
RONALD DWORKIN, RELIGION, AND NEUTRALITY

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INTRODUCTION	1241
I. DWORKIN'S NEUTRALITARIANISM	1241
II. THE FLUIDITY OF NEUTRALITY	1243
III. THE SOCIAL BASES OF NEUTRALITY	1245
IV. WITHOUT GOD	1250

INTRODUCTION

Ronald Dworkin's posthumously published book, *Religion Without God*, has two theses. One of these, neutrality toward all conceptions of the good, is familiar from his earlier work, has been enormously influential, and is deeply mistaken. The other, about the common ground that unites religious and nonreligious people, is new, and although it may not attract a large following, it is correct and enormously important.

I. DWORKIN'S NEUTRALITARIANISM

Dworkin is well known for his formulation of what I shall call neutralitarianism¹: “[G]overnment must be neutral on what might be called the question of the good life,” and this meant that “political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life.”² He showed that this position is consistent with a number of liberal positions, but said almost nothing about how it could be justified.³ Other prominent theorists offered similar formulations,⁴ but Dworkin's was the starkest and most succinct.

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¹ This useful one-word term for what has more commonly been called “liberal neutrality” was apparently first used in Talbot Brewer, *A Review Essay on John Rawls' Justice as Fairness: A Restatement*, 4 HEDGEHOG REV. 100, 101 (2002) (reviewing JOHN RAWLS, *JUSTICE AS FAIRNESS* (2001)).

² RONALD DWORKIN, *Liberalism, in A MATTER OF PRINCIPLE* 181, 191 (1985).

³ Such justifications as he did offer were subject to withering criticisms, which he never answered. See ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 83-109 (1993); MICHAEL PERRY, *MORALITY, POLITICS, AND LAW* 66-67 (1988); GEORGE SHER, *BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS* 92-104 (1997). The argument operates in part by making unsustainable claims based on Dworkin's theory of external preferences. See ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL*

Many of these writers defended neutralitarian liberalism as a generalization from the idea of religious liberty. John Rawls claimed that the “intuitive idea” of his theory was “to generalize the principle of religious toleration to a social form.”⁵ Bruce Ackerman: “The first principle [of Neutrality], a generalization of the Establishment and Free Exercise clauses of the Constitution, forbids citizens from justifying their legal rights by asserting the possession of an insight into the moral universe intrinsically superior to that of their fellows.”⁶ David Richards: “[T]he moral basis of the free exercise clause, properly understood, is a negative liberty immunizing from state coercion the exercise of the conceptions of a life well and ethically lived and expressive of a mature person’s rational and reasonable powers.”⁷ Charles Larmore:

Liberalism . . . depends on moral commitments, but on ones that are neutral with respect to the general ideals of individualism and tradition. . . . It becomes again what it was in early modern times with regard to religious controversy: an appropriate response to the problem of reasonable disagreement about the good life.⁸

Gerald Gaus:

[L]iberal political theory removes certain proposals from the political agenda, not simply on the practical ground that they are too divisive, but because they have been defeated in public discussion. This liberal conviction – that impositions of religion were defeated – evolved into a more general conviction that justifications for imposing ways of living were also defeated.⁹

Dworkin’s final formulation of neutralitarianism makes a similar move. A defense of freedom of religion, he argues, must “identify some particularly important interest people have, an interest so important that it deserves special

EQUALITY 18-24 (1996).

⁴ BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 11 (1980) (“No reason is a good reason if it requires the power holder to assert that his conceptions of the good is better than that asserted by any of his fellow citizens”); CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* 44 (1987) (arguing political decisions should “be justified without appealing to the presumed intrinsic superiority of any particular conception of the good life”); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 312 (1974) (stating that in the liberal utopia, “people are at liberty to join voluntarily to pursue and attempt to realize their own vision of the good life in the ideal community but . . . no one can *impose* his own utopian vision on others”); JOHN RAWLS, *A THEORY OF JUSTICE* 94 (1971) (“Nor does [justice as fairness] try to evaluate the relative merits of different conceptions of the good.”).

⁵ See RAWLS, *supra* note 4, at 205-06 n.6; see also *id.* at 220 (“[T]he principle of equal liberty . . . which arose historically with religious toleration can be extended to other instances.”).

⁶ BRUCE ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 99 (1984) (citation omitted).

⁷ DAVID RICHARDS, *TOLERATION AND THE CONSTITUTION* 140 (1986).

⁸ CHARLES LARMORE, *THE MORALS OF MODERNITY* 144 (1996).

⁹ GERALD F. GAUS, *JUSTIFICATORY LIBERALISM* 170 (1996).

protection against official or other injury.”¹⁰ There is, however, no good reason for singling out theistic religion for special treatment, “[s]o we must expand that right’s scope to reflect a better justification. How?”¹¹ One can try to expand the definition of religion, but then its outer boundaries are uncertain. A better solution is “abandoning the idea of a special right to religious freedom with its high hurdle of protection and therefore its compelling need for strict limits and careful definition.”¹² Instead, we should endorse a more general right to “ethical independence”: government must never restrict freedom just because it assumes that one way for people to live their lives – one idea about what lives are most worth living just in themselves – is intrinsically better than another, not because its consequences are better but because people who live that way are better people.¹³

Religious liberty is an imperfect anticipation of this right. “We know why, historically, the right was expressed as limited to religion, but we insist that we make the best contemporary sense of the right, and supply the best available justification for it, by taking religious tolerance as an example of the more general right.”¹⁴

This is not much of an argument. One option is summarily rejected and a different one substituted with no attention to the rest of the menu. A lot of neutralitarian philosophizing follows this pattern: it neglects the kind of neutrality that actually exists in American law.

II. THE FLUIDITY OF NEUTRALITY

The generalization of neutrality from religious liberty misapprehends the core case upon which it is based. The Anglo-American tradition of religious liberty itself rests on a controversial conception of the good: the idea that religion is valuable and that legal rules should be crafted for the purpose of protecting that value.¹⁵

Disestablishment of religion entails a *kind* of neutrality toward *certain* contested conceptions of the good. But it is a neutrality whose justification itself has rested on a contested conception. Perhaps that state of affairs is unjust, but the case for holding it to be so can find no support in the tradition of religious toleration.

Liberalism, at its core, is the commitment to making the goal of politics freedom, rather than the preservation of an aristocracy, or service to God, or the triumph of the nation or race over its enemies, or world socialism, or the glory of the king. Freedom means that the state protects some sphere of choice

¹⁰ RONALD DWORKIN, *RELIGION WITHOUT GOD* 111 (2013).

¹¹ *Id.* at 117.

¹² *Id.* at 132.

¹³ *Id.* at 130.

¹⁴ *Id.* at 133.

¹⁵ ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY passim* (2013).

and is neutral as to the choices made in that sphere.¹⁶ The liberal position seeks to abstract away from some disagreement, to find a common denominator that will appeal to people who otherwise radically disagree, and that is neutral with respect to the objects of their disagreement. Any liberalizing argument will be an argument for some kind of neutrality.

Some goods – prototypically, the good of salvation by Christ – are bad for the state to pursue. We need filters to filter out bad goods from government decision-making. But the filters may be – in fact, generally have been – motivated by considerations that themselves violate neutralitarianism. Thus, neutralitarianism blots out some of the reasons for deeming some goods to be bad for politics.

One of the many ways in which government can go wrong is to take a position on some question that it should abstain from deciding.¹⁷ The classic example is the question of which (if any) religion is true. The idea of neutrality (of which neutralitarianism is only one extreme formulation) holds that government ought to avoid this pathology. Claims for neutrality will always be claims that the state should not try to answer authoritatively certain questions. There is probably an infinite number of ways in which the field of abstinence might be specified. The range of possible reasons and combinations of reasons for any particular specification yields a lush profusion of possible neutralities.

Here are some typical arguments for understanding the political good in an abstract and inclusive way. *The argument from moral pluralism* holds that there are many good ways of life and that the state should not prefer any of these to any other. *The argument from futility* holds that some perfectionist projects are doomed to failure. *The argument from incompetence* holds that the state should be neutral about things that it is likely to get wrong. *The argument from civil peace* proposes that some issues be removed from the political agenda in order to avoid destructive controversy. *The argument from character* argues that neutrality is necessary, either because deviations from it will damage the character of state actors, or because a regime of freedom with respect to the issue in question will be good for the character of citizens. Finally, *the argument from dignity* argues that some political projects fail to properly respect citizens' capacity for free choice.¹⁸

¹⁶ If liberalism is understood in this way, then it is not clear that Dworkin is a liberal. His equality-based commitment to liberalism is fragile, since civil liberties will give way when they come into tension with equality. The fragility was most strikingly exposed by Rae Langton. See RAE LANGTON, *Whose Right? Ronald Dworkin, Women, and Pornographers*, in *SEXUAL SOLIPSISM: PHILOSOPHICAL ESSAYS ON PORNOGRAPHY AND OBJECTIFICATION* 117 (2009).

¹⁷ In the following four paragraphs, I draw on my discussion in Andrew Koppelman, *The Fluidity of Neutrality*, 66 REV. POL. 633 (2004), which is restated in revised and compressed form in KOPPELMAN, *supra* note 15, at 15-26.

¹⁸ KOPPELMAN, *supra* note 15, at 18.

Each of these is capable of a huge number of specifications. Each can be, and typically is, combined with one or more of the others so that they are mutually reinforcing and compensate for each other's weaknesses. The argument thus constituted will function as a filter that filters out bad goods. But there is no way, in advance of the particulars, to say just how the filter will operate, or what will or will not be filtered out.

Different versions of these arguments have persuaded different people. Everyone probably accepts most of them, at least in some form, as applied to some question. But each is contingent on the ideas of the good that animates it. Thus, even though they are all arguments for some kind of neutrality, they all violate neutralitarianism. For example, the idea of moral pluralism will not tell us which ways of life are appropriately placed within the set of possible good lives. The fact that a set includes members *A* through *W* does not entail either the inclusion or the exclusion of *X*. The argument for same-sex marriage that actually persuades people, for instance, rests not on Dworkinian neutralitarianism,¹⁹ but on an argument from moral pluralism: same-sex relationships are as valuable as heterosexual ones. That claim needs to be defended, and proposed distinctions must be rebutted on the merits.²⁰

III. THE SOCIAL BASES OF NEUTRALITY

American religious neutrality proceeds from the premise that government may not take a position on contested religious questions. But the state is permitted to favor and regard as a good religion in general.²¹ Religion, as such, is routinely given special treatment. Quakers' and Mennonites' objections to participation in war have been accommodated since colonial times. Such accommodations are ubiquitous and very popular.²² Americans *like* religion, even minority religions. "When Congress enacted the Religious Freedom Restoration Act (RFRA), which required states to grant such exemptions, the bill passed unanimously in the House and drew only three opposing votes in the Senate."²³ After the Supreme Court struck down the Act as exceeding

¹⁹ See Ronald Dworkin, *Three Questions for America*, N.Y. REV. BOOKS, Sept. 21, 2006, at 28 (making a neutralitarian argument for same-sex marriage).

²⁰ See, e.g., Andrew Koppelman, *Judging the Case Against Same-Sex Marriage*, 2014 U. ILL. L. REV. 431.

²¹ See KOPPELMAN, *supra* note 15, at 15-45, 78-119.

²² See *id.* (describing various religious groups' requests for exemptions from zoning, drug, and discrimination laws).

²³ Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 160 (1997).

Congress's powers, many states passed their own laws to the same effect.²⁴ RFRA remains valid as applied to federal law.²⁵

Disestablishment, too, is based on a judgment that religion is especially valuable. One of its central purposes has always been protecting religion from corruption by the state.²⁶ James Madison, the principal author of the First Amendment, argued that:

[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution.²⁷

The same theme turns up in numerous Supreme Court opinions. Just one example is the Court's declaration in *Engel v. Vitale*²⁸ that under the Establishment Clause, "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."²⁹

It is, of course, possible to conceptualize disestablishment more abstractly than this. That is what the neutralitarians propose to do. But that more abstract understanding of disestablishment is the death of free exercise, which is predicated on an understanding of religion as distinctively valuable.

In short, if the state must be neutral toward all competing conceptions of the good, then the prevailing conceptions of both disestablishment and free exercise must be discarded. Both rest on the premise that religion as such is good.

Dworkin thinks it is arbitrary to single out religion for special treatment. "[I]s there any reason it should be thought wrong to take sides between orthodox theistic religions, but not to take sides between alternate views of what counts as living well?"³⁰ But he stays not for an answer. He makes no attempt to canvass responses to his question.

Neutralitarianism made a big splash in liberal political theory, even though almost no substantive arguments for it were developed. Dworkin, as we have seen, hardly tried. Ackerman, the other writer who made neutralitarianism a

²⁴ For a survey, see Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 211-12 (2004).

²⁵ See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (applying RFRA and creating an exemption from the Controlled Substances Act, a federal law).

²⁶ See KOPPELMAN, *supra* note 15, at 46-77.

²⁷ JAMES MADISON, Memorial and Remonstrance Against Religious Assessments (1785), reprinted in 2 THE WRITINGS OF JAMES MADISON 183, 187 (Gaillard Hunt ed., 1901).

²⁸ 370 U.S. 421 (1962).

²⁹ *Id.* at 431-32 (quoting MADISON, *supra* note 27, at 187).

³⁰ DWORKIN, *supra* note 10, at 115.

central theme of his work, gestured toward a cluster of arguments without carefully defending any of them.³¹ More substantial efforts have been made lately, preeminently by Gaus,³² but neutralitarianism did not need these in order to generate a major literature.³³

Why, then, has neutralitarianism become so influential?

Abstraction is part of the practice of American religious neutrality. As new minorities have emerged or immigrated, they have in time managed to renegotiate the terms of religious pluralism and disestablishment. One of the benefits of democratic contestation is that it makes relevant the size of any regime's remainder – the people who do not fit into the system created by the rules in place. The history of American disestablishment is a history of neutralities that shifted over time in order to cope with newly emergent remainders.³⁴ A constant, however, is the imperative to devise a level of abstraction that minimizes the remainder while continuing to treat religion as a good. If you abstract away from *that* part of the practice, then you are no longer describing the practice, but something different and new. In fact, the point of this particular practice of abstraction is a good that is internal to that practice – the good of religion, which, as I noted earlier, is not a natural kind. The neutralitarians propose to discard the core case and start over on an entirely different basis.

American religious neutrality is one of the world's most successful legal strategies for coping with the fact of religious diversity. In the United States, a growing proliferation of remarkably different religious factions – this is likely the most religiously diverse society in human history – live together in peace and even some harmony.³⁵ This has been beyond the capacities of many other generally well-functioning democracies, such as France and Germany.³⁶

A strength of the American approach is its responsiveness to what its citizens actually value. The object of its solicitude has shifted as population demographics have shifted and diversity has grown. Liberal neutrality of the kind Dworkin advocated, on the other hand, is designedly indifferent to any concern other than a desire for all-purpose means to individual ends. This produces its own form of what Rawls called “the strains of commitment”: the

³¹ ACKERMAN, *supra* note 4, at 359-69.

³² See Gerald F. Gaus, *Liberal Neutrality: A Compelling and Radical Principle*, in *PERFECTIONISM AND NEUTRALITY: ESSAYS IN LIBERAL THEORY* 137 (Steven Wall & George Klosko eds., 2003).

³³ See, e.g., *LIBERAL NEUTRALITY* (Robert E. Goodin & Andrew Reeve eds., 1989); *PERFECTIONISM AND NEUTRALITY*, *supra* note 32.

³⁴ KOPPELMAN, *supra* note 15, at 28.

³⁵ *Id.* at 166.

³⁶ See generally *ADDRESSING TOLERANCE AND DIVERSITY DISCOURSES IN EUROPE* (Ricard Zapata-Barrero & Anna Triandafyllidou eds., 2012), *archived at* <http://perma.cc/PBG9-S6FS> (providing an overview of religious diversity in sixteen European countries).

principles of justice should not be ones with which it is psychologically impossible to comply.³⁷

Any political practice inevitably will increase the likelihood that citizens will accept the corresponding political principles. Rawls thus argues that “at the first stage of constitutional consensus the liberal principles of justice, initially accepted reluctantly as a *modus vivendi* and adopted into a constitution, tend to shift citizens’ comprehensive doctrines so that they at least accept the principles of a liberal constitution.”³⁸ But this means acceptance of *those* principles, not of other, more abstract principles.

The tendency to seize on one aspect of a practice, fetishize it, and forget the point is evidently an ineradicable part of human nature. It is evident, for example, on both sides of the affirmative action debate. One faction thinks the cure for racial inequality is state colorblindness. The other thinks that the answer is more black faces in high places. Neither focuses much on the persistence of a black underclass, in the face of which affirmative action is a cheap and insignificant gesture.³⁹ The aim of reshaping society to end racial inequality disappears. Neutralitarianism is another instance of the same tendency.

Peter Berger and his colleagues observe that modern social life necessarily involves the daily experience of encounter with a “plurality of life-worlds” that reflect differing and inconsistent norms.⁴⁰ Ideologies of liberalism have facilitated this phenomenon, but they are not its cause. It is “more persuasive sociologically to view the experience of plurality as prior to the various bodies of ideas that have served to legitimate it.”⁴¹ Institutional structures beget a consciousness of the importance of individual autonomy, which in turn begets legitimating ideologies.

The core motivator of neutralitarianism is the experience of the state as an imposer of alien norms. All the early neutralitarians specifically criticized the criminal prohibition of homosexual sex, which was the law in most states.⁴² That prohibition was understood to be somehow religiously based, and so to partake of the same wrong as the establishment of religion. If that case is foremost in one’s mind, then the idea of disabling the state from promoting

³⁷ RAWLS, *supra* note 4, at 176-83.

³⁸ JOHN RAWLS, *POLITICAL LIBERALISM* 163 (1993).

³⁹ See Robert J. Delahunty, “*Constitutional Justice*” or “*Constitutional Peace*”? *The Supreme Court and Affirmative Action*, 65 WASH. & LEE L. REV. 11 (2008).

⁴⁰ PETER L. BERGER ET AL., *THE HOMELESS MIND: MODERNIZATION AND CONSCIOUSNESS* 64 (1973).

⁴¹ *Id.* at 68-69.

⁴² See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 240-58 (1978); RAWLS, *supra* note 4, at 331. In the 1960s, the question of legal enforcement of morality (with special attention to homosexual sex) was “one of the primary topics being discussed – perhaps the main topic” in philosophy of law. Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 74 (1995). This theme remains prominent in more recent neutralitarian theory. See, e.g., SONU BEDI, *REJECTING RIGHTS* 89-90, 149-60 (2009).

ideas of the good will make intuitive sense. Arguments will be unnecessary. Neutralitarianism presents itself as a quasi-Kantian deduction from first principles, but its intuitive core is a bad inductive argument: because this departure from neutrality was oppressive, all departures from neutrality are oppressive.

That experience has also generated alienation from religion. The number of Americans who say that they have no religious affiliation has doubled in recent decades, from 8.2% in 1990 to 15% in 2008 to just under 20% in 2012.⁴³ One-third of adults under thirty say they have no religious affiliation.⁴⁴ Those with liberal views on homosexuality are more than twice as likely as their statistically similar peers to belong to this group.⁴⁵ Almost half (48%) of LGBT Americans say they have no religious affiliation.⁴⁶ Politics has become unusually polarized along religious lines. In the 2012 presidential election, for example, 59% of those attending church weekly or more voted for Mitt Romney, compared with 34% of those who never attend services.⁴⁷ That pattern has persisted for years.⁴⁸

But the unaffiliated do not regard religion as unambiguously bad. More than three-fourths of the unaffiliated think that churches and other religious organizations “[b]ring people together and strengthen community bonds,” and that they “[p]lay an important role helping [the] poor and needy.”⁴⁹ Even three-quarters of atheists and agnostics agree.⁵⁰ More than half of the unaffiliated think that those institutions protect and strengthen morality.⁵¹ For a lot of the unaffiliated, alienation from religion is an ambivalent alienation: 68% believe

⁴³ BARRY A. KOSMIN & ARIELA KEYSAR, AMERICAN RELIGIOUS IDENTIFICATION SURVEY (ARIS 2008) 3 (2009), *archived at* <http://perma.cc/YC9B-JGXZ>; PEW RESEARCH CTR., “NONES” ON THE RISE: ONE-IN-FIVE ADULTS HAVE NO RELIGIOUS AFFILIATION 9 (2012), *archived at* <http://perma.cc/7JC6-CZY8>.

⁴⁴ PEW RESEARCH CTR., *supra* note 43, at 9.

⁴⁵ ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE 129 (2010). Self-described atheists and agnostics are far fewer, less than six percent of the public, but that is still more than thirteen million people. PEW RESEARCH CTR., *supra* note 43, at 9.

⁴⁶ *A Survey of LGBT Americans*, PEW RESEARCH (June 13, 2013), <http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/7/#chapter-6-religion>, *archived at* <http://perma.cc/AB6S-22VX>.

⁴⁷ *How the Faithful Voted: 2012 Preliminary Analysis*, PEW RESEARCH (Nov. 7, 2012), <http://www.pewforum.org/2012/11/07/how-the-faithful-voted-2012-preliminary-exit-poll-analysis>, *archived at* <http://perma.cc/TA68-FQ75>.

⁴⁸ *See id.* (documenting sharp political differences between those who attended weekly worship services and those who did not, reflected by the 2000, 2004, and 2008 presidential elections).

⁴⁹ PEW RESEARCH CTR., *supra* note 43, at 58.

⁵⁰ *Id.* at 59 (finding that atheists/agnostics agreed that churches and religious organizations play an “[i]mportant role helping [the] poor” (75%) and “strengthen community bonds” (73%)).

⁵¹ *Id.* at 58.

in God or a universal spirit; 21% pray daily, and 20% more monthly; 18% describe themselves as “[r]eligious”; and 37% describe themselves as “[s]piritual but not religious.”⁵²

It is far from clear that this population opposes the longstanding practice of regarding religion as good. The neutralitarian call to revolutionize our practice arises from recent political developments, but does not have much of a constituency. The better strategy, one that American law has already been pursuing, is to make the favored category of “religion” vague enough to accommodate the newer variants.⁵³ Here, too, political theory needs to catch up with political practice.

The life of political theory has not been logic. It has been articulating the zeitgeist.

IV. WITHOUT GOD

Dworkin never discussed these issues of political sociology. But he clearly thought about them. *Religion Without God* is full of passages that reveal awareness of its subject position in the culture wars. It is full of regret at the divide between the religious and the nonreligious, and it seeks to bridge that divide. “[T]heists share a commitment with some atheists that is more fundamental than what divides them, and that shared faith might therefore furnish a basis for improved communication between them.”⁵⁴

I thus far critiqued Dworkin’s neutralitarianism, but that is not the central thesis of *Religion Without God*. Dworkin begins with David Hume’s famous principle that one cannot derive an “ought” from an “is”: one cannot infer conclusions about what ought to be done from premises that only state what is the case.⁵⁵ From this, Dworkin infers that value judgments can only be supported by other value judgments.⁵⁶ The existence or nonexistence of God therefore has no normative implications. One can believe in God and in His Goodness without feeling any allegiance to that Goodness. (Most theists cannot quarrel with this, since Satan illustrates the point.) Disagreement about matters of theological fact can coexist with agreement about normative fundamentals. Theists and what Dworkin calls “religious atheists” agree that “human life has objective meaning or importance”⁵⁷ and that nature “is not just

⁵² *Id.* at 22.

⁵³ See Andrew Koppelman, *The Story of Welsh v. United States: Elliott Welsh’s Two Religious Tests*, in *FIRST AMENDMENT STORIES* 293 (Richard W. Garnett & Andrew Koppelman eds., 2012).

⁵⁴ DWORKIN, *supra* note 10, at 2.

⁵⁵ DAVID HUME, *A TREATISE OF HUMAN NATURE* 469 (L.A. Selby-Bigge ed., 2d ed. 1978).

⁵⁶ DWORKIN, *supra* note 10, at 26-29.

⁵⁷ *Id.* at 10.

a matter of fact but is itself sublime: something of intrinsic value and wonder.”⁵⁸

The upshot is an unnoticed common ground:

Atheists can therefore accept theists as full partners in their deepest religious ambitions. Theists can accept that atheists have the same grounds for moral and political conviction as they do. Both parties may come to accept that what they now take to be a wholly unbridgeable gap is only an esoteric kind of scientific disagreement with no moral or political implications. Or at least many more of them can. Is that too much to hope? Probably.⁵⁹

The common ground is certainly there (though Dworkin’s use of “religious” is distractingly idiosyncratic). The divide is less profound than, say, Steven D. Smith claims in his book, *The Disenchantment of Secular Discourse*.⁶⁰ Smith thinks that modern discourse has become degraded, and that this has happened because the idea of a purposive, normatively laden cosmos has been abandoned in favor of the idea of a purely secular world.⁶¹ A secular vocabulary lacks the capacity to express all of our values and aspirations.⁶² So secular discourse finds it necessary to “smuggle” in normative premises that cannot be accounted for within its framework.⁶³ Smith thinks that what is being smuggled in are “notions such as those that animated premodern moral discourse – notions about a purposive cosmos, or a teleological nature stocked with Aristotelian ‘final causes,’ or a providential design.”⁶⁴ Dworkin now shows that even these notions could not entail value claims. Value rests on value. Secularism is no worse off than theism in this regard.

In fact, Dworkin understates the amount of common ground. What American secularists and theists agree on, concerning action toward the human world, is more specific than “human life has objective meaning or importance.”⁶⁵ The September 11 terrorists would not have disagreed with *that* claim.

The common ground that Dworkin aims to articulate is more fully developed in Charles Taylor’s book, *A Secular Age*.⁶⁶ Taylor offers a historical explanation of why modern Western secularism and Christianity share the common ground that matters: a commitment to the equal dignity and wellbeing of everyone. That commitment does not follow from atheism. (Nor, once more,

⁵⁸ *Id.*

⁵⁹ *Id.* at 146-47.

⁶⁰ STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* (2010).

⁶¹ *Id.* at 24.

⁶² *Id.*

⁶³ *Id.* at 26-27.

⁶⁴ *Id.* at 26.

⁶⁵ DWORKIN, *supra* note 10, at 10.

⁶⁶ CHARLES TAYLOR, *A SECULAR AGE* (2007).

does it follow from theism.) The turn toward concern with the worldly flourishing of human beings, Taylor argues, had its roots in medieval movements of Church reform. Discontent with the division between the clergy and the laity, which had always been in tension with Christianity's universalizing aspirations, led to a sacralization of everyday life, which became a means of realizing God's benevolent intentions for mankind. This new focus on improving the world, which coincided with growing technological control, eventually made it possible for God to drop out of the picture altogether, or even appear as an enemy of human fulfillment.⁶⁷ Thus militant atheism was born.⁶⁸

Taylor does not really answer Smith, because Smith can respond that this new humanistic formation is incoherent. Without God, it cannot ground its humanitarianism. Indeed, Taylor shares this worry.⁶⁹

Dworkin's analytic point is the best response: Value rests on value.⁷⁰ Religious humanitarians and secular humanitarians' values are equally ungrounded. Neither is more or less coherent than the other. "Our felt conviction that cruelty is wrong is a conviction that cruelty is really wrong; we cannot have that conviction without thinking that it is objectively true."⁷¹ In ethics, as in science and mathematics, there are premises upon which the whole system depends that are simply assumed because we cannot not believe them.⁷² "In each domain we accept felt, inescapable conviction rather than the benediction of some independent means of verification as the final arbiter of what we are entitled responsibly to believe."⁷³ Dworkin's work has from the beginning taken as "axiomatic" that human beings are entitled to equal concern and respect.⁷⁴ Taylor shows the historical basis of this cultural formation.

The humanitarian impulse is a unifying force, which the culture wars have obscured. Same-sex marriage, in particular, has been a distraction and source of division.⁷⁵ Meanwhile, American politics increasingly embodies a different mantra: Eat the Poor. With its neglected, violent ghettos, its insane drug war,

⁶⁷ *Id.*

⁶⁸ For further discussion of Taylor's thesis, see Andrew Koppelman, *Naked Strong Evaluation*, 56 *DISSENT* 105 (2009).

⁶⁹ See TAYLOR, *supra* note 66, at 697.

⁷⁰ DWORKIN, *supra* note 10, at 20-21 ("Acknowledging the role of felt, irresistible conviction in our experience of value just recognizes the fact that we have such convictions . . .").

⁷¹ *Id.* at 20.

⁷² *Id.* at 17-19.

⁷³ *Id.* at 19.

⁷⁴ DWORKIN, *supra* note 42, at xii ("[O]ur intuitions about justice presuppose not only that people have rights but that one right among these is fundamental and even axiomatic. This most fundamental of rights is a distinct conception of the right to equality, which I call the right to equal concern and respect.").

⁷⁵ That does not, of course, mean that its proponents (of whom I am one!) should not win. See Koppelman, *supra* note 20.

its bulging prisons, its radical constriction of government services, and its increasing concentration of wealth at the top, America is becoming a pitiless oligarchy.

The radical philosophical division between the theists and the secularists should not prevent concerted action against the common enemy. The American Left's focus on the culture wars was inevitable, but it has been unfortunate to the extent that it has distracted us from these issues, and led regular churchgoers increasingly to support these oligarchical policies.⁷⁶ The American Right recently converged around the proposition that, if you get sick and cannot pay for it, the state has no right to help him, because universal health insurance invades the liberties of those who would prefer not to pay for others' medical care.⁷⁷ Christianity has something to say about that. Christians should not be political allies of libertarians.

The common ground between atheist humanism and Judeo-Christian ideals of social solidarity deserves more attention than it has gotten. Dworkin performed a valuable service by calling attention to that common ground. Now that the gay rights struggle is ending (the gays won), maybe both sides will notice that they have more important things to worry about. The end of the culture wars can presage other fights.

⁷⁶ See ALAN I. ABRAMOWITZ, *THE POLARIZED PUBLIC? WHY AMERICAN GOVERNMENT IS SO DYSFUNCTIONAL* 62-82 (2013).

⁷⁷ See ANDREW KOPPELMAN, *THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM* (2013). On the defects of libertarianism, see ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, *A RIGHT TO DISCRIMINATE?: HOW THE CASE OF BOY SCOUTS OF AMERICA V. JAMES DALE WARPED THE LAW OF FREE ASSOCIATION* (2009); Andrew Koppelman, Book Review, *NOTRE DAME PHIL. REVIEWS* (May 5, 2012), <http://ndpr.nd.edu/news/30638-free-market-fairness>, archived at <http://perma.cc/5EEB-JQWK> (reviewing JOHN TOMASI, *FREE MARKET FAIRNESS* (2012)).