

PANEL DISCUSSION AND COMMENTARY*

Judge Sykes: We will now have a few moments for response from each of the panelists, and then we will have a question period.

Dr. Skillen, you can take the podium or speak from where you are.

Dr. Skillen: Just a few comments. I am anxious to hear questions.

I am quite in agreement with Mike McConnell and the general statement that he laid out. It seems to me that to prejudge how someone may speak is itself a judgment about who may participate as a citizen and who may not. But everyone who is a citizen should be free to participate in public debate without qualification. Also, I would say, if at many points where Professor Audi uses the terms “secular,” “secular reasoning,” or “secular reasons,” he would instead speak of public-legal reasons or political reasoning, I would be quite sympathetic. That is to say, anyone who is speaking to matters of political or legal life should offer public-legal arguments from their religious or nonreligious point of view. It will not be very helpful in political discussions for someone to say simply that God told them something, or that science has lately shown, or that their best friend thinks this or that. A speaker needs to argue, for example, that Congress or the courts should do something, and then, of course, what should follow is an argument for why that “something” will be just or sound for the common good. And that, of course, raises the question: what is it that we think government ought to do? What is the nature and the task of government in its relationship to other institutions? I would dare say that it is precisely with such basic questions that we arrive at the most fundamental considerations and beliefs. Where do we get our notions of a diversified society, limited government, the dignity of human beings, and constitutional freedoms and restrictions? I think that in every case those convictions are grounded in some kind of comprehensive point of view.

So in this regard, we bring to public debate our political philosophies. We bring our views of life, and that is why I would say I think Judge McConnell is right. Everyone should be free to make his or her arguments, and in the end we might well disagree with one another because of where we started, but we may find—through majority

* This panel discussion was presented as part of the Federalist Society for Law & Public Policy Studies 2007 National Lawyers Convention, November 15, 2007. The panelists included: the Honorable Michael W. McConnell, United States Court of Appeals for the Tenth Circuit; Professor Robert Audi, University of Notre Dame; Professor Kent Greenawalt, Columbia Law School; Dr. James W. Skillen, President, The Center for Public Justice; moderated by the Honorable Diane S. Sykes, United States Court of Appeals for the Seventh Circuit.

decisions and good constitutional reasoning—that we can continue cooperating and agree to uphold the law.

I do not know of any religious language in the United States that can lead to justified coercion unless, of course, it becomes law—public law that governments impose. That is why I believe a constitutional protection must be enforced that guarantees the right of all citizens to speak, to associate, to organize, to live, regardless of their religious convictions. Even a majority of ninety percent should not be allowed to deny to the minority a right to speak and live from out of a different viewpoint.

Where the difficulties arise are when someone is restricted (or inequitably funded or otherwise impeded) in the exercise of their right to speak or associate because they are judged to be too religious and not secular enough.

Judge Sykes: Thank you. Professor Audi?

Professor Audi: I will be as brief as I can and so will speak only to two things Judge McConnell said, which I suspect interest the audience most. He cited my excusability clause in connection with freedom of expression, but I want to stress once again that I do not have any principle for restricting free expression, which I support to the hilt. Prudence operates there, of course. I think in another place he associated me more closely with Rawls than he should have. I think I am much more an accommodationist than Rawls, particularly in comparison with his work before his introduction to the paperback edition of *Political Liberalism*.¹

Now, related to this, he referred to an epistemological pre-screening device, so let me remind you that I said that for coercion, one should have adequate secular reason, something that is available to us as rational, informed citizens. One can also have religious reasons, and they can be evidentially sound. It is just that if I am going to illegalize assisted suicide, I should not do it just on a basis that involves my interpretation of scripture, let's say, when lots of people who are equally devoted to scripture read differently; and then there are those who are not religious at all who would like the freedom to have assisted suicide.

It is really a requirement that we have an appropriate certain kind of reason for coercion. It is not a requirement that one's speech be limited or that one cannot act for religious as well as other kinds of reasons, even with coercion. And, I might add, when it comes to liberalization, given that liberty is the default position in a free

¹ See JOHN RAWLS, *POLITICAL LIBERALISM*, at xiii (1993).

democracy, religious reasons are just fine. So, I applaud their use in lifting oppression.

I also want to say that in no way would I want to de-legitimize religious argument. It is a question of what role it ought to play and whether you want it to play the role all on its own, unsupported by the kinds of reasons one can have when one is in a theo-ethical equilibrium where natural reason cooperates with theological and religious insight to produce an integrated view.

There is a larger thing I want to mention that I think has not surfaced, except perhaps in Kent's initial remarks. It is that a morality that concentrates just on rights is too narrow. I gave the example of a right not to give to charity. It seems to me you can have wrongs within rights. Not every exercise of a right is something we should approve of. There are times you have a right to punish a child or criticize a colleague, and on balance you ought not to do it. But no one should coerce you to prevent you from doing it.

I am interested in an ethics of citizenship that calls for our meeting a higher standard than simply living within our rights. Sure, there is a right to vote on your religious convictions, but would you want a majority Islamic population that wanted women to wear burkas, to impose that for religious reasons only? There might be reasons for wearing burkas that have another basis, so I do not rule that out *a priori*. But, the point is, we very much dislike being coerced at all, especially by religious reasons from another person's religious point of view.

So, maybe at that point I would just say, one question for Judge McConnell (if you would like to address it), is whether he has an interesting restriction in the idea that everyone has a right to advocate for the public good. Is there an objective notion of the public good that creates a constraint on the appropriate sort of normative reason one can give for laws and public policy? Maybe so, but I did not hear that in the position overall.

Judge Sykes: Judge McConnell?

Judge McConnell: Well, I think it would be good to get to the audience, so I will just address the two particular questions that have been put to me. Kent Greenawalt asks, in my capacity as a judge would I rely upon explicitly theological premises? The answer to that is, no. Nor would I rely upon any other personal philosophical, whether secular or non-secular, premises. I believe a judge is a constrained decision-maker whose obligations rely upon the law and nothing else but the law. My theological principles do not appear in the United States Code and, therefore, they will not appear in my opinions either. But, it is not

because they are theological. It is because my personal opinions about matters are not an appropriate basis for legal or judicial decision-making.

Professor Audi asks a hard question, and I really quite like his question. He asks whether there is any interesting restriction implied when I talked about citizens making arguments based upon the common good. I do not know how interesting they are, but I do think that there is a sense in which purely self-interested arguments are a brand of a bad citizen. But, I also think that the common good or the public good is something that only the citizens are able to decide.

So, I think that we should not try in advance to label some arguments. Agricultural price supports would be my favorite example of a public policy that is virtually impossible to defend on only a genuine public good basis. But, I say, let people defend them, and let the rest of the public decide. I do think that it is a problem of our politics that so much of our political practice seems to be cobbling together a whole bunch of people's self-interests, and it is as if we get enough earmarks in the bill, then everybody benefits. I do not like that aspect of our politics. But, it does not lead me to think that we need a complicated theory. I just think that a healthy democracy will be skeptical of so much self-interested argument. But, I really like that question. It makes me think.

Judge Sykes: Thank you. Professor Greenawalt?

Professor Greenawalt: I just have two fairly brief points. The first is that both Judge McConnell and Dr. Skillen talked about no pre-screening devices and so on—that kind of language. Now, I would think that there are some bases for arguments that are really contrary to liberal democratic premises such as racism. And, I would think that we would say, if somebody makes an explicitly racist argument, “You are free to do that, but that really is contrary to the way we think about things in this society.”

So, I am skeptical that what one would really want to defend is no pre-screening if it includes that. Then the question is, if one does think that kind of pre-screening is appropriate for that kind of argument, how do religious arguments relate to those? So, again, I do think there is a huge difference between the religious arguments and these other arguments, but I do not think one can just sort of toss the religious arguments off on the basis that, “Well, there is no pre-screening of arguments.”

My second point is one I did not mention when I first posed this issue about how the judge compares to the legislator in respect to relying on theological arguments. Judge McConnell and I were at a conference at Catholic University about seven or eight years ago, in which we

engaged in this exchange, and those papers have finally seen the light of day, thanks to Bill Wagner about seven years later.² These have just come out. But anyway, I think that Judge McConnell oversimplified to a considerable degree here. That is, I think judges are often in the position of deciding when the law is not clear about something or how to interpret a law that considers questions of public welfare and justice, and views that are not drawn explicitly from the law do bear on their opinions.

Just to take one example of that, how about—of course Judge McConnell is not in this position—the judge who has got to decide what is in the best interests of a child in a custody dispute. That is the standard. The judge has to decide what is in the best interests of the child. The law does not tell the judge everything that is relevant to the best interests of the child. A judge could rely on various things. Would it be appropriate for a judge to say, “Well, I know from the Bible that this is in the better interests of the child, from God’s point of view, from the true religious point of view, than the alternative.” I still think that is inappropriate.

So, I do think there is a difference for the judge between relying on explicit theological premises and relying on some other premises that are not directly drawn from the law itself.

Judge Sykes: All right. We will now take your questions for the panel, and there is a microphone in the center of the room if you would like to step forward if you have a question.

If you have a question for a specific member of the panel, that is fine, or for the panel as a whole.

Question 1: I have a question for anyone on the panel. Would there be any cases where, within our current political discussion, there are particular issues where an important viewpoint could not be justified except on what some of you have labeled “explicitly religious grounds”? Are their arguments that would be shut out entirely, either viewpoints or entire topics, if we did not allow people to make their points based on their individually held religious beliefs?

Judge Sykes: Dr. Skillen or anyone? Who would like to field that question? Okay, Professor Greenawalt.

Professor Greenawalt: I think it would be a rare issue where you could not find some non-theological argument. So, in that sense I think nothing would be excluded. But if we were going to be honest with

² Symposium, *Idea of Public Reason: Achievement or Failure?*, 1 J.L. PHIL. & CULTURE 13–197 (Spring 2007).

ourselves, we would have to think sometimes the nonreligious reasons might not be enough to carry the day, whereas the religious reasons we would find strong enough to carry the day. And then it would make a difference whether you are relying on them and advocating them. Same-sex marriage might be an example of that; maybe abortion for some people might be an example of that, and so on. I do not think we should think of this as whether there is ever going to be an issue that does not involve anything other than theological arguments but whether the tipping point could be altered by the use of a religious basis.

Judge McConnell: I do not think there are very many; there are some having to do with Native American beliefs about the land. For example, there have been several cases that have come up in my part of the world where there have been, for a specific example, Rainbow Bridge, an arch down by Lake Powell, which is sacred to the Navajos, and there is an effort by the National Park Service to restrain voters from going and cavorting on this particular arch.³ And, there is no—I mean they can cavort on every other arch, so it is not as if there is any—the only reason Rainbow Bridge is different is because some of our fellow citizens think that it is sacred. So, that is an example of an argument that I guess would be excluded if we excluded expressly religious arguments.

Professor Greenawalt: I would just like to add that I would not actually call that a religious argument. It is an argument from respect for religion, and it is not obvious to me that other sufficiently deeply held views might not generate the same kind of judicial action.

Judge McConnell: It may not be a religious argument for us, but it is a religious argument for the Navajos who think it is sacred. They are saying that this is sacred ground.

Professor Greenawalt: Well, if we relativize to what is religious for a speaker, practically anything could be religious.

Judge Sykes: Dr. Skillen?

Dr. Skillen: No. Thank you.

Judge Sykes: All right, next question.

³ *Natural Arch & Bridge Soc'y v. Alston*, 209 F. Supp. 2d 1207, 1209–11 (D. Utah 2002).

Question 2: I have a three-sided question, and I hope the panel will, from one end to the other, respond. The strongest argument that seems to be made thus far for religious speech in the public square is an equality argument. And it seems to me that some of Judge McConnell's writings make it an even stronger argument. I wonder if he has reconsidered that? That is, that the First Amendment is more than, religious speech is more than just equal, that there is some sense of a preference or at least a special place for that kind of speech in our political system that may be different than others. So I wonder if we cannot make a stronger argument than, let all the flowers bloom, including the religious ones.

Second, I noticed that none of the panelists made a religious argument for the proposition. They have all presented their positions in non-religious, rational terms, and I wonder what that tells us. I mean, certainly nobody is going to throw stones at you for making a religious argument in this setting, and yet it does not come out. What does that tell us about our society? Have we become so secularized? Is it because there is no common religious value that we can speak to in terms of, you know, it is not just? I can make a Baptist argument or a Catholic argument or a Mormon argument, but are there no common religious arguments that we can make that are persuasive in a public setting anymore? There were times when you would have grace before you had a meal in a public setting. I do not even think that occurred here. I was in another room though when things began. I may be wrong.

Question 2: The third point is American exceptionalism, the theme of this conference, and it seems to me that we have a mission not just to bring democracy or liberty to the world but to set an example for the world. That is what American exceptionalism has meant, to set an example of how this "city upon a hill,"⁴ the shining city, governs with a moral mission. I wonder if we are not seeing in events like Abu Ghraib⁵ the effect of a generation of sanitizing moral and religious speech from the public square. We are seeing a generation of young people coming of age with citizenship responsibilities and guns in their hands that are doing things that their fathers would never have done, that we did not see happen in World War II despite the horrors that soldiers faced then.

So those three sides I would love to have an answer. Is not there a stronger argument for religious speech?

⁴ John Winthrop, *A Modell of Christian Charity* (1630), in *POLITICAL THOUGHT IN AMERICA: AN ANTHOLOGY* 7, 12 (Michael B. Levy ed., Waveland Press, Inc. 2d ed. 1988).

⁵ See Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge: Abu Ghraib Detainees' Statements Describe Sexual Humiliation and Savage Beatings*, WASH. POST, May 21, 2004, at A1.

Judge Sykes: All right, who would like to start? Dr. Skillen?

Dr. Skillen: Two brief comments. I do not read the First Amendment as giving a special protection for religious speech. There is freedom of speech, and there is freedom of religious practice. Religious practice includes speech, of course, but I do not read the amendment as having a special place for religious speech compared with nonreligious speech.

This panel was to discuss the role of religion and public argument. I would be more than willing, if there was more time, to make an argument from out of my deepest convictions that humans have been created in the image of God, that we are not created by the state, that states are not the authors of religious freedom, and that there are Christian grounds for an open society with a constitutionally limited state, and that people of all faiths and nonfaiths should be free to live from out of their deepest beliefs in public as well as in private life.

Judge Sykes: Professor Audi?

Professor Audi: Very briefly, it seems to me that religion is very deep in people who are genuinely religious and that a free democracy as a system of government of, by, and for the people will protect religious liberty as much as possible. Now, whether religious liberty is even more precious than any other kind is an interesting question, but you may remember that I said that the principle that governments should treat different religions equally does not entail that it should be neutral toward religion, so for instance, treat the religious and the nonreligious equally. So it is an interesting question on which I defer to others, whether the Constitution might allow protecting religious liberty even more zealously than certain other liberties.

Judge Sykes: Judge McConnell?

Judge McConnell: The specific references to religion have to do with exercise, not speech and establishment. I do think that the Constitution contemplates special protections for religious exercise, but I do not think that it gives religious speakers any preference over anyone else. I think the Free Speech Clause is fundamentally one of the equality of all citizens, and I think the religious Free Exercise Clause gives all citizens the right to practice their religion in accordance with conscience to the greatest extent consistent with important governmental purposes.

We have not used any religious arguments? I do not know. I thought some of the things we said were pretty religious. I do think that there is

one reason why we do not worry about some of the pragmatic arguments against the use of religious arguments in a pluralistic society like America—the pressures are all the other way. That is, I think in a pluralistic world, in a democracy, when you are advocating for policy that there are good, prudent political reasons why even religious people will be moved to couch their arguments in fashions that are going to be broadly acceptable. And I think, without having any pre-screening devices at all, a society like this will tend to have much less sectarian argumentation because of the greater diversity, because it does not work, is ineffective, and so forth. I suspect that is true of this, even in a room like this.

I am very hesitant to attribute Abu Ghraib or any other moral failings of our day to the decline in religious speech. I do not know, but the Calvinist in me is tempted to say that “all have sinned and fall short of the glory of God,”⁶ and there is no one righteous, no, not one.⁷

Judge Sykes: Professor Greenawalt?

Professor Greenawalt: I agree with a lot of what Judge McConnell just said. I agree with him, first of all, that the Supreme Court’s position on the Free Exercise Clause is not nearly as generous as it should be. Well, I do not know whether he still believes that, but he has certainly written that in the past.

Judge McConnell: Well, I cannot believe anything anymore.

Professor Greenawalt: Yes, right.

Judge McConnell: I just call the balls and strikes.

Professor Greenawalt: I think protecting religious speech is different from the acceptance of theological premises as true by the people that are making the decisions. I think these are separate issues.

I want to say I agree completely with what Judge McConnell said about bad things that are going on now; and just as a reminder, if we think the Nineteenth Century was great, that was the century for slavery, of terrible persecution of blacks after slavery ended, inequality for women, and so on. There are various things where if we said, “Was that a morally great century?” I think the answer would be “no,” and where I think we actually have made some considerable progress over time.

⁶ *Romans* 3:23 (NIV).

⁷ *Romans* 3:10 (NIV) (“There is no one righteous, not even one . . .”).

My final point is that given the change in immigration law in the 1960s—previously there was tremendous favoritism for people that were coming from Europe, and now, most of our immigrants are coming from Asia—we are going to see increasing religious diversity over the years unless those laws are significantly changed back. And, we have to think about a society in which we have this great religious diversity.

Judge Sykes: All right, next question.

Question 3: With the premise that we are in an experiment of self-government, that is, in America, and that free discussion among the people of that government, of these policies, is a necessary component of self-government, I do not see what is advanced by essentially saying that certain arguments that motivate citizens or public officials cannot be raised because what you are doing then is forcing them to not give their true motivation or justification, but a pretense.

I mean, they are motivated by *X*, and if I understand the argument, if it is a religiously based argument, it is at least unethical. So that person is required not to give—if he wants to be ethical—not to give the true reason, but a pretense. And I do not see how our discussion is advanced by having people not state their true arguments to be evaluated and discussed, and I think there are costs to that. The continuation of this experiment is dependent in part upon people believing that it is legitimate and that their concerns can be raised and discussed. If religious people cannot discuss public policy in religious terms, you are threatening their belief in the legitimacy of the government and of the process.

And finally . . .

Judge Sykes: All right.

Question 3: Just one more quick one on public officials. What is advanced by a pretense, a pretextual argument by a public official? What is advanced by that? I mean, would not those who do not want public officials to make decisions based upon religious justifications want to know it so that they can vote them out of office, as opposed to them pretending that there is some other reason than the true one?

Judge Sykes: Right. This sounds like a challenge put to Professor Audi.

Professor Audi: I think it is. I think it is. I would like to remind you of comments made by other panelists to the effect that in public policy matters, there normally are reasons of a kind that do not depend

on a particular religious point of view. Then I want to remind you also that I have no objection to people's giving religious arguments. I would, however, be very puzzled if someone had only religious reasons for wanting to pass a coercive law or public policy and could not think of any other reasons. But, if those are the only reasons the person has, then I agree with you, it would be honest to give those reasons in public advocacy. Doing so might tend to invite others who have religious reasons on the other side to present those, and as I have said before, we have to be careful about a situation in which we have, in effect, a clash of gods. It is like a meeting of an irresistible force with an immovable object.

Judge Sykes: Go ahead, Professor Greenawalt.

Professor Greenawalt: I think actually this is more an attack on me than Professor Audi, because my position is the one that draws a distinction between advocacy and decision. He says there should be more limits on the basis of decisions, as well, and I think that is the strongest argument against my position. I guess my answer to it is—take someone like Jimmy Carter, a very religious person, who I think rarely, if ever, made a religious argument for laws when he was president.

It is a degree of lack of full candor. I do not think there are many legislators and public officials that are engaging in full candor much of the time, so I do not think the sacrifice there is too great, but I think that is a substantial point that you have made.

Judge Sykes: All right, next question.

Question 4: I would celebrate Professor Audi's inimical attitude toward relativism, but on the point at which you raised that, perhaps taking the extreme, you are correct. But I do not think it would be at all incorrect or particularly relativistic to suggest that making policies, say, based on *Earth in the Balance*⁸ or the kind of Crystal Cathedral preaching tour that Al Gore is now engaged in would not be in a sense giving in to arguments of a very spiritual territory. And my concern is not that we have a legal prohibition, but at least currently we seem to have a social prohibition or an allowance to throw tomatoes at somebody that would make a biblically based argument, but to insulate from that style of criticism the types of advocacy in which people of the ilk of Al Gore are now engaged.

Would you see at least bringing them into the sphere of your criticism?

⁸ AL GORE, *EARTH IN THE BALANCE* (1992).

Professor Audi: Well, I think you have been a little abstract. It might help to distinguish the religious from the spiritual. There are spiritual people who have pretty secular and spiritual considerations, like respecting the beauty of the environment; such considerations are secular, it seems to me. Also, the call here may be for voluntary conservation rather than coercion. So, I think I can see much of the value in the direction you are going, but I am not sure exactly what policy implications you are aiming at, and I do not know that I said anything incompatible with the view you are moving toward.

Judge Sykes: Anyone else? All right, next question.

Question 5: Would it make more sense to have an ethic of respect for the points of view of other citizens rather than a requirement that people limit their discourse? Would it make more sense to have an ethic of citizenship that says, “When I hear a citizen make an argument that comes from a philosophical or religious point of view that I do not share, it would be good for me as a citizen to evaluate the argument, see if there is perhaps something there that I might agree with, something even in their basic grounding that makes more sense than I thought it had,” so that instead of encouraging people to say less, we encourage people to say more and encourage listeners to hear in an understanding way to try to make sense out of what their fellow citizens are saying? That is my first question.

The second question is for Professor Greenawalt. I wonder if a restraint on officials giving religious reasons for advocating public policy, I mean if that is to be a standard, what does that do to the Declaration of Independence, for example? What does that do to Lincoln's oratory? And, is it, in a sense, the effectiveness of the advocacy in those cases, as with Jefferson's Statute for Religious Liberty,⁹ in part due to the appeal to a people who are largely religious, and for a very good result? Thank you.

Judge Sykes: Let us take that one first, the question to you, Professor Greenawalt.

Professor Greenawalt: Okay. Well, there certainly are things in the past that would not fit what I said. That is why I talked about time and place. I think what Lincoln says, if one is careful and looks at it, usually is not to say we should do *X* because of some theological

⁹ Virginia Statute of Religious Liberty (Jan. 16, 1786), *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY 125, 125–26 (Henry Steele Commager ed., 7th ed. 1963).

argument. It is to rely on theological arguments in very different ways that I think are perfectly acceptable.

And, on the first point, I think there is a lot to what you say. I think it does not apply so much to officials. There is a book by Jeffrey Stout called *Democracy and Tradition*¹⁰ that I think is very good on that.

Judge Sykes: Any other reactions?

Dr. Skillen: From my religious standpoint, and I would hope from that of others, I want us to be teaching children and students an ethic of respect, but to say that is to express a kind of an abstraction. When it comes to the political-legal world, how should we show respect? It is not simply that I want somebody to hear me and say, "Well, I will respect what you say." We need to learn how to argue with one another about what will make for a good public order. If I have respect for you but I think the argument you are making is very unsound and is going to lead to injustice, my respect calls for me to argue back and say, "Oh, but that is not right."

Civil discourse has to be very vigorous. It has to clarify the different standpoints we have so that we can try to figure out how to live together. So, I am fully for an ethic of respect. But it has to extend to the different kinds of discourse in which we engage, including political and legal debate. It has to mean showing respect to those with whom we deeply disagree by deeply disagreeing with them.

Professor Audi: Very briefly, I think we all think we are proposing an ethic of respect, and I have emphasized theo-ethical equilibrium, which involves learning on the religious side from secular thinking and on the secular side from religious thinking. This is not possible for just anyone, but even non-religious people can think their way into a religious perspective. A general point on sharing ideas is that arguments on the whole tend to be valuable, though they can be overdone. Arguments are both paths to understanding and pillars of conviction. So, in many contexts, the more, the better.

Judge Sykes: All right, last question. We have less than five minutes.

Question 6: First of all, I want to thank the panel. It has been very, very stimulating, and my compliments. I am sure that when we finish this, we will all give you a round of applause.

¹⁰ JEFFREY STOUT, *DEMOCRACY AND TRADITION* (2004).

But given that religious arguments and secular arguments all proceed from the citizen's own individual view of how the world works, can any member of this panel explain why we should carve out secular views as having a special role as a gatekeeper?

Judge Sykes: Who would like to field that one?

Dr. Skillen: I do not think there is any reason to give special public privilege to any viewpoint, including a viewpoint that is called "secular." What does one mean by a secular viewpoint? Which "secular" viewpoint should be given special privilege? There are Libertarian, Marxist, and all kinds of other so-called secular viewpoints.

I think the proper question is how to do justice in a pluralistic society to all voices, all viewpoints, whether they are called religious or secular. The difficulty often arises when there is public funding, public institutionalization, or public support for citizens. But in all cases, I would call for equal treatment of the full diversity of viewpoints. Public law should not exclude anyone by a prejudgment that a person or group holds an insufficiently secular (or religious) viewpoint.

Question 6: Well, I would argue that being secular is a religion in itself, so to speak. That was my point. Why should someone who has a world view that does not include God, which in effect is its own world view, impose that as a gatekeeper on me?

Judge Sykes: Professor Audi?

Professor Audi: I think that it is important to emphasize that the secular does not have to be anti-religious. At least when we talk about secular reasons, we are talking about considerations that can be seen to be evidential without depending on theology, but they may be reasons that can also be seen to be evidential from a theological point of view.

One other comment. We do share . . .

Question 6: Well, why does it make a difference if it depends on theology?

Professor Audi: Pardon me?

Question 6: Why does it make a difference if it is theology?

Professor Audi: Oh, it makes a difference for free democracy because we have different theologies, and our capacity to iron out differences that come from our theologies is hampered in ways that our

capacity is not hampered when it comes to findings of fact, a point in the law as well as in the theory of knowledge. But no . . .

Question 6: So you do not believe that the secular should be a gatekeeper?

Professor Audi: The gatekeeper analogy, like a pre-screening analogy, I reject. I am not proposing any such thing. I am proposing that we have in common perception, memory, intuition, and standard inductive and deductive logic. Those things cross the religious traditions and they are a meeting point from which we can compare notes, whether theologically or otherwise. Even theology has to use some kind of logic. Perception is always crucial. It is even crucial in mystical experience.

Judge Sykes: All right, final word?

Professor Greenawalt: Just on this point, I think most of the people that are taking the position in favor of self-restriction would include other comprehensive views including atheism and other things. If what you are arguing depended definitely on an atheist view of the world, that would be knocked out also. What is supposed to be relied upon are sort of shared ways of understanding and ways of determining facts that are shared by the population generally. That is the idea. The idea is not to stick religion out here and treat everything else more favorably.

Judge Sykes: We have one final comment here.

Judge McConnell: I was just going to say that not only do we have many different theologies; we have many different perspectives of all sorts. The idea that there are some shared perspectives that we all have, I think, is a contradiction of the fact of life in a pluralistic republic. There is no more reason to think that we should look for a shared perspective of a secular sort than of a religious sort.

Democracy is all about discussions and coming to determinations, given that we do not agree about the premises. And, sure, there are going to be facts beyond religion, as well as religious ideologies, as well as secular ideologies. They proceed from facts. They proceed from authorities. They proceed from experiences. They all do. I just do not think that any of them are privileged.

Judge Sykes: All right. With that, we will have to conclude. Our thanks to the panel.