

COMMON GROUND:
LAW SCHOOLS IN AMERICAN LIFE
DURING THE NEW AGE OF FAITH

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AS is true with many law schools deans, I frequently discuss with audiences the role of law schools and the legal profession in American life. In doing so, I speculate that the high water mark of public approval for the profession in recent decades may have been reached in 1962, when Gregory Peck played the role of Atticus Finch, the fictional lawyer in Harper Lee's acclaimed *To Kill a Mockingbird*, and has gone downhill ever since. In opposition to the trend, I suggest that law schools and lawyers play a much more constructive and important role in American life than is usually appreciated by the public. I point particularly to their role in maintaining and strengthening the rule of law in our society, our democratic processes, capital markets and individual freedoms.¹

Because of the prominence of religion in what is commonly referred to as the "public square" during the last year or so, I have of late considered the interface (if any) between religion and the role of law schools and the profession—and most particularly what I term the underpinnings of contemporary legal education—in American life. For the most part, my conclusion is that there is no significant interface. But there may be one exception, and that is between a religious faith that is thought to mandate certain public laws and the traditional theoretical underpinnings of legal education.² Indeed, the exploration of this

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1. Robert W. Gordon, *Why Lawyers Can't Be Hired Guns*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION* 42-55 (Deborah L. Rhode ed., 2000). For a short and thoughtful discussion of this subject, see generally GEOFFREY C. HAZARD, JR. & ANGELO DONDI, *LEGAL ETHICS: A COMPARATIVE STUDY* 1-14 (2004).

2. It is hazardous to generalize about complicated institutions—and law schools in America are certainly complicated, numerous, and varied. My views on the underpinnings of legal education are based on my experience and the reading I have done. I, of course, recognize that important variations among law schools exist which may make my comments on the underpinnings of legal education inappropriate for some law schools. I am also aware that a small number of law schools recently opened that may depart to some degree from the model. See Adam Liptak, *Giving the Law a Religious Perspective*, N.Y. TIMES, Nov. 22, 2004, at A16. For an informative history of legal education in the United States, see generally ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983).

interface has led me, to my surprise, to gain a new appreciation of the character of the underpinnings of legal education.

But before I turn to that subject directly, I will address some preliminary but related points in order to place my own thinking on this subject in context. First, it is obvious that religion and religious leaders played a rich and important role in shaping the European societies that first took root in the American southwest in the sixteenth century and on the eastern coastline in the seventeenth century. Thus, from an historical perspective, there is nothing dramatically new about religious groups being very influential in shaping public policy, fashioning public laws, and influencing important public events. Recalling three historical moments may help ground this general point. In the eighteenth century, religious groups long subject to discrimination supported the separation of church and state on the ground that their right to practice their religion would be better protected if the state did not have an established religion.³ In the nineteenth century, religious leaders and groups favored the abolition of slavery.⁴ More recently, religious leaders were instrumental in shaping and leading the Civil Rights Movement in the 1950s and the 1960s.⁵

3. In his famous study, Bernard Bailyn wrote that “radical sectarians,” which he identified as New Light Presbyterians, Separate Baptists, and Strict Congregationalists, carried the “burden of this internal opposition” to religious establishments. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 257 (1967). The result was, Bailyn wrote, that “the most advanced pre-Revolutionary arguments for disestablishment—arguments that would eventually bear fruit in all the governments of the new nation—were unstable compounds of narrow denominational and broad libertarianism.” *Id.*

4. See STANLEY M. ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL & INTELLECTUAL LIFE 184-85* n.90 (Universal Library 1963) (1959) (pointing out that the dispute over slavery eventually split the Methodists in 1844 and Baptists in 1845 into Northern and Southern sectional wings). Elkins also concluded:

The Presbyterians did not divide along completely sectional lines until 1861, but the schism of 1837 was due, at least in part, to growing tension over the slavery issue. This is not to say, of course, that the Northern and Southern church organizations thereby became impotent; it was rather that they no longer retained the kind of institutional commitments that transcended sectional interests and that might mediate in any way between the respective Northern and Southern moral positions on slavery.

Id. For commentary by religious leaders on *The Dred Scott Case*, see DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 422-23 (1978).

5. But see 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 304 (Phillip Bradley ed., Henry Reeve trans., Alfred A. Knopf, Inc. 1945) (1835). De Tocqueville offers the following observations regarding the role of American clergy in political affairs in the early nineteenth century and provides a useful historical reference:

I have remarked that the American clergy in general, without even excepting those who do not admit religious liberty, are all in favor of civil freedom; but they do not support any particular political system. They keep aloof from parties and from public affairs. In the United States religion exercises but little influence upon the laws and upon the details of public opinion; but it directs the customs of the community, and, by regulating domestic life, it regulates the state.

Second, even in light of the long and rich history of religion in American life, the contemporary role of religion and the current prominence of religious leaders in the public square seems more intense and significant than at anytime since World War II. To benchmark this change, let me offer three examples. The first invites a comparison between Presidents John F. Kennedy and George W. Bush. In 1960, during a tough primary in West Virginia against Hubert H. Humphrey, John F. Kennedy, a Catholic, was told that the people of West Virginia were afraid of Catholics and was advised to avoid the issue of religion. Kennedy disagreed and told a television audience:

[S]o when any man stands on the steps of the capitol and takes the oath of office of President, he is swearing to support the separation of church and state; he puts one hand on the Bible and raises the other to God as he takes the oath. And if he breaks the oath, he is not only committing a crime against the constitution, for which Congress can impeach him—and should impeach him—but he is committing a sin against God.⁶

The contrast between President Kennedy reassuring voters during the 1960s campaign that he supports a strict separation of church and state in government, and President George W. Bush reassuring voters of his deep religious faith is sharp.⁷ Indeed, Senator Rick Santorum of Pennsylvania, a Catholic who has been identified as the “nation’s pre-eminent faith-based politician,” thought the contrast between Kennedy and Bush so definitive that he quipped while in Rome, Italy, in 2002, that he considered President George W. Bush, who is a Methodist, to be “the first Catholic president of the United States.”⁸

A second example contrasts Billy Graham, hailed as the dominant evangelical minister of his time, with contemporary evangelical ministers. In a 2005 profile,

Id.

6. THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT 1960*, at 117 (1961). See also Michael Sokolove, *The Believer*, N.Y. TIMES, July 3, 2005, § 6 (Magazine), at 61 (stating that President Kennedy’s “most famous statement on church and state was: ‘I do not speak for my church on public matters—and the church does not speak for me.’”).

7. A striking expression of President Bush’s relationship with religious leaders and groups was provided the day after the 2004 Presidential election, when Bob Jones III, President of Bob Jones University, wrote an open letter to President Bush which stated: “In your reelection, God has graciously granted America—though she doesn’t deserve it—a reprieve from the agenda of paganism.” Richard Byrne, *The Good Book*, AM. PROSPECT, Mar. 2005, at 57.

8. Sokolove, *supra* note 6, at 60. Senator Santorum made his comment to the *National Catholic Reporter*, a United States-based weekly. In the same article, Sokolove reported: “At a time when overt expressions of religiosity are increasingly a part of politics, Santorum is, with the exception of President Bush, the nation’s pre-eminent faith-based politician—a devout Catholic so valued by religious conservatives of all faiths that Time magazine recently included him on its list of America’s ‘25 Most Influential Evangelicals.’” *Id.* at 58. Behind the Senator’s quip may have been the fact that President Bush won 52% of the Roman Catholic vote in the 2004 Presidential election, defeating the first Catholic presidential candidate, Senator John Kerry, from a major political party since John F. Kennedy. In 2000, Bush narrowly lost the Catholic vote. *Election Reinforces USA’s Religious Schism*, USA TODAY, Nov. 4, 2004, available at http://www.usatoday.com/news/politicselections/2004-11-04-religion_x.htm.

the *New York Times* reported that Mr. Graham, who has spent “five decades preaching to 210 million people in 185 lands,” has “set himself apart” from the “other evangelical leaders” who are “plunging into political issues” by “refusing to talk about politics, the evangelical movement or any of the issues important to evangelical conservatives, like abortion, homosexuality and stem cell research.” Mr. Graham stated: “I’m going to preach the gospel and am not going to get off on all these hot-button issues.” Mr. Graham continued: “If I get on these other subjects, it divides the audience on an issue that is not the issue I’m promoting. I’m just promoting the gospel.”⁹

A third example in support of the view that the contemporary influence of religion in the public square constitutes a departure from recent decades is a short news comment that appeared in *The Economist* that captured in a few words the distance traveled in recent decades. The report read:

After the Scopes Monkey trial in 1925, where creationist ideas were widely discredited, the idea of fundamentalists from the Bible Belt ruling the roost would have looked foolish. In the 1960s, many liberal Americans thought they had banned religion from the public square for good. Yet nowadays the president, the secretary of state and the House speaker accept the evangelical label. A packed prayer breakfast takes place every Thursday in Congress. And liberals regularly contend that one of America’s two great parties is bent on creating a theocracy—backed by a solid core of somewhere between a quarter and a third of the population.¹⁰

My next preliminary point takes note of the striking breadth of the agenda that religious leaders currently press upon the American public for consideration. In a comparatively short period of time, the issues of serious concern to them has

9. Laurie Goodstein, *Spirit Willing, One More Trip Down Mountain for Graham*, N.Y. TIMES, June 12, 2005, § 1, at 34. For a news magazine review of influential contemporary evangelists, see David Van Biema, *The 25 Most Influential Evangelicals*, TIME, Feb. 7, 2005, at 34.

10. *You Ain’t Seen Nothing Yet—America’s Religious Right*, ECONOMIST, June 25, 2005, at 25. In a recent article on evangelicalism published in *Time* magazine, David Van Biema states:

There is no Pope, no central ruling body. American Evangelicalism—with its home-schooling Fundamentalism and PTA-attending megachurch moms, its neo-Calvinists and Pentecostals, its multiple denominations and thousands of unaffiliated churches—seems to defy unity, let alone hierarchy. Yet its members share basic commitments: to the divinity and saving power of Jesus, to personal religious conversion, to the Bible’s authority and to spreading of the Gospel. Those same understandings unite the generation of influential leaders who channel conservative Christianity’s overflowing energies. *TIME*’s list of 25, composed with the help of preachers, politicians, scholars and activists, deliberately leaves out some familiar figures—Jerry Falwell, Pat Robertson, Don Wildmon—whose stories are well known. Instead, we focus on those whose influence is on the rise or who have carved out a singular role for themselves. The following pages serve as a primer to their growing force in American life.

Van Biema, *supra* note 9, at 34. For a newspaper editorial focusing on “the disappearing wall” between church and state, see Editorial, *The Disappearing Wall*, N.Y. TIMES, Apr. 26, 2005, at A18.

Fall 2005]

COMMON GROUND

147

expanded to include at least the following subjects:¹¹

- A woman's privacy rights and her decision to have a child or to have an abortion;¹²
- An individual's interest in influencing decisions affecting the end of life;¹³
- A person's interest in having access to birth control information and devices;
- Society's interest in supporting research on AIDS and in controlling its spread;
- The use of "clean and free needles" to curtail the spread of contagious diseases;¹⁴
- Federal support for embryonic stem cell research;
- The teaching of evolution in the public schools;
- The display of the Ten Commandments in government buildings;
- The rights of Gays and Lesbians to equal treatment under the law.

Fourth, I draw an important distinction between a religious faith as providing an orientation and outlook, which may substantially influence but does not mandate certain public laws, on the one hand, and a religious faith as understood as mandating certain public laws or policies on the other.¹⁵ The former stops

11. The range of issues raised by religious groups is even broader than the issues listed in the text. Thus, there is dispute over whether standard history texts and narratives are fair to the role of religion in American history. See generally David D. Kirkpatrick, *Putting God Back into American History*, N.Y. TIMES, Feb. 27, 2005, § 4, at 1. At least one historical site has been criticized for failing to give adequate attention to the role of religion in the life of one of the Founding Fathers. Thus, Garry Wills wrote: "The director of Mount Vernon, James Rees, tells me that members of the religious right complain that not enough is made of Washington's religion in the displays and literature at his plantation." Garry Wills, *The Wise Warrior*, N.Y. REV. OF BOOKS, Mar. 10, 2005, at 15, 16. Senator Bill Frist has portrayed Senate Democrats as "'against people of faith'" for opposing some of President Bush's nominations to the federal judiciary. David D. Kirkpatrick, *Frist Set to Use Religious Stage on Judges Issue*, N.Y. TIMES, Apr. 15, 2005, at A1. The very popular Harry Potter books were criticized by Pope Benedict XVI when he was Cardinal Joseph Ratzinger, head of the Vatican's office of the Doctrine of Faith, on the ground that the "tales are sacrilegious and dangerous for children." Elisabeth Rosenthal, *As a Cardinal, the Pope was no 'Potter' Fan*, INT'L HERALD TRIB., July 16-17, 2005, at 2. Public funds are used to support religious sponsored activities. Elisabeth Bumiller, *Bush Says \$2 Billion Went to Religious Charities in '04*, N.Y. TIMES, Mar. 2, 2005, at A17. The superintendent of the United States Air Force Academy has acknowledged that "religious intolerance permeates the military school." *Air Force Academy Leader Admits Religious Intolerance at School*, N.Y. TIMES, June 4, 2005, at A10.

12. For an extension of the familiar debate over abortion, see Jodi Wilgoren, *Kansas Prosecutor Demands Files On Late-Term Abortion Patients*, N.Y. TIMES, Feb. 25, 2005, at A1.

13. Perhaps the most astonishing episode in recent times concerning end-of-life issues was the case involving Teri Schiavo. For a news report reviewing how Christian groups managed to get this individual case, involving a Florida woman whose feeding tube had been withdrawn, before the United States Congress and President Bush, see David D. Kirkpatrick & Sheryl Gay Stolberg, *How Family's Cause Reached the Halls of Congress*, N.Y. TIMES, Mar. 22, 2005, at A1.

14. See Editorial, *Ideology and AIDS*, N.Y. TIMES, Feb. 26, 2005, at A14.

15. As with most if not all sharp distinctions, this distinction can fail to capture the complexity of views regarding the relationship between religious faith and public laws that may exist along a spectrum connecting the two end points I have identified. For a thoughtful book on the role of religious convictions in the public square, see generally KENT GREENAWALT, RELIGIOUS

short of mandating certain public laws, which then requires other considerations to shape its ultimate position, while the latter, directly determines the content of public law. This distinction was recently emphasized by former Republican Senator John C. Danforth of Missouri, who is an Episcopal minister. Senator Danforth made clear his view that “people of faith” have “the right, and perhaps the obligation, to bring their values to bear in politics.”¹⁶ But he also pointed out:

Many conservative Christians approach politics with a certainty that they know God’s truth, and that they can advance the kingdom of God through governmental action Moderate Christians are less certain about when and how our beliefs can be translated into statutory form, not because of a lack of faith in God but because of a healthy acknowledgment of the limitations of human beings.¹⁷

Senator Danforth distinguished between a religious person who is involved in the nation’s public affairs and those who seek to base public laws solely on the basis of religious faith. He juxtaposed what he termed “moderate Christians,” who “do not agree that our responsibility to live as Christians can be codified by legislators” with what he termed “conservative Christians” who wish to “translate religious beliefs into the laws of the state.”¹⁸ Senator Danforth wrote:

Far from claiming to possess God’s truth, we claim only to be imperfect seekers of the truth. We reject the notion that religion should present a series of wedge issues useful at election time for energizing a political base. We believe it is God’s work to practice humility, to wear tolerance on our sleeves, to reach out to those with whom we disagree, and to overcome the meanness we see in today’s politics.¹⁹

With these preliminary points in mind, let me now turn to the question of the interface between faith and the underpinning of legal education. By religious faith, I mean the willingness to accept as valid certain historical and metaphysical

CONVICTION AND POLITICAL CHOICE (1988). See also Marci A. Hamilton, *What Does “Religion” Mean in the Public Square?*, 89 MINN. L. REV. 1153 (2005) (reviewing JEFFREY STOUT, *DEMOCRACY & TRADITION* (2004)).

16. John C. Danforth, Op-Ed., *Onward, Moderate Christian Soldiers*, N.Y. TIMES, June 17, 2005, at A27.

17. *Id.*

18. *Id.*

19. Senator Rick Santorum expresses the view that Senator Danforth would term the “conservative Christian” position when he stated: “How is it possible, I wonder, to believe in the existence of God yet refuse to express outrage when his moral code is flouted? How is it possible that there exists so little space in the public square for the standards that follow from belief in a transcendent God?” Sokolove, *supra* note 6, at 61. A poignant illustration of Senator Danforth’s conservative Christian would seem to be the Rev. Chan Chandler, who told his congregation in the Waynesville Baptist Church in Waynesville, N.C., in October 2004: “The question then comes in the Baptist Church, ‘How do I vote?’; let me just say this right now, if you vote for John Kerry this year you need to repent or resign. You have been holding back God’s church way too long.” Shaila Dewan, *Political Split Leaves a Church Sadder and Grayer*, N.Y. TIMES, May 16, 2005, at A1.

beliefs for which we have little or no evidence.²⁰ As defined, faith not only does not depend upon evidence, it may rely upon premises contradicted by the available evidence.²¹ Faith, as I use the term, is a “way of knowing”²² that differs significantly with others that depend upon facts, reason and argumentation. Given this definition, it follows not only that there may be deep disagreements among those of differing religious faiths, but also that there is no reason to assume the existence of a common ground for deliberation among those of differing religious faiths. As I define religious faith, there is not necessarily a relationship between a religious faith and public laws. Thus, one religious faith may be understood as mandating some public laws and another may be understood as not mandating any public laws. This is the distinction Senator Danforth has drawn between “conservative” and “moderate” Christians.²³

Two contemporary disputes may illustrate efforts to translate a religious faith into public laws.²⁴ The first involves the recent attacks on the teaching of evolution. Of course, the struggle over evolution in the public schools has a long history, which has pitted religious leaders against scientists, but some controversies never die. Not only have there been recent flare ups in Kansas and Oklahoma, but three scientists, two of them Roman Catholic biologists in the United States, recently wrote Pope Benedict XVI asking him to clarify the church’s position on evolution. The scientists were concerned by recent statements by Cardinal Christoph Schönborn, an influential theologian and the archbishop of Vienna, that the modern theory of evolution may be incompatible with Catholic faith.²⁵ According to a news report, the scientists asked the pope to

20. I draw a distinction between religious faith and the everyday usage of the word belief. Daily we wager our existence on an incomplete empirical basis. Will it rain, and should I take an umbrella? Are we experiencing a “housing bubble?” Should I change jobs? Although there is an element of uncertainty in each of these and other decisions that we make daily, these decisions, at least as I am categorizing them, are fundamentally different from decisions made on the basis of religious faith. The type of decision we make daily and that I put under the heading of “belief” is made in light of the empirical evidence that is available. Moreover, when we make these decisions we are open to change if we receive additional information that suggests that the factual premises underlying our initial decision are no longer adequate.

21. A well-known historical example was the Catholic Church’s assertions about the solar system that were initially challenged by Copernican theory and later directly confronted by Galileo Galilei, whose inquisition in 1616 remains a major touchstone in the historical struggle between religious faith and science. *See generally* PIETRO REDONDI, *GALILEO HERETIC* (Raymond Rosenthal trans., 1987).

22. I have borrowed this phrase from Stephen L. Carter, who used it in his article. Stephen L. Carter, *The Religiously Devout Judge*, 64 *NOTRE DAME L. REV.* 932, 939 (1989).

23. Danforth, *supra* note 16.

24. Basing public laws solely on religious faith obviously gives rise to important and complicated constitutional considerations under the First Amendment to the Constitution, which is a subject beyond the purview of this article. But, as is obvious, this is a subject of intense concern today. For a recent book on the subject, see generally MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005). *See also* Noah Feldman, *A Church-State Solution*, *N.Y. TIMES*, July 3, 2005, § 6 (Magazine), at 28.

25. *See, e.g.*, Jodi Wilgoren, *In Kansas, Darwinism Goes on Trial Once More: School Board Wants Evolution Challenged*, *N.Y. TIMES*, May 6, 2005, at A18. A recent editorial in the *International Herald Tribune* recounted a public controversy in Tulsa, Oklahoma between

“reaffirm statements on the subject by Pope John Paul II and others ‘that scientific rationality and the church’s commitment to divine purpose and meaning in the universe were not incompatible.’” The scientists further stated that it was important that “‘the Catholic Church not build a new divide, long ago eradicated, between the scientific method and religious belief.’”²⁶

The second example involves the public financing of stem cell research. In a May 2005 statement, President George W. Bush stated in reference to a bill under consideration in Congress that would provide public financing for stem cell research: “‘I made it very clear to the Congress that the use of federal money, taxpayers’ money, to promote science which destroys life in order to save life is—I’m against that. And therefore, if the bill does that, I will veto it.’”²⁷ In response, Mario M. Cuomo, former governor of New York, criticized the President’s “refusal to consider retrieving stem cells from the many thousands of unused embryos awaiting destruction.” According to the Governor, Bush’s view was “compelled by his belief that retrieving stem cells from the embryo destroys it, thereby resulting in the killing of a human being that cannot be justified no matter how vast the potential benefits.” Cuomo, however, stated that “our pluralistic political system adopts rights that arise out of consensus, not the dictates of religious orthodoxy.”²⁸

scientific evolution and Christian fundamentalism that maintains that the Genesis account of God’s creating the universe is the only true account. See Editorial, *How’s This for Creationism?*, INT’L HERALD TRIB., July 11, 2005, at 10. The editorial stated:

Christian creationists won too much of a victory for their own good in Tulsa, Oklahoma, where the local zoo was ordered to balance its evolution science exhibit with a display extolling the Genesis account of God’s creating the universe. A determined creationist talked three of the four zoo directors, including the mayor, into the addition by arguing that a statue of the elephant-headed god Ganesh at the elephant house amounted to an anti-Christian bias toward Hinduism.

After the inevitable backlash from bewildered taxpayers warning that Tulsa would be dismissed as a science backwater, the directors “clarified” their vote to say they intended no monopoly for the Adam and Eve tale but rather wanted “six or seven” creation myths afforded equal time. There was the rub: There are hundreds of creation tales properly honored by the world’s multifarious cultures, starting with the American Indian tribes around Tulsa

....

...The futility of the exercise was emphatically made clear last week when a crowd of critics demanded reconsideration In stumbling upon so many worthy cosmogonies, Tulsa did us all a favor by underlining how truly singular the evolution explanation is, rooted firmly in scientific demonstration.

Id.

26. Cornelia Dean, *Scientists Ask Pope To Address Evolution*, N.Y. TIMES, July 13, 2005, at A18.

27. Peter Baker, *President Vows Veto on Stem Cell Research*, WASH. POST, May 21, 2005, at A6.

28. Mario M. Cuomo, Op-Ed., *Not on Faith Alone*, N.Y. TIMES, June 20, 2005, at A15. Another illustration involving public financing of stem cell research concerns Cardinal William H. Keeler of Baltimore, the American Bishops’ chief representative on abortion, who sent a letter to all members of Congress urging them to oppose a bill, popularly known as the “Castle bill,”

Contrast that approach to the issue with one based on the philosophical underpinnings of contemporary American legal education.²⁹ Legal education today values defining legal, ethical, moral, economic, social, cultural, and political norms with precision, and it emphasizes the importance of reviewing, assessing, and revising these norms. Legal education invites students to challenge accepted norms in light of new evidence, changing circumstances, and countervailing considerations. As a result, law students are encouraged to question and explore social, economic, political, cultural, ethical, and moral norms as they relate to the law and to take account of facts and changed circumstances in shaping a position.

In legal education, as in the practice of law, evidence matters. Evidence is an important ingredient in making persuasive arguments. Evidence supports legal norms and is used to explore the wisdom and efficacy of legal norms. Changed facts and evidence will change conclusions reached by the application of identifiable norms, and new facts and evidence may undermine the basis of previously established norms and compel a revised norm. Legal education frowns on hiding from inconvenient evidence and acknowledges no external authority that limits freedom of inquiry and debate.³⁰

concerning a vote in Congress pertaining to embryonic stem cell research, on the ground that it was “destructive and morally offensive.” Sheryl Gay Stolberg, *As Vote Nears, DeLay Attacks Bill Expanding Stem Cell Research*, N.Y. TIMES, May 19, 2005, at A17.

29. I should emphasize that my comments apply to any effort to make public laws *solely* on the basis of religious faith. Thus, my comments apply as much to those who are perceived as political liberals as they do to those who are perceived as political conservatives. For an interesting recent book in that regard, see generally JIM WALLIS, *GOD’S POLITICS: WHY THE RIGHT GETS IT WRONG AND THE LEFT DOESN’T GET IT* (2005).

30. The potential, abstract collision between a religious faith that mandates public laws and the underpinnings of legal education—and by extension, to the legal profession—may have practical consequences for the public affairs of the nation. Because of their education and the authority our society has historically granted lawyers, lawyers have played a dynamic and influential role in America’s public life. Lawyers, as is commonly known, were influential in the drafting of the Constitution, and as Felix Frankfurter has asserted, that “was not accidental.” *OF LAW AND LIFE & OTHER THINGS THAT MATTER: PAPERS AND ADDRESSES OF FELIX FRANKFURTER 1956-1963*, at 154 (Philip B. Kurland ed., 1965).

During the early years of the new republic law graduates permeated public offices. Thus, between 1784, when it opened, and 1833, when it closed, the Litchfield Law School in Connecticut “had produced over 1,000 students, and among the 805 students whose names were recorded were 2 vice-presidents of the United States, 3 U.S. Supreme Court justices, 34 judges of state supreme courts, 6 cabinet members, 2 ministers to foreign countries, 101 members of the House of Representatives, 28 senators, 14 governors, and 10 lieutenant governors.” STEVENS, *supra* note 2, at 11 n.9.

And although the point hardly needs additional development, it is worth recalling Alexis de Tocqueville’s observation, which is as valid today as it was 170 years ago when offered: “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.” DE TOCQUEVILLE, *supra* note 5, at 290. A recent example of the clarity of Tocqueville’s perceptiveness are the two cases decided by the Supreme Court on June 27, 2005, deciding whether the placement of the Ten Commandments violated the Constitution. In *Van Orden v. Perry*, the Court decided that the placement of a six-foot-high monolith inscribed with the Ten Commandments on the grounds of the Texas State Capitol, which also contained 21 historical markers and 17 monuments, did not violate the Constitution. 125 S. Ct. 2854, 2858 (2005). In

Ultimately, legal education is committed to freedom of inquiry, the expansion of knowledge, and exploring the meanings of justice.³¹ Legal education emphasizes the significance of tradition and precedent—recall Holmes’ famous admonition: “The life of the law has not been logic; it has been experience”³²—while committing itself to rethinking the past in light of present day facts, evidence, and circumstances so that normative legal guides for today and tomorrow will resonate with the moral, ethical, and practical requirements of a society and be ones that the citizenry will respect.

Understanding the differences between these two different ways of resolving social and political issues is an important but limited point.³³ To assure that the boundaries of this point are plain, let me emphasize that there is no inherent tension between religious faith and the underpinnings of legal education, nor is there any inherent conflict between individuals of profound religious beliefs and the actual practice of law.³⁴ In addition, my comments obviously have no bearing on the free exercise of religion as protected by the First Amendment to the Constitution, the important role of religion in individual lives or American life, the many contributions that religious groups make to American life, or the significant contribution of religious law and thought to the western legal tradition.³⁵

To a surprising extent, there seems an affinity between the underpinnings of legal education and the considerations that prompted the adoption of the First Amendment’s prohibition barring the establishment of a religion. Legal education places a premium on what I consider the tools of deliberation—evidence, reason, and argumentation. A deliberative process based on these

McCreary County, Ky. v. ACLU of Ky., the Court concluded that readily visible copies of the Ten Commandments in the courthouses in two Kentucky counties did violate the Constitution. 125 S. Ct. 2722, 2738-39 (2005).

31. For a symposium on the teaching of values in law schools, see Symposium: *Teaching Values in Law School*, 36 U.S.F. L. REV. 591 (2002).

32. OLIVER WENDELL HOLMES, COMMON LAW 5 (Mark DeWolfe Howe ed., Harv. Univ. Press 1963) (1881).

33. The differences between a religious faith mandating a public law or policy and the underpinnings of legal education may be illustrated by reference to the controversy over abortion. Some religious faiths assert that life begins at conception and that abortion is therefore immoral and against God’s will lacks a common ground for deliberation with an approach that insists on evidence, reasons, and argumentation as a basis for policy or law. But a position opposing abortion that rests on a variety of factors such as a broad societal interest in increasing a society’s population and an empirical assertion that it is always in a pregnant woman’s best interest not to have an abortion is a position open to deliberation based on evidence, reason, and argumentation and does share a common ground with the underpinning of legal education.

34. See generally Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 CASE W. RES. L. REV. 127 (2004); Russell G. Pearce, Foreword: *The Religious Lawyering Movement: An Emerging Force in Legal Ethics and Professionalism*, 66 FORDHAM L. REV. 1075 (1998); Suzanne L. Stone, *Sinaitic and Noahide Law: Legal Pluralism in Jewish Law*, 12 CARDOZO L. REV. 1157 (1991).

35. For an important and recent study on this subject, see generally HAROLD J. BERMAN, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION (2003).

considerations promotes a common ground among those of diverse perspectives that helps hold together a pluralistic society such as that in the United States.³⁶

Similarly, the Establishment Clause of the First Amendment not only seeks to keep the state neutral so that it does not prefer one religion over another, but, by so doing, it also encourages the state to make public laws and policy by what I have termed the tools of deliberation. These tools become a common ground for deliberation among individuals and groups whose historical, religious, and cultural differences may be substantial. Thus, the effort to keep some separation between church and state in the making of public laws in the United States promotes unity by requiring a common ground for the making of public laws.³⁷

It is not fashionable today to say many good words about law schools, the legal profession, and their contributions to American life. I think that is regrettable, not because law schools and the profession lack serious failings—they most certainly do not—but because the inclination to take them to the wood shed has largely overshadowed their constructive role in our society. The United States simply could not be what it is without law schools and the legal profession. As already noted, law schools and the profession are central to the rule of law, our democratic structure and process, our capital markets, and our

36. *But see generally* Carter, *supra* note 22 (offering a different analysis).

37. The United States Supreme Court recently emphasized this theme when it said: “The Framers and citizens of their time intended not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate” *McCreary County*, 125 S. Ct. at 2742 (citations omitted).

Former Senator Danforth recently highlighted the connection between maintaining a wall between religious faith and public laws and fostering unity in a diverse American society. Referring to what he termed “moderate Christians,” Senator Danforth wrote: “We strongly support the separation of church and state, both because that principle is essential to holding together a diverse country, and because the policies of the state always fall short of the demands of faith.” Senator Danforth continued by pointing out the harmful consequences of a system of government that permitted religious faith to be the sole basis for the making of laws: “To assert that I am on God’s side and you are not, that I know God’s will and you do not, and that I will use the power of government to advance my understanding of God’s kingdom is certain to produce hostility.” Danforth, *supra* note 17. *See also* Cuomo, *supra* note 28. In a review of Michael J. Perry’s book, *Love and Power: The Role of Religion and Morality in American Politics*, Sanford Levinson offers a summary analysis of a dominant perspective:

A principal philosophical project during the last two decades, represented most prominently in the work of John Rawls and Bruce Ackerman, has been to derive the postulates of the best feasible political system for a world characterized by significant (and, as a practical matter, ineradicable) moral and religious pluralism. These theorists generally endorse a state that remains scrupulously neutral, insofar as possible, regarding the competing views of the good life that are found in civil society. Moreover, according to some contemporary liberal theorists, not only public policies, but also the discourse concerning them, should be neutral—devoid of any reference to the moral (or religious) ideals that might in fact motivate many citizens’ commitments to the policies.

Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061, 2064 (1992) (footnotes omitted) (reviewing MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991)).

freedoms. But, as this essay has endeavored to make plain, law schools and the legal profession contribute to fostering the tools of deliberation and providing us with a common ground that help bridge our differences and shape our public laws and policy. And even though not generally acknowledged—perhaps because of the dominant perception of the practice of law as being adversarial—that contribution, providing our pluralistic society with a common ground for bridging our differences, may be as important to our nation as any that law schools and the legal profession daily make to American life.