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Bruce Ledewitz, American Religious Democracy: Coming to Terms with the End of Secular Politics

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BRUCE LEDEWITZ, AMERICAN RELIGIOUS DEMOCRACY: COMING TO TERMS WITH THE END OF SECULAR POLITICS

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A fundamental principle of the United States Constitution, which is no doubt familiar to most American citizens, is that religion is separate from government. The First Amendment, which was ratified in 1791, begins with the statement that "Congress shall make no law respecting an establishment of religion."[1] Since the Supreme Court held that the Establishment Clause was binding on state and local governments sixty years ago in *Everson v. Board of Education*,[2] hardly any other constitutional provision has provoked such persistent and fundamental disagreement over its meaning. Inspired by the dissent of the second Justice Harlan in *Poe v. Ullman*,[3] Professor Bruce Ledewitz[4] believes that the Supreme Court ultimately responds to the consensus of the nation. His remarkable thesis in this thought-provoking book is that the 2004 presidential election marked the tri-

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[1] U.S. CONST. amend. I.

[2] 330 U.S. 1, 15-16 (1947).

[3] 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting). Justice Harlan took the position that the content and meaning of due process under the Fourteenth Amendment was ultimately based not on judges' formulas but rather on "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society" as reflected by the traditions of the people. *Id.*

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umph of "religious democracy" over the formerly dominant secular consensus, and that this has transformed our national polity for the foreseeable future.

Ledewitz's book, which is sure to be controversial because it departs from the Supreme Court's jurisprudence as well as from the prevailing secular viewpoint in this area, is a tour de force. He writes clearly and comprehensibly, and his wide range of sources show his great erudition. They include not only relevant cases and law review articles but also Old and New Testament texts, political scientists, legal philosophers, newspaper articles, and an exhaustive list of recent books on religion in law and society. Reared in a Jewish home, Ledewitz states that he does not believe in God as a being separate from the universe or in an afterlife but does believe that "the good has real weight in history—indeed is sovereign in history—and that the world has a tilt in the direction of the good."[5] Despite this lack of traditional faith, he has a profound commitment to biblical truths and teachings about what constitutes a good life. To sum up, Ledewitz labels himself "a biblically oriented secularist."[6]

It is a common view that American politics have become increasingly polarized in the last decade and a half. Analysts have divided the country into the "blue" (liberal) states clustered on the coasts and the Northeast, and "red" (conservative) states spanning the interior and the South, with presidential elections largely decided in a handful of "purple" (in-between) states like Ohio and Florida. The

[5] BRUCE LEDEWITZ, AMERICAN RELIGIOUS DEMOCRACY: COMING TO TERMS WITH THE END OF SECULAR POLITICS 171 (2007).

[6] *Id.* at 169.

nation's political polarization is in part a religious divide: Protestant Evangelicals in particular have become increasingly active in state and national politics in recent decades, mostly as Republicans, and they formed a vital component of President Bush's 2000 and 2004 victories. Among other issues, their political activism as Republicans is largely due to the party's "pro-life" position on abortion and its opposition to same-sex marriage. In 2004, a considerable majority of white Evangelicals (78 percent) and a lesser majority of weekly churchgoers of all faiths (61 percent) voted for President Bush, whereas large majorities of atheist and agnostic voters voted for Kerry.[7] Ledewitz raises the question "[i]s it really true that the Democratic Party is antireligious?"[8] and answers it with a qualified yes, concluding that "[t]he hostility to religion among secularists in the Democratic Party is a real phenomenon."[9]

For decades following *Everson*, Supreme Court jurisprudence reflected, and most of the Academy supported, a "secular consensus" which adhered strictly to the " 'wall of separation' between Church and State" enunciated in President Thomas Jefferson's famous letter to the Danbury, Connecticut Baptist community in 1802.[10] The "separatist" approach eventually led to the test which the Supreme Court applied to laws whose constitutionality was challenged under the Establishment Clause. To pass muster, the law had to: (1) have a secular purpose; (2) have the primary effect of neither advancing nor

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[7] *Id.* at 3.
[8] *Id.* at 160.
[9] *Id.* at 162.
[10] LEDEWITZ, *supra* note 5, at 63.

inhibiting religion, and (3) not lead to excessive "entanglement" between government and religion.[11] While at least five Supreme Court Justices criticized the "Lemon test,"[12] and the Supreme Court has refused to apply it consistently, it has never been officially overruled.[13] Under this test and its similar precursors, the Supreme Court struck down school prayer[14] and reading of the Bible in public schools,[15] as well as numerous state statutes granting aid to private religious schools.[16]

In tandem with the Supreme Court's jurisprudence, Ledewitz asserts that enlightened academic opinion tended to adopt the "secularization thesis," for example, that progress in various sectors of society would lead to the decline of organized religion. Political philosophers like John Rawls, Ronald Dworkin, Yale Law Professor Bruce Ackerman, and Harvard Law Professor Alan Dershowitz each

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[11] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[12] Lee v. Weisman, 505 U.S. 577, 631 (1992) (Scalia, J., joined by Rehnquist, C.J., and Thomas, White, JJ., dissenting); *see also, e.g.*, Bd. of Educ. v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring); *see also id.* at 732 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting); *see also* County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part, dissenting in part).

[13] For scathing criticism of the Lemon test and its inconsistent application by the Supreme Court, see Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398-400 (Scalia, J., dissenting). Justice Scalia describes the test as a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Id. See also* Marsh v. Chambers, 463 U.S. 783, 792-93 (1983).

[14] *See* Engel v. Vitale, 370 U.S. 421, 424-25 (1962).

[15] *See, e.g.*, Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 205(1963).

[16] *See* Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 397 (1985) ("[Michigan's] Shared Time programs have the 'primary or principal' effect of advancing religion, and therefore violate the dictates of the Establishment Clause of the First Amendment."); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 798 (1973) ("New York's aid provisions . . . [have] a 'primary effect that advances religion' and offends the constitutional prohibition against laws 'respecting an establishment of religion.' "); *see also* Wolman v. Walter, 433 U.S. 229, 255 (1977) (holding that Ohio's use of public money "to provide nonpublic school pupils" with "instructional materials and equipment and field trip services" was unconstitutional); Sloan v. Lemon, 413 U.S. 825, 834 (1973) (invalidating a Pennsylvania law that reimbursed parents for nonpublic school tuition costs).

tried to construct a legal and social order which was totally secular and devoid of religious influence.[17] Absence of any mention of "God" in the United States Constitution was emphasized, and secularists like former Stanford Law School Dean Kathleen Sullivan ruled religiously-motivated arguments out of bounds in public policy discourse.[18] This led Father Richard Neuhaus to protest the public marginalization of religion in *The Naked Public Square: Religion and Democracy in America*[19] and Yale Law School Professor Stephen Carter to take a similar position in *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion.*[20]

From its highpoint in the 1970s, the "secular consensus" began to decline. The religious observance of the American people remained relatively stable during the past three decades,[21] and the "secularization thesis" was disproven. President Ronald Reagan was elected in 1980 as the most conservative president in decades, and while he was not an active church member, the Republican coalition which elected him contained many religious conservatives and opponents of abortion. Despite President Bill Clinton's success in swimming against the conservative Republican tide, the Republican take-

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[17] LEDEWITZ, *supra* note 5, at 16-18.

[18] *Id.* at 17-18. Similarly, Ledewitz cites Harvard Law Professor Noah Feldman to the effect that "secularism argues that, given our diversity, the best way to keep the democratic conversation going is to agree to a 'precondition of politics' that religious reasoning be kept out of political policy debate." LEDEWITZ, supra note 5, at 1 (citing NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM AND WHAT WE SHOULD DO ABOUT IT 223 (2005)).

[19] RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984).

[20] STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993); LEDEWITZ, *supra* note 5, at 10.

[21] *See* LEDEWITZ, *supra* note 5, at 27.

over of the House of Representatives in 1994 enhanced the power of the religious right, and the two electoral victories of George W. Bush[22] gave it new political power. Following the abortive Harriet Miers Supreme Court nomination, President Bush's masterstrokes in nominating the brilliant and archconservative John Roberts and Samuel Alito consummated the long-term Republican project of pushing the Court to the right,[23] and in light of their relative youth, this may turn out to be his most lasting legacy. While neither of the two has a major track record on Establishment Clause cases, their near-lockstep conservatism during the last term gives every reason to suppose that they will join Justices Scalia and Thomas in further eroding the "wall of separation" between church and state.[24]

The 2004 presidential election was one of the most bitter and hard-fought in recent history. Democrats, still smarting from *Bush v. Gore*,[25] which awarded the presidency (illegitimately, according to many Democrats) to President Bush, and angered by the administration's strident partisanship which had given the lie to the president's "compassionate conservative" promises of the 2000 campaign, were convinced that they would stage a comeback. They were plunged into despair by the outcome of the election and stricken with near disbelief that millions of Americans harmed by the Bush Administra-

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[22] *Id.* at xiii.

[23] Presidents Nixon, Reagan, and both Bushes all proclaimed this objective, although Justices like Harry Blackmun, Sandra Day O'Connor and David Souter all proved less reliably conservative than the Republican presidents who nominated them would have liked.

[24] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793 (2000), 874-75; *see also* Gonzales v. Carhart, 127 S. Ct. 1610, 1633 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003); LEDEWITZ, *supra* note 5, at 63.

[25] 531 U.S. 98 (2000).

tion's policies could vote for President Bush and against their own economic interests.[26] For Ledewitz, regardless of his own political views,[27] it was time to face some basic facts. He concluded that "[o]n November 3, 2004, with the reelection of President George W. Bush, the American people finally decided that government should, and would, endorse religion."[28] Ledewitz argues that secular democracy was "in steep decline politically today[,]"[29] and "America is now a 'religious democracy.' "[30]

These are, of course, earth-shattering claims which would stand Establishment Clause jurisprudence on its head. Ledewitz is, of course, fully aware of this.[31] He admits that since he "grew up with

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[26] The despair and disbelief of liberals is well captured by Ledewitz's quotation of an article in *The New Yorker* shortly after the election.

> The 80 percent of the evangelical voters who supported President Bush did so against their own material (and, some might imagine, spiritual) well-being. The moral values that stirred them seemed not to encompass botched wars, or economic injustices, or esnvironmental [sic] depredations; rather, moral values are about sexual behavior and its various manifestations and outcomes, about family structures, and about a particularly demonstrative brand of religious piety. What was important to these voters, it appears, was not Bush's public record but what they conceived to be his private soul. He is a good Christian, so his policy failures are forgivable.

LEDEWITZ, *supra* note 5, at 6 (quoting Hendrik Hertzberg, *Blues*, NEW YORKER, Nov. 15, 2004, at 33).

[27] Ledewitz appears to be a liberal Democrat. For example, he supports legislative efforts to legalize same-sex marriage. LEDEWITZ, *supra* note 5, at 20. He also implies that he did not vote for Bush in 2004. *Id.* at 11-12. However, he deplores what he considers to be the anti-religious bias of secularists. In "Radical Politics of Biblical Religion," he describes how biblical principles furnish a useful basis for calling into question the shortcomings of American government, and untrammeled economic system and foreign policy. *Id.* at 154 (describing politically progressive religious leaders in America today).

[28] *Id.* at xi.

[29] *Id.* at xv.

[30] *Id.* at xiii.

[31] As he acknowledges, "The first tenet of secular democracy was the denial that government could endorse religion." LEDEWITZ, *supra* note 5 at xiv. *See also* LEDEWITZ, supra note 5, at 21-22 (citing Wallace v. Jaffree, 472 U.S. 38 (1985)).

secular political assumptions,"[32] it was hard to accept that "secular democracy rather than religious democracy" was now "in question."[33] Nevertheless, he makes the above dramatic assertions as matter-of-fact observations, as if they were merely *a fait accompli*. He even goes on to say the 2004 electorate, in effect, "amended" the Constitution as a practical matter.[34]

Ledewitz anticipates the secularist argument that this outcome is fundamentally at odds with the basic meaning of the Establishment Clause as the Supreme Court has interpreted it for decades. His response is that the American people can and do have the final say:

> A Constitution in a democratic society cannot determine that society's fundamental arrangements. Every generation must decide its fundamental arrangements anew, although of course influenced by what has gone before. The framers of the original Constitution could no more keep America secular against our will than they could keep America capitalist. A Constitution that could do these things would not allow true democracy. Some people believe that original meaning is the benchmark for the Constitution, that such meaning does not change, and that the framers prohibited the religious political system that America now has. To such people, I can only say that *in the 2004 presidential election, the people amended their Constitution to allow for religious democracy.*[35]

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[32] *See* LEDEWITZ, *supra* note 5, at 2.

[33] *Id.*

[34] *Id.* at xvi.

[35] *Id.* at xv-xvi (emphasis added). Ledewitz admits, of course, that the statement that the people amended the Constitution "is not literally true." *Id.* at xvi. He means, rather, that the sustained pressure of the popular opinion of the electorate over a long period will eventually be reflected in Supreme Court decisions. Interestingly, the influential secularist political philosopher John Rawls expressed a similar opinion: "The constitution is not what the Court says it is. Rather it is what the people acting constitutionally through the other branches eventually allow the Court to say it is." *Id.* at 11 (quoting JOHN RAWLS, POLITICAL

At this point, of course, a traditional separationist, who believes that the Supreme Court got the law right more than thirty years ago and would be content to retain the Lemon test undiluted,[36] would surely protest vehemently. After all, it is the responsibility of the courts, particularly the Supreme Court, to interpret the law and the Constitution, and the latter means what the Supreme Court says it means.[37] What business do the voters, mostly uninformed laypeople who have never studied law, have pressuring the Supreme Court to adopt their tendentious and biased notions of what they would like the Bill of Rights to stand for when it conflicts with decades of precedent decided by learned justices?

Ledewitz's answer, of course, is the Harlan approach in *Poe*,[38] described above. While Justice Harlan was commenting in the context of a due process case, his description of how popular opinion has a way of sorting cases into groups which posterity has decided were wrongly decided, for example *Dred Scott v. Sandford*,[39] and those whose rightness posterity vindicates, such as *Brown v. Board of Education*,[40] can appropriately be applied to a matter of such intense in-

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LIBERALISM: THE SUPREME COURT AS EXEMPLAR OF PUBLIC REASON 237-38 (1993)). As Justice Ginsburg said, echoing a familiar observation, "judges 'do read the newspapers and are affected . . . by the climate of the era.' " *See id.* at 90 (quoting Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 268 (1997)).

[36] This group includes Justices Stevens, Souter, Ginsburg, and often Breyer, who have strenuously protested against recent cases in which the Court has lowered the barrier to government aid to religious schools, for example. *See generally* Mitchell v. Helms, 530 U.S. 793, 885 (2000) (Souter, J., dissenting).

[37] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[38] *Poe*, 367 U.S. at 542-43 (Harlan, J., dissenting).

[39] 60 U.S. (19 How.) 393 (1856).

[40] 347 U.S. 483 (1954); *See, e.g.*, *Mitchell*, 530 U.S. at 793 (2000).

terest to the American electorate as the relationship between law and religion.

If Ledewitz's thesis that "religious democracy" and what it presages will prevail for the foreseeable future[41] is true, then many if not most in the legal Academy will recoil in alarm if not horror. Secularists who regard *Roe v. Wade*[42] as a milestone in human progress despite its shaky basis in substantive law, and who cherish the hard-won victories in the Warren and Burger Courts over government aid to and endorsement of religion, will deem it unthinkable to even contemplate such a possibility. In contrast, while not endorsing or promoting such a sea change in the law, Ledewitz seems curiously tranquil at the prospect. He positions himself as a neutral observer who is not part of the victorious political movement but must defer to the *vox populi*, which has spoken:

> In the 2004 election a sizeable group of religious voters, primarily and almost exclusively Christian, achieved an impressive degree of political/governmental power in America. They achieved this power self-consciously as Christians, that is, as the Church. It is, therefore, not possible for the rest of America to think in anti-Constantinian terms. The rest of us cannot think of public life without seeing the Church as a powerful component in it. The rest of us can only decide whether we are rivals or allies of this

[41] Ledewitz acknowledges the Democratic takeover of Congress in the 2006 election but notes that the Democrats, without entire success, had become more receptive to religion in public life and had nominated many moderates for Congress. LEDEWITZ, *supra* note 5, at 203-05.

[42] 410 U.S. 113 (1973). *Roe* is an even more controversial example than *Dred Scott* or *Brown*, although Ledewitz expects it to be eventually overruled. *See* LEDEWITZ, *supra* note 5, at 96, 116. As *Lochner v. New York* demonstrates, substantive due process holdings are susceptible to being overruled when the jurisprudential climate changes. Lochner v. New York, 198 U.S. 45, 54 (1905).

> Christian accomplishment. It is not for the rest of us to declare for Christians whether their political power is theologically legitimate. It is not for the rest of us to say whether Christians should have done what they did . . . . In the political realm, there is no debate. Events have left anti-Constantinianism behind.[43]

Most secular liberals, while unable to deny the electoral power of Evangelical Protestants and its decisive impact on the outcome of the 2004 election, would no doubt regard voting to advance a religious agenda as illegitimate. Certainly, such leading commentators as Noah Feldman and Kathleen Sullivan would disapprove.[44] Ledewitz disagrees. He notes that Professor Sullivan has argued that the Constitution has relegated religion to the private sphere and brought about "the establishment of the secular public order."[45] As a consequence, religious reasons for political action would be prohibited:

> This notion of privatization of religion has to do with giving 'reasons' for public action. Secularists like Sullivan think of public debate as if there were a referee enforcing debate rules. This all-powerful referee would not allow the players in the political 'game' to invoke religious reasons on behalf of their proposed course of public action.[46]

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[43] LEDEWITZ, *supra* note 5, at 11-12. "Constantinianism," i.e., approval of the union of religion and government, refers to the historic change by Emperor Constantine in making Christianity, which had been persecuted by his predecessors, the official religion of the Roman Empire.

[44] *See id.* at 17-23.

[45] *Id.* at 17 (quoting Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 201 (1992)).

[46] *Id.* at 18.

Ledewitz rejects this approach because it holds "religious people to a higher standard than everyone else."[47] Noting that political partisans disagree strongly on a wide variety of issues on non-religious grounds, he sees no reason to apply special restrictive rules to positions based on religion and concludes that "[i]t is not true that religion particularly interferes with democratic debate."[48]

An apparent reason for Ledewitz's equanimity in accepting the new dispensation of "religious democracy" has to do with his view of religion in general. Since *Everson*, the Supreme Court, evoking European history, has emphasized the dangerous potential for discrimination and oppression which results from the union of government and religion.[49] With reference to the current conflict between Sunni and Shiite Muslims in Iraq, some current observers ascribe the same potential for discrimination and intolerance on religious grounds to fundamentalist extremists in the United States. In contrast, Ledewitz seems to have a quite positive view of religion and religious doctrine, both of the Old and New Testament variety. He devotes an entire chapter to describing how "religious democracy" can foster such progressive causes as the rights of women, social justice, and world peace.[50] Another chapter calls on the Democratic Party to give up its alleged aversion to organized religion and to draw upon its progressive potential, making common cause with progressive people of faith to foster a more just society.[51] One of his

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[47] *Id.* at 23.
[48] LEDEWITZ, *supra* note 5, at 23.
[49] *Everson*, 330 U.S. at 8-9.
[50] *See* LEDEWITZ, *supra* note 5, at 139-51.
[51] *Id.* at 155-65.

points is that religious persons and secularists share many of the same political and social values, and progress in this country will be blocked if they remain politically divided.[52] He sums up his view of the just society to which we should aspire when he concludes, "[t]he *Bible*, not the Constitution or the courts, is our real guarantee of freedom."[53]

Space here does not permit a description of how Ledewitz expands and elaborates his "religious democracy" thesis, applying it to current political and social issues not only in the United States but also in the world. While they are unorthodox and subversive of numerous traditional assumptions, Ledewitz's theses are cogently and articulately argued. Those who are concerned with "church-state" issues will certainly find much food for thought in this provocative book.

Many secularists dismayed by the current course of the Supreme Court in this field and more importantly by what it presages for the future[54] will remain skeptical and unpersuaded that anything good can come out of the "religious democracy" which Ledewitz postulates. Indeed, they might question the authenticity of his self-identification as a secularist non-believer addressing his message principally to other secularists. This reviewer, who has found fault with the traditional approach of the Supreme Court in this area,[55] and

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[52] *Id.* at 177-88. Ledewitz states further that "American political life is crippled today by a false dualism between religious voters and secular voters." *Id.* at 201.

[53] *Id.* at 188.

[54] *See, e.g.*, Hein v. Freedom From Religion Foundation, Inc., 127 S. Ct. 2553 (2007) (severely restricting while not overruling the standing rule in Establishment Clause cases from Flast v. Cohen, 392 U.S. 83 (1968)).

[55] *See, e.g.*, Thomas A. Schweitzer, *Lee v. Weisman: Whither the Establishment Clause*

who probably could not honestly describe himself as a secularist at all, finds the author's ideas congenial.

and the Lemon v. Kurtzman Three-Pronged Test?, 9 TOURO L. REV. 401 (1993); Thomas A. Schweitzer, *The Supreme Court Rules in Favor of Religious Club's Right to Meet on Public School Premises: Is this "Good News" for First Amendment Rights?*, 18 TOURO L. REV. 127 (2001).