisional process of rationalization (thus justified by the opinion). Do judges, in other words, reach outcomes by their reasons, or do their reasons merely buttress the outcomes that they have already reached by some (undisclosed) intuitive process?[16]

Happily, there is no need in this limited medium to resolve the question, which in any event is nothing more than a trite oversimplification or caricature of the potential complexity of the judicial process.[17] Rather, it is enough simply to highlight that the proper role of religion in judging may vary enormously depending on one's own resolution to this and related questions. If one accepts some version of the explanatory model, for example, then the presumption should be that religious values—to the extent they do in fact influence a judge's decision—should have a place in the written opinion. This presumption may possibly be overcome in special circumstances, but by and large the omission of an influential variable runs directly contrary to the explanatory, deductive model of judging. By comparison, if one accepts some version of the justificatory model, wherein written opinions are designed to rationalize a judge's outcome, then the place of religious values—even if they do influence the judge's end result—may be less certain. The idea of justification, after all, is not really to disclose all influences in the decisional process, but rather to persuade the audience that the outcome reached is defensible under the governing sources of legal authority. In fact, given that religious bases may be less than universal in their acceptance among the relevant audiences to the opinion, it is quite sensible that the judge would not

misleading to think that a positivist would then embrace judicial use of religious values, whether or not the judge could explain that they served as one link in a deductive chain. *See id.* at 2063-64 (describing the potential discontinuity between law and morality as a fundamental principle of classical legal positivism as formulated by Bentham and Austin); *see also* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

16. *See* Daniel G. Ashburn, *Appealing to a Higher Authority?: Jewish Law in American Judicial Opinions*, 71 U. DET. MERCY L. REV. 295, 297 n.6 (1994) ("[T]he question is often whether the court's formal written opinion presents the actual reasoning behind a decision or merely serves as an apologetic device meant to justify a result."). Professor Stephen Carter, in an important article on religion and judicial decisionmaking, notes as well the significance of the explanatory versus justificatory conception in relation to religion's inclusion in the judicial process. *See* Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 943 (1989).

17. For one perspective, see Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200 (1984).

necessarily make reference to them in the act of justification.[18]

C. The Empirical Reality of Religion in Judging

The third foundational premise is empirical or descriptive and concerns whether and to what extent religious values do in fact influence the decisionmaking of judges, without regard to any normative or theoretical formulations of that relationship. The importance of this premise is obvious, as the worth of any model of judging must in part be measured by its correspondence to actual judicial practice. As Professor Greenawalt has observed: "[w]hat some or most judges are doing does not ... determine what judges should be doing ... [o]rdinarily a normative theory should not call for behavior that is impossible or extremely difficult."[19]

What, then, *is* the basic empirical relationship between religion and judging? For the recognizably religious judge, it would appear that religious values often constitute an unavoidable source of insight and authority,[20] although their use may not always be evident[21] and although

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18. *See* Joan B. Gottschall, *Response to Judge Wendell Griffen*, 81 MARQ. L. REV. 533, 534-35 (1998) (explaining that judicial legitimacy, from the perspective of litigants, may be undermined by decisionmaking that appears to rest on extralegal, judge-specific sources of authority). This process of self-censorship may partly explain the omission of religion in Professor Steven Smith's "fourth zone of disestablishment." *See* Steven D. Smith, *Legal Discourse and the De Facto Disestablishment*, 81 MARQ. L. REV. 203, 211 (1998). Legal academic discourse as well may be subject to this type of self-censorship, insofar as scholars, too, would often like their work to be as widely accessible and widely influential as possible. This is not to say, in either case, that religious references are truly inaccessible to any reader—many such references arguably are not—but simply that readers might perceive them as such and that judges and scholars, in turn, might acquiesce to these perceptions by omitting these references from their works. On the related question of whether there is actually an atmosphere of hostility toward religion in the academic setting, see Frederick M. Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 671 n.2 (1992) (noting the view that the "legal academy" may be hostile towards religion, and citing several works); Peter Steinfels, *Universities Biased Against Religion, Scholar Says*, N.Y. TIMES, Nov. 26, 1993, at A22 (discussing perceived academic bias against "scholarship that reflects religious viewpoints, especially traditional Christian ones").

19. Kent Greenawalt, *The Perceived Authority of Law in Judging Constitutional Cases*, 61 U. COLO. L. REV. 783, 786 (1990). That said, Professor Greenawalt is also careful to note that "[t]he unavoidability of some influence does not settle ... the degree of influence, and thus does not settle what judges should *aim* to do. Class prejudices and deep-seated personal resentments will also affect judgment, but the judge should strive to discount or overcome them." KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 144 (1995); *see also id.* at 149 ("To say that judges may sometimes have to use religious and other personal convictions does not settle whether they should self-consciously do so.").

20. The influence of a judge's religious commitments may not always be confined to the resolution of outcome-determinative, substantive questions of law. For example, such commitments may affect: (1) a judge's disposition or perspective on authority, see James L.

their relevance may only be apparent in situations where the positive law is substantially underdeterminate or where the substance of the dispute directly implicates fundamental or controversial ethical issues.[22] To the extent such values may influence judges at a subconscious level, as first principles paradigmatically do, this unavoidability may even extend to those judges who deliberately attempt to steer clear of their religious commitments when rendering decisions.[23] In this regard, Judge

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Buckley, *The Catholic Public Servant*, FIRST THINGS, Feb. 1992, at 20; (2) a judge's reasoning or rhetorical style, compare George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990), with Donald L. Beschle, *Catechism of Imagination: Is Justice Scalia's Judicial Style Typically Catholic?*, 37 VILL. L. REV. 1329 (1992); (3) a judge's assessment of evidentiary admissibility, see MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 916-17 (1996) (discussing State v. Lafferty, 749 P.2d 1239 (Utah 1988)); (4) a judge's conception about the rationality or irrationality of religious belief itself, see Michael Ariens, *Evidence of Religion and the Religion of Evidence*, 40 BUFF. L. REV. 65, 105-10 (1992); or (5) a judge's determination of legal or constitutional facts, see Thomas C. Berg & William G. Ross, *Some Religiously Devout Justices: Historical Notes and Comments*, 81 MARQ. L. REV. 383, 404 (1998). *Cf. also* SANFORD LEVINSON, CONSTITUTIONAL FAITH 27-53 (1988) (analyzing the notion that approaches to constitutional interpretation may be considered "Protestant" or "Catholic" in nature by virtue of their relative emphasis on text, tradition, and so forth).

21. Religious values may function subclinically for several reasons. First, even the judge who has no fundamental objection to permitting his religious values to influence his decisionmaking may nevertheless have ample prudential reason to refrain from overtly doing so, especially when more conventional sources of authority would appear sufficient. *See infra* Part II.D. Second, though religious values may amount to unavoidable influences, nevertheless they may not be strong influences, especially in comparison to other variables affecting a judge's decisionmaking. *See* Berg & Ross, *supra* note 20, at 384 ("Even if the legal realists were right that decisions usually rest on factors other than legal doctrines, the justices' religious beliefs may be less important than are considerations of political opinion, social class, or geographical background. Or religion may be intertwined with these factors in ways that are very difficult to sort out.").

22. It is interesting to contrast the American experience, wherein underdeterminacy and the consequent need for judges to resort to extra-positive law sources are seen as problematic, with the situation in Israel, among other jurisdictions. In particular, Israeli law includes the Foundations of Law Act of 1980, which provides: "Where a court finds that a question requiring a decision cannot be answered by reference to an enactment or a judicial precedent or by way of analogy, it shall decide the same in the light of the principles of freedom, justice, equity and peace of the heritage of Israel." Foundations of Law Act, 5740-1980, *reprinted in* Daniel Sinclair, *Jewish Law in the State of Israel*, *in* AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW 397, 411 (N.S. Hecht et al. eds., 1996). The Israeli Supreme Court, in turn, has relied upon the Act to refer directly to Jewish Law in certain cases, particularly those of ethical significance. *See id.* at 413-15; *see also* Netty C. Cross, *In the Tradition of Justice*, JERUSALEM POST, Jan. 21, 1994, at 4.

23. *See* GREENAWALT, *supra* note 19, at 144 ("[F]undamental beliefs will influence decision even when judges conscientiously try to exclude them. In this respect, religiously grounded beliefs are not qualitatively different from other beliefs; deeply held religious convictions will sometimes have an influence on judgment."). Professor Daniel Conkle provides three examples of judges who, though religious, would consider it improper to permit their religious values to influence their decisionmaking: (1) the strict legal positivist,

Griffen goes so far as to suggest that "[r]ather than suspecting the reasoning of the judge who honestly includes her religious values in [the decisional] process, we should suspect the judge who maintains that he is being intellectually honest about judicial decision-making devoid of religious values that he professes to hold."[24]

Although there is relatively little in the way of statistically sound analysis of the relationship between religion and judging (perhaps because of inherent definitional or methodological difficulties), nevertheless there are studies correlating religious affiliation with judicial decisions, at least in certain types of cases.[25] The anecdotal evidence as well would appear to support the idea that, in general, it is often a necessary relationship where the judge is herself religious—and, I might add, sufficiently cognizant and candid. Such evidence would include both extrajudicial statements concerning that relationship[26] and

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who believes that all disputes should be, and can be, resolved by conventional legal sources; (2) the judge who believes that reference to his religious values would violate the First Amendment Establishment Clause; and (3) the judge who believes that reference to her religious values would violate her own religious dictates insofar as such reference could transgress the religious voluntarism of others. *See* Conkle, *supra* note 3, at 525-28. Although these judges may readily avoid the appearance of such reference (*e.g.*, by writing a thoroughly formalistic or secular opinion), it is doubtful whether they may genuinely avoid reliance on religious values altogether, given the fairly conventional notion that religious commitments are the sort that one does not simply remove like one's overcoat. *See* GREENAWALT, *supra* note 19, at 144. Thus, for example, it is difficult to reconcile Justice Thomas's assertion that religious faith is important and that religious persons "cannot turn [their] backs on the essence of [their] current sanity and well-being" with the proposition that he does not decide cases, even in part, based on his religious beliefs. *Compare "Fog of Victimization" Hurts U.S., Thomas Says*, MILWAUKEE J.-SENTINEL, May 12, 1996, at A18 (reporting that Justice Thomas "stopped short of saying that religion will influence his Supreme Court decisions" and quoting him as stating that "[w]e don't decide cases by referring to the Bible"), *with* Tony Mauro, *Thomas' Higher Law*, LEGAL TIMES, Sept. 4, 1995, at 8 (relating a *Washington Times* column discussing Justice Thomas's private disclosures that he follows "God's Law" in at least some of his decisionmaking). *See also* Berg & Ross, *supra* note 20, at 401 (noting discontinuity between the devoutness of Justices Scalia and Thomas and their disavowal of reliance on religious values in their decisionmaking). For an example of the formalist perspective, see Buckley, *supra* note 20 (arguing, as a judge, that religious or moral values should not influence judicial decisionmaking); *and cf.* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting) ("[A]s judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard.").

24. Griffen, *supra* note 1, at 516.

25. *See* GREENAWALT, *supra* note 19, at 144.

26. *See* Rick Bragg, *A Sixth Sense and Sensibility*, N.Y. TIMES, Oct. 22, 1996, at A18

judicial decisions explicitly referring to religion,[27] and may even include the empirical speculations of academics[28] and other legal commentators.[29] Of course, even if this hypothesis is fully accurate, there should be hesitation about considering it in anything more than general terms. For example, to presume in any given instance to know that a judge's religiosity will affect her decisionmaking, and on that basis to seek or justify the judge's recusal, would probably be empirically indefensible,[30] if not also constitutionally suspect,[31]

(reporting, with regard to Alabama state circuit judge Tony Cothren, "that his Christian upbringing and strong belief in God help him make his decisions on the bench. 'I understand the differences between my personal beliefs and what the law says I can do,' he said. But his faith helps him see more clearly right and wrong, he said, in a time when spin and half-truths seem to rule courtrooms."); Raul A. Gonzalez, *Climbing the Ladder of Success—My Spiritual Journey*, 27 TEX. TECH. L. REV. 1139, 1147-56 (1996) (cataloguing several cases in which his religious beliefs apparently were influential); Gottschall, *supra* note 18, at 533 (explaining that beliefs of a religious nature "are part of a stew of factors that unavoidably underlie my decisions"); Griffen, *supra* note 1. *See also supra* note 23 (contrasting Justice Thomas's public stance, that religion does not influence his decisionmaking, with his apparent private disclosures, that it does). *But see* Tom Jackman, *High Court Justice's Speech Revisits Society's Treatment of Catholics*, KANSAS CITY STAR, Oct. 3, 1996, at C4 (quoting Justice Scalia as saying that "I do not think it is proper for the religious views of a judge to influence his decisions from the bench... . The only aspect of my Catholic upbringing that I believe, and hope, affects my work as a judge is I believe it is wrong to lie."); Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1049, 1062-65 (1990) (setting forth positions of then-Supreme Court nominees William Brennan, Antonin Scalia, and Anthony Kennedy, each disavowing the influence of their Catholic faith upon their decisionmaking, and concluding that "Justices identified with Catholicism have been forced to proclaim the practical meaninglessness of that identification").

27. *See* Ashburn, *supra* note 17, at 295; Idleman, *supra* note 2, at 475-77 & nn.145-56.

28. *See* Jonathan Edward Maire, *The Possibility of a Christian Jurisprudence*, 40 AM. J. JURIS. 101, 103-04 (1995) ("[T]he process we call 'adjudication,' which encompasses not only the judge's decisional processes, but the arguments of lawyers that urge a particular decision, inevitably proceeds in a moral context, and ... this moral context just as inevitably entails deployment, tacitly if not explicitly, of the religious convictions of the judge."); *cf. generally* Mark B. Greenlee, *Echoes of the Love Command in the Halls of Justice*, 12 J.L. & RELIGION 255 (1996).

29. *Compare* Richard Carelli, *Justices' Faith Can Influence Entire Nation*, NEW ORLEANS-TIMES PICAYUNE, Jan. 25, 1997, at A18 (quoting Brent Walker of the Baptist Joint Committee: "A justice's religious views are part of the decision-making process. It happens all the time. Judges come into the process with religious convictions they cannot, and probably ought not, shed.") *with* Joan Biskupic, *Changing Faith: Protestants No Longer Rule the High Court*, WASH. POST, Aug. 4, 1996, at C1 (asserting that "[j]ust as justices no longer are substantially defined in the public eye by their religious backgrounds, church affiliation does not dictate a justice's vote").

30. *See* John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 343-46 (1998); *cf. also* Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4-5 (S.D.N.Y. 1975) (holding in a discrimination suit that a judge's gender and race are not themselves sufficient indicators of bias warranting disqualification under 28 U.S.C. § 144).

institutionally problematic,[32] and socially unwise.[33] That said, one could still fairly conclude that in general the decisionmaking of religious judges will be influenced, in some way, by their religious values.

This conclusion, of course, necessarily raises additional questions. First, in terms of gauging the degree of this influence, how important is the particular nature or denomination of a judge's religious commitments? Perhaps surprisingly, the answer may be mixed. On the one hand, this aspect can clearly be significant, even determinative. Some religious traditions essentially compel their adherents to observe the norms of faith regardless of situational circumstances,[34] while others may either offer more leeway in this regard or adhere to a theological stance on religion and government that could preclude judicial reliance

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31. *See* Jake Garn & Lincoln C. Oliphant, *Disqualification of Federal Judges Under 28 U.S.C. § 455(a): Some Observations on and Objections to an Attempt by the United States Department of Justice To Disqualify a Judge on the Basis of His Religion and Church Position*, 4 HARV. J.L. & PUB. POL'Y 1, 49-59 (1981) (discussing State v. Freeman, 507 F. Supp. 706 (D. Idaho 1981)); Garvey & Coney, *supra* note 30, at 346-48.

32. *See* Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 686 (1985) ("[R]eligious background alone should not be a proper basis for disqualification. Otherwise, a Jewish judge, for instance, could not hear cases affecting Jewish interests, such as the constitutionality of Sunday closing laws, nor could Catholic judges sit in cases affecting Catholics as a group. A judge's religious background, like his race or ethnic background, should not be *presumed* to affect his ability to execute his judicial duties faithfully and impartially.").

33. As noted by the Eleventh Circuit:

> The fact that an individual belongs to a minority does not render one biased or prejudiced, or raise doubts about one's impartiality: "that one is black does not mean, ipso facto, that he is anti-white; no more than being Jewish implies being anti-Catholic, or being Catholic implies being anti-Protestant." ... As Judge Higginbotham eloquently wrote:
>
> > "It would be a tragic day for the nation and the judiciary if a myopic vision of the judge's role should prevail, a vision that required judges to refrain from participating in their churches, in their non-political community affairs, in their universities. So long as Jewish judges preside over matters where Jewish and Gentile litigants disagree; so long as Protestant judges preside over matters were Protestant and Catholic litigants disagree; so long as white judges preside over matters where white and black litigants disagree, I will preside over matters where black and white litigants disagree."

United States v. Alabama, 828 F.2d 1532, 1542 (11th Cir. 1987) (footnotes omitted) (quoting Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155, 163, 181 (E.D. Pa. 1974)), *cert. denied*, 487 U.S. 1210 (1988).

34. *See, e.g.*, Greenlee, *supra* note 28, at 255 n.1 (noting that "[j]udges standing within [the author's] own neo-Calvinist tradition would view themselves as called to apply their religious beliefs to their judicial office and would view as religious the most basic, nondependent beliefs of other judges, whether they are recognized as 'religious' or not, as playing an inevitable part in their own decision making process").

on religion altogether.[35] On the other hand, if one embraces an extremely broad definition of religion—*e.g.*, an individual's set of indelible first principles, or "a comprehensive way of perceiving and understanding life and the world ... [that] affects *everything*"[36]—then religious values may turn out to be unavoidable referents for virtually all individuals and, as a consequence, particular denominational stances may become considerably less significant. At best, it may be a matter of degree.

Second, does a correlation between religious commitment and judicial decisionmaking indicate that the evaluation of candidates or nominees for judicial office should include consideration of their religious beliefs or affiliations?[37] As Professor Sanford Levinson has pointed out, this is a serious and potentially difficult question.[38] At the outset, it should be recognized that the federal Constitution would appear in many instances to preclude the governmental consideration of religious beliefs in that process, at least where they constitute an adverse or determinative factor.[39] Yet, that prohibition neither renders

35. *See* Conkle, *supra* note 3, at 527-28.

36. Smith, *supra* note 18, at 215; *see also* Carter, *supra* note 16, at 940 ("The very idea of devotion suggests a way of ordering all life and all knowledge, including, although not exclusively, moral knowledge.").

37. Regarding whether or not religious affiliation should be used as part of the Supreme Court appointment process, see BARBARA A. PERRY, A "REPRESENTATIVE" SUPREME COURT? THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS chs. 2-3, 6 (1991).

38. Regarding Catholic judicial candidates in particular, see generally Levinson, *supra* note 26. For a relatively recent controversy, see John Flynn Rooney, *Judicial Candidates Won't Be Asked About Religion*, CHI. DAILY L. BULL., Aug. 2, 1991, at 1 (reporting that the Chicago Council of Lawyers governing board stated that, in general, it would not inquire into the religious beliefs of judicial candidates). For a study finding uneven treatment of judicial candidates based on religious beliefs, see Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228 (1987).

39. At the federal level, the No Religious Test Clause could preclude such consideration, see U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."), while the Free Exercise Clause could have comparable significance at the state level. *See, e.g.*, McDaniel v. Paty, 435 U.S. 618 (1978) (invalidating a Tennessee state constitutional provision prohibiting any member of the clergy from serving the state legislature); Torcaso v. Watkins, 367 U.S. 488, 489 (1961) (invalidating a Maryland state constitutional provision requiring "a declaration of belief in the existence of God" as a qualification for public office); Silverman v. Campbell, 486 S.E.2d 1 (S.C. 1997) (affirming the invalidation of two South Carolina state constitutional provisions requiring affirmation of the existence of a Supreme Being as a qualification for public office); *see also* Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (noting that pursuant to the First Amendment the government may not "impose special disabilities on the basis of religious views or religious status") (citing Larson v. Valente, 456

such beliefs logically irrelevant nor precludes private entities and individuals from urging or from independently undertaking this type of inquiry. There may, of course, be a cultural repugnance or resistance regarding such an inquiry, borne of our national historical experience, that is sufficiently powerful to forestall even private inquiry into religious beliefs.[40] On that basis, a candidate's religious beliefs could be rendered out-of-bounds even though relevant and informative. In the words of Professor Levinson, "one might ... be willing to concede that information about a nominee's religious stance would be relevant, but nonetheless prohibit inquiries about that stance either because of the likely unfairness for the particular nominee or, more generally, because of the adverse consequences for the general tone of American public life."[41] Unfortunately, the question becomes particularly difficult when the judicial candidate herself identifies her religious beliefs as an important factor in her candidacy, or, perhaps, when the candidate's religious beliefs are so very much at odds with the constitutional values of liberty, equality, and tolerance that to overlook them would itself be travesty far worse than the risk of religious persecution.

Having addressed the religious judge, it is also necessary to ask about the relationship between religious values and the self-identified *nonreligious* judge. As a general matter, the nature and consequence of this relationship will turn principally on two considerations. The first of these is, once again, the conceptualization of religion and religious values. A broad conceptualization or formulation, such as one of those noted above,[42] could lead to the conclusion that there is in fact no such thing as a nonreligious judge or, alternatively, that even self-identified nonreligious judges necessarily, from time to time, rely on values or premises that are in some sense religious. For certain observers, neither alternative may be pleasant to contemplate, let alone accept, but given

U.S. 228, 245 (1982); McDaniel v. Paty, 435 U.S. 618 (1978); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953)).

40. Recall the criticism of Virginia Governor Douglas Wilder after his questioning then-Judge Clarence Thomas about Thomas's Catholicism, including the potential for divided allegiance between the Constitution and Rome as well as the doctrine of natural law. *See* Donald P. Baker & David S. Broder, *Wilder in Hot Water: Prelates, Politicians Angered by Words on High Court Nominee's Catholicism*, WASH. POST, July 4, 1991, at C1; Beschle, *supra* note 20, at 1329 & n.3; Robert A. Destro, *The Structure of the Religious Liberty Guarantee*, 11 J.L. & RELIGION 355, 375 n.85 (1994-95). More generally, see Julia Lieblich, *Politics and Religion: When Are Questions Justified About a Candidate's Beliefs*, SAN DIEGO UNION-TRIB., Oct. 30, 1994, at G4; Larry Witham, *Theological Potshots Traded in Campaigns*, WASH. TIMES, Sept. 26, 1994, at A1.

41. Levinson, *supra* note 26, at 1074.

42. *See supra* text accompanying notes 10, 36.

contemporary understandings about the nature of religion, summary dismissal of this possibility is simply not an option.

The second consideration is the larger relationship among the judge's worldview, the culture in which that worldview was formed and with which it interacts, and the degree to which and ways in which this culture reflects or embodies religious norms and beliefs. In particular, it may be impossible for even the nonreligious judge to avoid the use of religious values to the extent they permeate the cultural context and, thus, his worldview. This would be especially true where the judge is specifically contemplating the moral dimensions of a case.[43] (Of course such contemplation itself, without regard to the question of religious values, may be controversial from some jurisprudential perspectives.[44]) Be that as it may, the fact is that even the nonreligious judge cannot necessarily avoid reliance on religious values, though the non-conscious nature of the reliance and the extrinsic nature of the values may render such reliance less obvious and less problematic as a result.

Before proceeding to the question of limits, it is worth noting one additional empirical proposition, albeit one with substantial normative force. It is an observation not about judges per se, but rather about the nature of many religious belief systems and the peculiar significance of that nature for the judge's task. Specifically, the consideration of religious values or norms, including especially their origins and development, can have a tremendous and possibly unique humbling influence on the disposition of judges. Many of the religious traditions in this country are, after all, repositories for centuries of deep reflection upon human nature, society, and ethics—in short, upon the human condition. In turn, for a judge, in the process of reaching a decision about human relationships or institutions, to stand in earnest before this wealth of religious insight necessarily impresses upon him the sophistication of his task, the fallibility of his sense of judgment, and the significance of his fiduciary obligations. That such extratextual contemplation could actually render judges more humble and their decisionmaking more responsible may very well seem paradoxical to a

43. *See* GREENAWALT, *supra* note 19, at 147 ("In our culture, as in most others, religion is intertwined with our deep moral premises. Ordinarily, one can identify these premises, such as the idea of universal human respect, without looking at religious sources; but the sources are undoubtedly of causal significance ... .").

44. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990). For a more recent and wide-ranging critique, see ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (1996).

formalistic or positivistic mindset, but it is an empirical proposition that warrants serious reflection and further undergirds the general position set forth by Judge Griffen.

II. OPERATIVE LIMITS

No less important than the task of conceptualizing the use of religious values in judicial decisionmaking is the task of compartmentalizing such use—of delineating the major limits on the substantive interrelationship between religion and the judicial process. Judges hardly need reminding that much of their craft involves the difficult function of line-drawing. While advocates and scholars can be counted on to raise the principles and competing principles at stake in any dispute, it is the authoritative articulation of limits on those principles (and thus the authoritative reconciliation of the competing principles) that distinguishes the art of judging from, say, a conversation at the dinner table, let alone a "panel discussion" on the Jerry Springer show. In contrast even to legislators, who have the luxury either to avoid articulating limits by casting laws in general or ambiguous terms or instead to articulate limits that represent relatively unprincipled compromises, judges must articulate limits that stem from the processes of reason and logic, from the principles themselves, and, of course, from the authority of text, tradition, precedent, and the like.[45]

Regarding the circumscription of religious influences in judicial decisionmaking, one might consider at least four categories of limits—those arising from the federal Constitution, those arising from our unwritten or informal philosophical commitments as a politically constituted people, those arising from the professional ethical obligations of the judicial office, and those arising from the prudential constraints inherent in the task of judging. As one canvasses each type of limit, one might also consider their application to different aspects of the judicial process: the assessment of evidence and facts, the resolution of questions of law, the expression of that resolution in an opinion, the formulation of remedies, and so forth.

A. Federal Constitutional Limits

Although the federal Constitution is relatively silent on matters of

45. *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15-19 (1959). As Professor Greenawalt observes, "[o]f all officials, judges are the most carefully disciplined in restraining their frame of reference." GREENAWALT, *supra* note 19, at 149.

religion, it nevertheless contains several provisions or guarantees that could limit the role of religion in the judicial decisional process.[46] Chief among these, and those considered here, are the Establishment Clause, the Free Exercise Clause, and the Due Process Clauses.[47] It is important to note at the outset, however, that even a colorable claim under one of these provisions, if asserted against or in relation to a judicial officer, may be precluded by any number of doctrines, particularly that of judicial immunity[48] and, at least in federal court, that of standing.[49]

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46. There may also be state constitutional limits—say, where a state constitutional analog to the federal religion clauses is equally or more restrictive in a relevant way. *See generally* G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73 (1989); Linda S. Wendtland, Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625 (1985).

47. Another possible avenue is the equal protection guarantee as applicable to the states, *see* U.S. CONST. amend. XIV, § 1, and to the federal government, *see id.* amend. V; Bolling v. Sharpe, 347 U.S. 497 (1954), but it is likely that any claim brought under this guarantee would already be addressable under one or more of the clauses already discussed here. Importantly, the Constitution also contains at least one provision—the No Religious Test Clause of article VI—that may effectively serve to constrain the limits imposed by these clauses. *See supra* note 39; Feminist Women's Health Center v. Codispoti, 69 F.3d 399, 400 (9th Cir. 1995) (Noonan, J.) (invoking the No Religious Test Clause to deny a recusal motion based on the plaintiffs' claim that the judge's "fervently-held religious beliefs would compromise [his] ability to apply the law"); Garvey & Coney, *supra* note 30, at 346-48 (discussing the relevance of the clause to the question of recusal). *See generally* Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that Has Gone of Itself*, 37 CASE W. RES. L. REV. 674 (1987); Daniel L. Dreisbach, *The Constitution's Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban*, 38 J. CHURCH & ST. 261 (1996).

48. Judges are generally immune from suits for damages as long as they are functioning in a judicial capacity, see Forrester v. White, 484 U.S. 219, 225-28 (1988), and are acting with minimal jurisdictional authority, see Stump v. Sparkman, 435 U.S. 349, 356-57 (1978); Bradley v. Fisher, 80 U.S. 335 (1871); Simmons v. Conger, 86 F.3d 1080, 1085 (11th Cir. 1996). Importantly, however, judicial immunity is generally "not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." Pulliam v. Allen, 466 U.S. 522, 541-42 (1984).

49. Article III standing involves both constitutional and prudential requirements. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-62 (1992); Allen v. Wright, 468 U.S. 737, 750-51 (1984). While a party directly and adversely affected by a judicial ruling that rests substantially on religious authority may very well have standing to challenge the use of such authority on appeal or collaterally, it is unlikely that any other individual could sustain this type of action. *Cf.* Suhre v. Haywood County, 131 F.3d 1083, 1086 (4th Cir. 1997) (holding, in a challenge to the maintenance of a Ten Commandments display in the main courtroom of a county courthouse, that a challenger must have "unwelcome direct contact with a religious display that appears to be endorsed by the state" and that "a mere abstract objection to unconstitutional conduct is not sufficient to confer standing"); Alabama Freethought Ass'n v. Moore, 893 F. Supp. 1522 (M.D. Ala. 1995) (holding, in a challenge to a judge's posting of the Ten Commandments and instigating of prayer during jury organizing sessions, that persons not actually litigating before the judge lacked standing).

1. The Establishment Clause

By Supreme Court interpretation, the Establishment Clause has been held to prohibit government conduct that has the purpose of advancing or inhibiting religion[50] or that has no secular purpose at all[51]; that has the effect of advancing or inhibiting religion[52] or of inducing psychological coercion[53]; that fosters the excessive entanglement of religion and government[54]; or that amounts to preferentialism either among religions or between religion and irreligion.[55] Without question these proscriptions apply to judges, both federal and state, no less than to other governmental actors.[56] In turn, they obviously have the potential to limit the judicial use of religious values, although the appropriate test or standard may depend on the nature of the judicial proceeding, the manner in which the religious value is employed, and perhaps the source and substance of the religious value.[57]

It does not require a great deal of imagination to suppose that a judge's use of religious values might be driven by the purpose of advancing religion or, alternatively, might lack a secular purpose.[58] Nor

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50. Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997).

51. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); Edwards v. Aguillard, 482 U.S. 578, 589-94 (1987); Stone v. Graham, 449 U.S. 39, 41-42 (1980).

52. *See Agostini*, 117 S. Ct. at 2010; *Lemon*, 403 U.S. at 612.

53. *See* Lee v. Weisman, 505 U.S. 577, 592-98 (1992); *cf.* School Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 223 (1963). For a helpful analysis of *Weisman*, see Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 458-63 (1995).

54. *See Agostini*, 117 S. Ct. at 2015; Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126-27 (1982); *Lemon*, 403 U.S. at 613; Walz v. Tax Comm'n of N.Y. City, 397 U.S. 664, 674 (1970). At least in the government aid context, the Court has recently indicated that the entanglement inquiry may often be treated as an inquiry into effect. *See Agostini*, 117 S. Ct. at 2015.

55. *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994); Larson v. Valente, 456 U.S. 228, 244 (1982); Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968); Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

56. *See* Gibson v. Brewer, 952 S.W.2d 239, 246 (Mo. 1997) (en banc) ("The First Amendment applies to any application of state power, including judicial decision on a state's common law.") (citing Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190, 191 (1960)).

57. *Cf., e.g.*, GREENAWALT, *supra* note 19, at 147-49 (presenting and assessing four uses of religious values that do not directly implicate a judge's own religious beliefs). Previously I noted that "[f]or Establishment Clause purposes, ... it may be necessary to discriminate among different judicial uses of religious values" and that "three factors may be helpful in this process: (1) the *nature* of the religious value; (2) the *degree* to which it informs the judge's decision making; and (3) the *manner* in which it is employed by the judge." Idleman, *supra* note 3, at 481.

58. The Supreme Court has made clear, however, that a government action does not violate "the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'" Harris v. McRae, 448 U.S. 297, 319 (1980) (quoting

would it be difficult to imagine that the judicial invocation of religious values, particularly standing alone, could be considered an "endorsement" of religion, a standard which from time-to-time has been employed as an apparent refinement of the purpose or effect inquiry.[59] (That said, it may be debatable whether the inclusion of, say, a scriptural citation in a judicial opinion is genuinely comparable to the government's placement of a nativity scene on public property.) Likewise, the judicial use of religious values could invite entanglement, and at the very least could transgress the epistemological prohibition, set forth in *United States v. Ballard*,[60] on governmental assessment of the objective validity of any given religious belief or claim.[61] Finally, there is always a risk—arguably a substantial risk—that judicial reference to religious norms or authorities could be preferential among religions or otherwise nonneutral toward religion.[62]

McGowan v. Maryland, 366 U.S. 420, 422 (1961)); *accord* Bowen v. Kendrick, 487 U.S. 589, 604 n.8 (1988); Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983); Clayton by Clayton v. Place, 884 F.2d 376, 380-81 (8th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990). For criticism specifically of motivation analysis under the Establishment Clause, see Carter, *supra* note 17, at 936-38.

59. *See* County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 593-94 (1989) (holding that government action may not have the effect of perceived endorsement); *see also* Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763-68 (1995) (elaborating on, and explaining the limits of, the "so-called 'endorsement test'"); Ran-Dav's County Kosher, Inc. v. State, 608 A.2d 1353, 1360 (N.J. 1992) ("Under the Establishment Clause, the State can neither impose religious rules nor endorse religious norms."), *cert. denied*, 507 U.S. 952 (1993).

60. 322 U.S. 78 (1944).

61. *See* Sherbert v. Verner, 374 U.S. 398, 407 (1963) (reaffirming "the prohibition against judicial inquiry into the truth or falsity of religious beliefs"); United Christian Scientists v. Christian Science Bd. of Directors, First Church of Christ, Scientist, 829 F.2d 1152, 1167 (D.C. Cir. 1987) ("The Establishment Clause prohibits any and all official judgments concerning the rectitude of religious belief."); Williams v. Bright, 658 N.Y.S.2d 910, 914 (N.Y. App. Div. 1997) ("American courts have no business endorsing or condemning the truth or falsity of anyone's religious beliefs.").

62. Consider, for example, the Oklahoma Supreme Court's decision in Hadnot v. Shaw, 826 P.2d 978 (Okla. 1992), which essentially involved a claim of wrongful excommunication within the Mormon faith. In defining the nature of religious association and the constitutional relationship between religion and the state, the Court expressly and exclusively embraced a Calvinist perspective, or at least attempted to do so. *See id.* at 988 ("While the Constitution protects the jurisdiction of an ecclesiastical tribunal by its Free Exercise Clause's shield, it also serves to protect the rights of an individual to worship or not to worship according to one's conscience. Sovereign only within her own domain, the church has no power over those who live outside of the spiritual community. The church may not be forced to tolerate as a member one whom it feels obliged to expel from its flock. On the other hand, no citizen of the state may be compelled to remain in a church which his conscience impels him to leave.") (citing ABRAHAM KUYPER, LECTURES ON CALVINISM 108 (Wm. B. Eerdmans 1987) (1898-99)).

There is, to my knowledge, no decision holding that a judge's use of religion as a decisional factor violated the Establishment Clause. Assertions to that effect have periodically been advanced,[63] and there are cases finding Establishment Clause violations where a judge engaged in courtroom prayer[64] or posted the Ten Commandments on the courtroom wall.[65] As for a direct challenge to the substantive utilization of religious norms or authority by a judge, however, the judiciary itself apparently, and understandably, has yet to offer a ruling.[66]

2. The Free Exercise Clause

Like the Establishment Clause, the Free Exercise Clause may also impose limits on the judicial use of religious values, particularly in relation to the parties to a case. Under the doctrinal regime of *Employment Division v. Smith*,[67] government actions that are generally

63. *See* Mark Langford, *Judge Denies Death Row Inmate's Request for New Hearing*, UPI, Oct. 12, 1993 (available on Lexis) (noting William Kunstler's objection to a state judge's signature of a death warrant with a "happy face," which the judge claimed was a symbol of his religious faith, and reporting that "Kuntsler said the use of such a symbol showed the judge's 'born-again Christianity' and 'religious motivations,' violating the constitutional requirement of separation of church and state").

64. North Carolina Civil Liberties Union Found. v. Constangy, 947 F.2d 1145 (4th Cir. 1991) (holding that a judge's practice of beginning sessions with a prayer violated the Establishment Clause), *cert. denied*, 505 U.S. 1219 (1992). *Compare* Hill v. Cox, 424 S.E.2d 201, 206-07 (N.C. Ct. App. 1993) (essentially side-stepping the issue by holding that a trial judge's prayer request—that all individuals in the courtroom join him "as we invoke the blessing of the Almighty that what we do this date might be guided by his hand and further that what we do might be equitable to our fellow man"—amounted to harmless error).

65. *See* Alabama *ex rel.* Pryor v. ACLU of Ala., No. CV 95-919-PR (Montgomery County Circ. Ct. Feb. 10, 1997) (holding that an Alabama trial judge's two hand-carved plaques of the Ten Commandments, hung on the wall behind his bench and visible from any position in the courtroom, especially from the jury box, violate the Establishment Clause of the U.S. Constitution and the Alabama Constitution), *judgment vacated and appeal dismissed on jurisdictional grounds*, Nos. 1951975, 1960572, 1960839, and 1960927, 1998 WL 21985 (Ala. Jan. 23, 1998); *see also* Harvey v. Cobb County, Ga., 811 F. Supp. 669 (N.D. Ga. 1993) (holding that the display of the Ten Commandments on a county courthouse wall violated the Establishment Clause), *aff'd*, 15 F.3d 1097 (11th Cir.), *cert. denied*, 511 U.S. 1129 (1994); Rick Bragg, *Judge Allows God's Law To Mix with Alabama's*, N.Y. TIMES, Feb. 13, 1997, at A14 (discussing the Alabama case); Derek H. Davis, *Religion and the Abuse of Judicial Power*, 39 J. CHURCH & STATE 203 (1997) (critiquing the judge's conduct in the Alabama case); Deborah Tedford, *Suit Asks To Bar Commandments from Courtroom*, HOUSTON CHRON., Dec. 11, 1997, at 39 (discussing a suit recently filed by an attorney against a Texas state court judge whose courtroom is adorned with a poster of the Ten Commandments).

66. For further analysis, especially under the *Lemon* test, see Idleman, *supra* note 2, at 481-85.

67. 494 U.S. 872 (1990).

applicable and neutral towards religion are for the most part beyond the proscriptive reach of the Free Exercise Clause.[68] Critical to the inquiry in any given instance, therefore, is whether the judicial use of religious values can be considered generally applicable and neutral. First, it is conceivable that a judicial decision directed towards specific parties might not be considered a generally applicable government action, though the law applied would presumably be. Second, it is also conceivable, as noted under the Establishment Clause discussion, that a judge may employ religious values in a way that is not neutral towards religion, though such use may nonetheless be neutral towards the religious liberty of the claimant.[69] Obviously these are case-specific inquiries that will turn on the allegations and circumstances of each controversy.

3. The Due Process Clauses

Yet another constitutional guarantee that could limit the use of religious values is that of due process.[70] At least three due process concerns present themselves: (1) whether decisionmaking grounded in religious values or authority can be said to exhibit a rational basis or a legitimate government purpose, (2) whether such decisionmaking provides adequate notice to affected parties, and (3) whether such

68. Exceptions to this general rule include cases involving so-called hybrid claims where the party has alleged a constitutional right in tandem with the free exercise right, see *id.* at 881-82, and in cases involving the denial of unemployment compensation benefits, see *id.* at 883-84, although the latter exception may be nothing more than an instance of where the law is not actually generally applicable. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2161 (1997). It is conceivable that the former exception may be applicable where a party's right to due process or court access, along with the party's free exercise, is somehow infringed by the judicial use of religious values, but the scope and rationale of the hybrid claim concept are murky. *See generally* Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833 (1993); James R. Mason, III, Comment, *Smith's Free-Exercise "Hybrids" Rooted in Non-Free-Exercise Soil*, 6 REGENT U. L. REV. 201 (1995).

69. *Cf.* Muhammad v. Muhammad, 622 So. 2d 1239, 1248 (Miss. 1993) (concluding that a trial judge's (chancellor's) outright disagreement with the substance of a party's religious beliefs, which were considered as part of a child custody determination, was inappropriate and "served ... only to expose a view held by the chancellor that in ordinary circumstances would be present but tacit" and that reversal was not warranted because "[h]e was careful to point out in the opinion and in several later stages of the proceedings that religious doctrine and beliefs in and of themselves would play no part in his decision"), *cert. denied*, 510 U.S. 1047 (1994).

70. *See* U.S. CONST. amend. V (providing, as interpreted, that the federal government shall not deprive any person "of life, liberty, or property, without due process of law"); *id.* amend. XIV (providing, as interpreted, that state and local governments shall not "deprive any person of life, liberty, or property, without due process of law").

decisionmaking deprives the parties of an impartial or unbiased adjudicative forum.

First there is the rational basis analysis, which is the baseline level of constitutional scrutiny for all government actions, including judicial decisions. While there is obviously an institutional disincentive among judges to subject each other's decisions to the type of rationality review to which they subject every other branch or agent of government, there is no theoretical or jurisprudential bar to such scrutiny. What is particularly interesting about this prospect is that the "rationality"—really, the acceptability under a rational basis analysis—of what one might call pure moral justifications for government actions is somewhat uncertain at present.[71] In turn, the viability of religious justifications within the context of judicial decisionmaking might be jeopardized as well.

In a key passage in *Bowers v. Hardwick*,[72] the Supreme Court remarked that

> [t]he law ... is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. [The respondent] insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on that basis.[73]

The concern here is that the *Bowers* Court's acceptance of a pure moral justification as a legitimate government interest, and hence the acceptance of it as part of the rational basis equation, may become increasingly less authoritative in the years to come.[74] To the extent

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71. By "pure moral justification" I mean a justification that does not rely on temporal, material consequences (perhaps in the Millian tradition), but rather looks to metaphysical or abstract notions of ethics, whether deontological or perhaps teleological. The notion that certain conduct might be "malum in se" is congruent with the concept of pure moral justifications, as are many religious ethical mandates. Even some arguments that appear materially consequentialist—*e.g.*, homosexuality should be prohibited because it will undermine the social order—tend actually to rest on pure moral justifications—*i.e.*, that the social order as it is presently constituted is ethically good or desirable.

72. 478 U.S. 186 (1986).

73. *Id.* at 196; *see also* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (plurality opinion) (reaffirming the legitimacy of government interests in morality in the context of upholding a public indecency statute) (citing *Bowers*, 478 U.S. at 196; Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973)).

74. The notion that a pure moral justification may not be sufficient as a matter of due process was advanced several years ago in Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 402-07 (1963). Indeed, Professor Henkin articulated the issue not only as one of due process, but ultimately, in many instances, as one

Romer v. Evans,[75] for example, was in part about the illegitimacy of popular or governmental nonacceptance of homosexuality on moral grounds—which is one plausible reading of the opinion[76]—the *Bowers* principle is indeed called into serious question.[77] And to the extent that judicial decisions rest in part or in whole on religious justifications, their ability to satisfy the rational basis test could become gradually diminished.[78]

In addition to mandating that government actions exhibit a rational basis, "[d]ue process requires people to have notice of what the law requires of them so that they may obey it and avoid its sanctions.... [I]f access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to

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of the prohibition against the establishment of religion. *See id.* at 407-11.

> It is time to begin to examine—if only in order to justify—the right of constitutional government to legislate morality which has no secular, utilitarian, or social purpose. It is time to attempt to define and articulate the extent to which the religious antecedents of our values may continue to motivate our governments in the enactment and enforcement of law."

Id. at 414. The question today, of course, is whether Professor Henkin's is an idea whose time has in fact come—and, if so, what limits this will place on the relationship between religion and judging.

75. 116 S. Ct. 1620 (1996).

76. *See id.* at 1629-37 (Scalia, J., dissenting); Able v. United States, 968 F. Supp. 850, 852, 859, 860, 864 (E.D.N.Y. 1997) (invalidating under the equal protection component of the Fifth Amendment the military's so-called "don't ask, don't tell" policy, 10 U.S.C. § 654, concluding that "[i]mplicit in th[e] holding" of *Romer* "is a determination that ... discrimination [against homosexuals], without more, is either inherently irrational or invidious" and that the disparate treatment of homosexuals under 10 U.S.C. § 654(b) was based on nothing more than "private" or "subjective" or "irrational prejudice") (repeatedly citing *Romer*, 117 S. Ct. at 1627). *See also* Larry Catá Backer, *Reading Entrails*: Romer, VMI, *and the Art of Divining Equal Protection*, 32 TULSA L.J. 361, 387 (1997) ("[I]t is difficult to escape the conclusion that there is no rational relationship between the criminalization of private, adult consensual homosexual activity and any legitimate state policy, if such professed policies are subject to the kind of strict-rational-basis-scrutiny exercised in *Romer*. This is especially so if we understand broadly the Court's admonition that moral disapproval, disapproval of a lifestyle that is distasteful, is insufficient as a basis for legislation which negatively impacts the target."). For an argument that *Romer* did not necessarily undermine this aspect of *Bowers*, see Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, the Culture War, and* Romer v. Evans, 72 NOTRE DAME L. REV. 345, 350-52 (1997).

77. In this regard, see also Smith, *supra* note 18, at 206 (relating a leading constitutional scholar's assertion that laws criminalizing consensual adult homosexual conduct could not possibly pass a rational basis test because such laws, in that scholar's view, are grounded in religious belief and because religious belief cannot provide a legitimate basis for law).

78. For a discussion of the marginalization of religion as irrational within the context of legal progressivism, see Ariens, *supra* note 20, at 77-78. For a general overview of the notion of permissible government objectives, see ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 96-97 (1989).

which due process entitles them."[79] In this regard, the use of religious values in the context of judicial decisionmaking can be especially problematic if the religious values are employed normatively or authoritatively but, as would likely be the case, are not found as part of the formal law of the jurisdiction. It is true, of course, that judges often advert to principles and customs that are not always evident from the extant legal landscape, whether or not they purport to be engaged in common law reasoning. But it is questionable whether religious values—as religious values and not simply generic data—are of the same order as these principles and customs, either in terms of their intrinsic nature or in terms of their influence on the judge's decisionmaking. If not, then their use could be seen as problematic from the standpoint of notice, although the prospect of a party litigating and prevailing on such a ground does seem rather remote.

Lastly, due process requires that one have access to an impartial or unbiased adjudicative forum. Insofar as religious values are perceived as personal biases on the judge's part, their invocation by the judge may violate this aspect of due process. Consider in this respect the decision in *United States v. Bakker*,[80] which addressed a federal district judge's remarks concerning the defendant—fallen televangelist Jim Bakker. At sentencing, the judge declared that the defendant "had no thought whatever about his victims and *those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests.*"[81] On appeal, the Fourth Circuit, disturbed by the first-person phrase "those of us," held that the judge violated due process by "tak[ing] his own religious characteristics into account in sentencing."[82] According to the court:

> Our Constitution, of course, does not require a person to surrender his or her religious beliefs upon the assumption of judicial office. Courts, however, cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it. Whether or not the trial judge has a religion is irrelevant for purposes of

79. Building Officials & Code Adm'rs v. Code Technology, Inc., 628 F.2d 730, 734 (1st Cir. 1980). *See generally* Joseph E. Murphy, *The Duty of the Government To Make the Law Known*, 51 FORDHAM L. REV. 255 (1982).

80. 925 F.2d 728 (4th Cir. 1991)

81. *Id.* at 740.

82. *Id.*

sentencing.[83]

To what extent does *Bakker* speak to the constitutionality of using religious values? On the one hand, the judge's error was not the influence of his own religious values per se, but rather the influence of his own religiousness. (Had the judge adverted generally to the adverse effects of Bakker's conduct on religion or religious adherents at large, it appears, from the opinion at least, as if no due process violation would have occurred.) Thus the case could be altogether irrelevant. On the other hand, at some point one's religious values and one's religiousness may be indistinguishable, and it is not clear, in this regard, that the Fourth Circuit would have been less troubled had the judge stated that Bakker's conduct was especially grievous because it violated the judge's own understanding of Christian morality.

B. Philosophical and Jurisprudential Limits

Various commentators, such as Kent Greenawalt and Michael Perry, have proposed that judges also ought to conform their decisionmaking to certain philosophical or jurisprudential norms associated with the American political and legal order.[84] Several of these proposals are fairly conventional and have no unique relevance to religion, while others have been developed or refined specifically to address the relationship between religion and law. At bottom, however, all of them can be conceptualized as limits on the ability of judges to employ religious values or reasoning in the decisional process.

One such proposed limit is that religious values may be used only when more conventional legal authority is partially or fully indeterminate,[85] and relatedly they should not be used either as the

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83. *Id.*

84. *See, e.g.*, GREENAWALT, *supra* note 19, at 141-50; MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 102-04 (1997).

85. *See* GREENAWALT, *supra* note 19, at 149 (maintaining that "on exceptional occasions the indecisiveness of legal and public reasons will be sufficiently apparent to allow a judge to make a self-conscious use of personal convictions"); PERRY, *supra* note 84, at 102-04 (condoning judicial reliance on religious premises where both the relevant law and the relevant public values are underdeterminate). One commentator, in a carefully peer-reviewed periodical read mostly for its articles, appears to suggest that religious norms are inherently external to the law, although certain nonreligious moral norms are not, and that this is why judicial reliance on religious values or authority would be improper or unconstitutional. *See* David Barringer, *Holier than Law*, PLAYBOY, May 1997, at 49, 50 ("Judges are expected to be moral agents. But they must be moral agents within the authority of the law. They invite a new era of religious justice when they rely on external authority, whether it be Moses, Muhammad or Mammon.").

leading justification[86] or as the exclusive justification (*i.e.*, without a parallel secular justification).[87] More generally, some have proposed that religious values can only be used if they involve reasoning that is accessible or available on a broad scale, or if they involve sources of authority which, in the words of Professor Daniel Conkle, can "be tested and put in conversation with competing sources."[88] As one commentator recently expressed the idea:

> While other citizens have an absolute freedom to make decisions according to their religious principles, judges are required to base their judicial decisions primarily upon legal precedent and established legal principles. This is not to say that a judge's personal convictions and beliefs will not enter the judicial decision-making process at all (it would be impossible to wholly eradicate personal belief or bias), but a judge should not let his religious beliefs be the primary guiding force behind his decision... . [J]udges should decide cases on bases available to all; only when the pool of common resources is lacking should they permit their personal moral and religious convictions to enter the decision-making process.[89]

Relatedly, it has been suggested that when religious values or authorities are employed, they should not necessarily appear in a judge's written opinion, again because of concerns about their accessibility or availability.[90] A final possible limit, one based more on

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86. *See* Carter, *supra* note 16, at 943 ("[W]e ought to be uncomfortable with the idea that the religiously devout judge will proceed *at once* to her religious values—but only for the same reasons that we ought to be uncomfortable with the idea that *any* judge will proceed at once to her own values.").

87. *See* PERRY, *supra* note 84, at 103 ("The nonestablishment norm forbids—*properly* forbids, in my view—government, including the judicial branch, to rely on a religious premise in making a choice if no plausible secular premise supports the choice. If a plausible secular premise *does* support the choice, however, government, including the judicial branch, may rely on a religious premise.") (footnote omitted); *id.* at 157 n.150 (reiterating the same point); Griffen, *supra* note 1, at 519-20 ("The devout judge may not, and should not, substitute religious conviction for judicial analysis when existing legal material is at hand... . The devout judge who relies on religious conviction as the sole basis for judicial decision-making is acting as a prelate, not as a jurist. The judge whose notion of justice includes a sensitivity for the interplay of religious and other values in the decision-making process is reasoning judicially, even when including religious values in the reasoning.").

88. Conkle, *supra* note 3, at 530; *see also* GREENAWALT, *supra* note 19, at 149 (favoring "shared premises and ways of reasoning" unless genuinely unavailable). For a critique of the accessibility requirement, see Maire, *supra* note 29, at 146-50.

89. Derek H. Davis, *Religion and the Abuse of Judicial Power*, 39 J. CHURCH & STATE 203, 210-11 (1997).

90. *Compare* GREENAWALT, *supra* note 19, at 150 ("Since different judges will have different views, ... [religious] reasons would have no comfortable place in a majority

substance than form, is that judges may advert only to those religious values that accord with the substantive commitments of our political system, such as liberty, equality, and toleration.[91]

These proposed restrictions obviously vary in theoretical and practical defensibility, and the more controversial ones have not gone without challenge.[92] Indeed, Judge Griffen's piece is itself a counterpoint to some of these proposals. While a thorough overview of the debate is beyond the scope of these comments, two points deserve brief mention. First, much of the validity of these limits turns, once again, on the definition or conceptualization of religion: the broader it is, the more far-reaching will be the restriction, even to the point that judicial decisionmaking could be reduced to a rhetorical formalism that defies the very notion of reasoned judgment. Second, many of these limits, though derived from political or legal philosophy, can also be expressed as prudential restrictions. And although expressing them as prudential rather than pure philosophical limitations may render them less theoretically compelling, it may also render them less problematic in two important respects. For one thing, they may appear less offensive to the observer whose vision of political or legal philosophy differs from those advocating the limits, which is significant to the extent that these are matters on which persons of intelligence, reason, and integrity can disagree. For another thing, prudential concerns are characteristically left to the discretion of the decisionmaker on a case-by-case basis, and such an arrangement—though perhaps a compromise of principle—may for many be substantially less troubling than a categorical rule of partial or wholesale exclusion. Taking into account the context and circumstances of each adjudication, judges would be empowered to employ (or not to employ) religious values as they best see fit, presumably in a manner no different from their treatment of other types of formal and informal authority.

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opinion... . [E]ven when the opinion represents the voice of a single judge, the opinion should symbolize the aspiration of interpersonal reason and be limited to public reasons.") *and* Gottschall, supra note 18, at 534-35 (arguing that "it is inappropriate and imprudent" to use religious sources to justify a judicial decision, largely because such justification could preclude a "dissent[ing]" reader from "access[ing] and assent[ing] to [the decision] as fully as anyone else") *with* PERRY, *supra* note 84, at 104 (questioning the tenability of Greenawalt's position).

91. *Cf.* RONALD F. THIEMANN, RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY (1996) (generally advocating such congruence in the assessment of religious influences in law and politics).

92. *See, e.g.*, Carter, *supra* note 16, at 940-44 (rejecting the idea that religious values can be categorically excluded from judicial decisionmaking, in part because they cannot be distinguished from comparable nonreligious values).

C. Professional Ethical Limits

One might also ask whether a judge's use of religious values could ever contravene the formalized professional ethics of the judicial office, such that a judge might actually be disciplined for such use. While it is probably fair to conclude that extrajudicial statements on religion would in general not violate such rules,[93] the invocation of religion or religious authority in judicial decisionmaking or in a written judicial opinion may present a more difficult issue. Principally this is because the processes of decisionmaking and reasoning are so central to the essence of the judicial task.

At first blush, this centrality might appear to favor regulation in order to preserve the integrity of the judicial process. After all, how better to protect this process than to safeguard its core components? It is arguably because of this centrality, however, that resort to regulatory and disciplinary measures could be problematic insofar as they might constitute a direct attack on judicial independence. The substance and structure of judicial decisions, though not without any constraints, are by and large the domain of the judge, and the legal system—the judiciary itself in many instances, not surprisingly—has gone to great lengths to shield the judicial decisional process from untoward encroachments. Hence, judges are generally immune from liability for conduct undertaken in their judicial capacity, no matter how egregious such conduct may seem.[94] And under the separation-of-powers

93. *See* Michael Stokes Paulsen & Steffen N. Johnson, *Scalia's Sermonette*, 72 NOTRE DAME L. REV. 863, 870-76 (1997) (concluding that Justice Scalia violated no such rules in his April 9, 1996, talk at a prayer breakfast, sponsored by the Christian Legal Society and held at the First Baptist Church in Jackson, Mississippi, in which he defended the intellectual integrity of the Christian faith). This is not to say that there are not general limits on the extrajudicial speech of judicial candidates, and that these limits might not incidentally impact a candidate's ability to speak on religion. *See generally* Talbot D'Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TUL. L. REV. 611 (1987); Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 36 SYRACUSE L. REV. 1181 (1986); Symposium, *The Sound of the Gavel: Perspectives on Judicial Speech*, 28 LOY. L.A. L. REV. 795 (1995). Nor is it to say that there are not prudential limits on extrajudicial speech involving religious matters. It is not clear, for example, that a municipal judge in Cincinnati who claims to have seen the image of Christ "every day ... in the swirls of a smooth marble pillar on the second floor of the Hamilton County Courthouse," see *Judge Sees Christ's Face on Court Pillar*, SAN JOSE MERCURY NEWS, Mar. 31, 1994, at A7, should necessarily make public this information, as it might call the objectivity or impartiality of the local judiciary into question, whether or not it is true.

94. *See* Cok v. Cosentino, 876 F.2d 1, 2 (1st Cir. 1989) (per curiam) ("This immunity applies no matter how erroneous the act may have been, how injurious its consequences, how informal the proceeding, or how malicious the motive.") (citing Cleavinger v. Saxner, 474 U.S. 193, 199-200 (1985)).

doctrine, the legislative branch is generally precluded from interfering with the essential aspects of the federal judicial process.[95] It follows from this tradition that disciplinary interference with the methodology and substantive aspects of a judge's decisionmaking should be viewed, at the very least, as an extraordinary device, and it is doubtful whether a judge's use of religion is so special that it alone should be capable of triggering this device.[96]

To be sure, there may be instances where a judge should be vulnerable to professional discipline for his use (or misuse) of religion, *e.g.*, where such use jeopardizes the apparent impartiality of his office or manifests a thorough disregard for the rule of law. Thus, a New York judge was admonished by the State Commission on Judicial Conduct for criticizing a Jewish mother who sought custody of her children on Christmas Eve and Christmas Day, because the criticism "gave the appearance that his decision was based on his views that a Jewish family should not observe Christmas."[97] And a judge in Minnesota was reprimanded by that state's Board on Judicial Standards after explaining to a man charged with animal abandonment (whom he fined only one dollar) that "God ordained the killing of animals" and that God "himself killed animals to provide skins for Adam and Eve after they sinned."[98] But it is important to note that the actionable transgressions in these cases were not the judicial reliances on religion per se, but rather the accompanying abdication of impartiality and

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95. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995) (citations omitted) (holding that the Court will not "give effect to a statute that was said '[t]o prescribe rules of decision to the Judicial Department of the government in cases pending before it'"; that "Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch"; and that the federal judiciary has "the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that 'a judgment conclusively resolves the case' because 'a 'judicial Power' is one to render dispositive judgments'").

96For an enlightening discussion of the tension between the need to protect the independence of judicial decisionmaking and the need to prevent the possible judicial misuse of religion, see *In re* Quirk, No. 97-O-1143, 1997 WL 765985, at **4-**8 (La. Dec. 12, 1997) (refusing to impose discipline on a judge who repeatedly sentenced misdemeanor offenders to church attendance as a condition of probation—even though such sentencing might have violated the religion guarantees of the U.S. and Louisiana Constitutions and allegedly transgressed Canons 2A, 3A(1), and 3A(4) of the Code of Judicial Conduct—because doing so in the absence of a clear violation of these constitutional provisions would unduly undermine judicial independence as embodied in Canon 1 of the Code).

97. *See* Martin Fox, *Religious Remarks by Nassau Judge Draw Judicial Panel's Admonition*, N.Y. L.J., Sept. 2, 1992, at 1.

98. *See Judge Reprimanded for Religious Statements*, WASH. TIMES, June 28, 1991, at B8.

effective repudiation of positive law, respectively.[99] Absent such transgressions, the use of religion in a judicial decision, in and of itself, should arguably not be the target of professional disciplinary action, or at least no more so than should a judge's use of comparable secular norms or authority.

D. Prudential Limits

Were there no constitutional, philosophical, or professional barriers to the outright use of religious values by judges, there would doubtless remain various limits stemming from the judicial virtue of prudence. As a general matter, a reputation of judicial excellence is rarely gained by one who, no matter how intellectually and rhetorically gifted, does not also possess an appreciation of the prudential parameters of his office. To the extent these parameters, though not found in any code or regulation, guide and constrain the conduct and decisionmaking of judges, they ought to be considered as they might limit the role of religion in the judicial process.

Addressed here rather briefly will be three prudential limits, expressed in the form of affirmative requirements—those of competency, efficacy, and clarity. First, a judge should invoke religious values only to the extent that he is competent to do so.[100] Although this rule ought to apply whether or not the religious values are made explicit through a written opinion, arguably their written expression does demand greater circumspection. Given its transcendent significance and rhetorical force, a judicial assertion that is explicitly informed by religion should be made cautiously and carefully, with unusual regard for the possibility of error. This is especially true, one might suppose, with regard to decisions that involve potentially extraordinary

99. A more recent example of a judge abandoning positive law in favor of religious norms is United States v. Lynch, 952 F. Supp. 167 (S.D.N.Y. 1997), in which a federal district judge acquitted two abortion protesters from criminal contempt charges in part because of "the prerogative of leniency which a fact-finder has to refuse to convict a defendant, even if the circumstances would otherwise be sufficient to convict." *Id.* at 171. Though he avoided expressly grounding the decision in terms of religion and natural law as such—a basis explicitly advocated by the defendants, see United States v. Lynch, 104 F.3d 357 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1436 (1997)—Judge Sprizzo did invoke essentially (and at length) the tradition of higher law, including moral opposition to American slavery, to the Nazi regime, and to human rights violations in Bosnia. *See Lynch*, 952 F. Supp. at 170-72 & nn.3-4. For commentary, see John C. Klotz, *Abortion Decision Undercuts Rule of Law*, NAT'L L.J., Feb. 24, 1997, at A23; Michael W. McConnell, *Breaking the Law, Bending the Law*, FIRST THINGS, June-July 1997, at 13.

100. *See* Idleman, *supra* note 2, at 485-86 (explaining why a concern about competence should not bar the judicial use of religious values altogether).

consequences, such as those concerning life-and-death issues.[101]

Second, a judge should guard against the deployment of religion or religious authority in the judicial opinion when such deployment would, for whatever reason, be inefficacious.[102] Needless to say, this is good advice as to *any* form of authority that could be included in a judicial decision. As with competence, however, it is especially relevant to religious references given their potential potency and the attendant risk that such invocations might consequently undermine the persuasiveness of the remainder of the decision. Not only that, but the gratuitous or excessive use of religion in judicial decisions is, perhaps paradoxically, one sure way of diluting the peculiar force of religious values or symbolism in cases where they are relevant or otherwise compelling. To the extent, in fact, that religious norms in a judicial decision can be the juridical equivalent of dropping an atomic bomb—if effective, they are surely more powerful than run-of-the-mill temporal authority—prudence dictates that such norms be sparingly and strategically deployed.

Third and lastly, a judge should use religious values only to the extent he can explain their inclusion and significance with clarity. Like efficacy, clarity of reasoning is not a novel requirement in the drafting of judicial opinions,[103] but again the special nature and authority of religious values may warrant its emphasis when such values are employed. One might consider in this regard the decision of the Pennsylvania Superior Court in *Wikoski v. Wikoski*,[104] which addressed a claimant's assertion that the state statutory provision for no-fault divorce violated his religious liberty under article I, section 3, of the Pennsylvania Constitution. In holding against the claimant, the court in typical fashion reviewed the case law of Pennsylvania and several other jurisdictions. At the close of its opinion, however, the court then stated

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101. *See, e.g.*, Daniel A. Rudolph, Note, *The Misguided Reliance in American Jurisprudence on Jewish Law To Support the Moral Legitimacy of Capital Punishment*, 33 AM. CRIM. L. REV. 437, 439-40 & nn.19-21, 460-61 (1996).

102. *See* Maire, *supra* note 28, at 133 (questioning the utility or efficacy of citing Scripture in a judicial opinion, at least in a legalistic way, as part of a judge's use of religious values). "Such citations may in a given case be apt, but an inordinate reliance upon the 'rules' of Scripture has proved to be no more fruitful in moral discourse than has the reliance upon the 'rules' of law by the legal positivists proved fruitful in legal discourse." *Id.* Elsewhere I have argued that the omission of relevant but inefficacious or redundant legal authority may be a justifiable judicial practice, despite a possible resulting loss of candor. *See* Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1383-84 (1995).

103. *See* Newman, *supra* note 17, at 212-13.

104. 513 A.2d 986 (Pa. Super. Ct. 1986).

that, while it hoped the claimant would be persuaded by its analysis thus far, "[i]f not, then we believe that the only authority best understood by [the claimant] ... is to quote scripture."[105] And quote scripture it did, reprinting in full the render-to-Caesar passage of *Matthew* 22:15-22.[106] What is truly interesting for our purposes is that the court then included in a footnote the following disclaimer: "It is not intended that the above quote from scripture be a legally binding precedent of this Court."[107] Whether or not the court's handling of scripture was competent or its use of scripture necessary, what is significant here is that the court at least attempted to make clear that, first, its citation was largely for a party's benefit and, second, the passage itself does not have independent precedential force within the jurisdiction—though of course one may still wonder exactly what legal value it does possess.

III. CONCLUSION

The judicial use of religious values will never be free from concern or criticism, even among those who do not find it categorically objectionable. This is attributable in part to widespread antecedent disagreement about the concepts and processes involved, and in part to prospective wariness about the limits of such use. Judge Griffen, in this author's opinion, has ably defended the inclusion of religious influences in judicial decisionmaking as a general matter, and these comments have simply attempted to discern the foundational aspects and functional limits of his position. How far judges themselves are willing to go, either in terms of explicitly referencing religious values in their decisionmaking (where such values are influential) or in terms of recognizing formal limits on the use and articulation of such values, is not certain, and plainly there are prudential and institutional reasons why judges might not pursue either practice with much vigor.[108] Be that as it may, these are important matters for judicial and academic discussion, and one hopes that Judge Griffen's presentation and the symposium at which it was delivered are merely the beginning, and not the end, of this discussion.

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105. *Id.* at 989.

106. *See id.*

107. *Id.* at 989 n.7.

108. In this regard, Judge Griffen's presentation is not only enlightening for its substance, but extraordinarily significant for its candor and its self-reflectiveness.