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Treating Others as Our Own: Professor Levinson, Friendship, Religion, and the Public Square

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I. INTRODUCTION

As to matters of religion in the public square, Professor Sanford Levinson ("Sandy")\(^1\) refers to himself as "a secular[] accommodationist."\(^2\) In this self-description, Sandy adopts Professor Emily Hartigan's definition of secular accommodationist: one who "asks for the public to embrace the previously personalized religious sphere, but does not [himself] demonstrate what he advocates space for."\(^3\) Sandy further classifies himself as "an agnostic rather than an atheist."\(^4\) Nevertheless, Professor Rebecca French refers to Sandy as a member of "a group variously called the New Religionists," given his "espous[al of] the return to a serious consideration of religious issues in legal discourse."\(^5\) I suspect that Sandy finds the reference to him as a "New Religionist" to be endearing, in much the way that I felt when a student came into my office and expressed his deep appreciation for the fact that I acknowledged my Judaism in class. My student had misconstrued my faith, given that I am a member of the Church of Jesus Christ of Latter-day Saints ("LDS Church"), but, in doing so, my student's comments were clearly taken to be a compliment—a recognition of my desire to be respectful of the deeply held views of my students. Sandy's record with regard

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1. I have chosen to refer to Professor Levinson throughout this text as Sandy, rather than as Professor Levinson or Professor Sanford Levinson, because it is the friendliest manner in which I believe I can describe Sandy. Indeed, friends usually prefer to be called by their first name and until Sandy indicates that he would prefer some other usage, I will use the personal form. Since much of this essay is about how the notion of friendship or, as I put it, "treating others as our own," might influence the place of religion in the public square, the use of the friendly form seems to be particularly appropriate.


3. Id. at 1877 (citing to Professor Emily F. Hartigan) (brackets in original).

4. Id. at 1880 n. 41.

to religion and religious liberty, even though he is not a religionist, certainly evidences a depth of respect for those who hold religious views.

When pressed to explain why he is so respectful of religionists and their participation in the public square, Sandy responded:

I am unpersuaded by the evidence of God’s existence or participation in human history. Yet I cannot find it in me to condemn as “irrational” those who are religious. Perhaps the [best] answer . . . [is] that some of my best friends, whom I respect both as decent human beings and . . . serious intellectuals, are deeply religious, and I am unwilling to dismiss them as being necessarily deluded.6

Sandy indicates that he defines himself as a “secularist,” and adds that he “possess[es] no ‘religious’ beliefs, as conventionally defined.”7 He does, however, “continue strongly to identify [himself] as Jewish . . . .”8

Sandy, in a related context, also fondly relates that:

In looking back and trying to determine, for better or worse, what might help to account for the development of my particular persona, I often think of [my childhood] friends [of various faiths] and of our discussions [regarding religious matters]. I am convinced that they had far more to do with my becoming an academic intellectual than anything that took place during the generally dreary school days, during which my primary achievement was getting so many C’s in “cooperation” that I was ineligible for the National Honor Society. It was with John, Jim, Benny Cole, and Gar that I became comfortable exploring some basic issues of life. I remain forever grateful to them.9

He adds, “[m]y own life was immeasurably aided by friendships, the result, with one exception, of mutual attendance at the local public school with other youngsters who, from a variety of perspectives, unabashedly took religious questions seriously.”10 Obviously, Sandy takes his friendship with religious individuals seriously enough that it contributes to the very respectful, even accommodationist, approach he takes toward those who are serious about their religion and the law.

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6. See Levinson, supra n. 2., at 1880 n. 41.
8. Id.
9. Id. at 994.
10. Id. Sandy even notes,

I particularly remember my Southern Baptist friends expressing seemingly genuine regret that my failure to acknowledge Jesus as my Savior condemned me to eternal torment in hell. They would have preferred knowing that I would join them in heaven. This was said by them, and perceived by me, without the slightest personal hostility. My non-saved fate was, from their perspective, simply a statement of theological fact, and their attempt to save me from what was quite literally a fate worse than death was, consequently, an act of friendship. Imagine, for example, a friend observing someone close to him or her driving while intoxicated. Surely we would not expect the friend to remain silent and accept as dispositive, following a fatal accident, the statement: “Well, it was her life, and friends don’t interfere with one another.” Friends ought to warn one another about perceived dangers facing them.

Id. at 993-94.
A thesis central to this essay is that friendship or “affection” for the other should inform our analysis regarding the treatment of religion in our legal system. I refer to this concept as “treating the other as our own” and believe that it can be used to help bring clarity to difficult and often contentious areas of the law. For example, in discussing counseling of clients, I often raise this concept because students are inclined to treat a non-related client in one manner and a friend or family member in another. They defer to what they consider to be their non-related client’s interests, which they generally consider to be economic, but they acknowledge that they would engage in a more robust moral dialogue with a family member or friend. I then inquire as to why they would choose to counsel one way with a client and another way with a close friend or family member. Is it because the client is less than, more than, or just different than a friend or family member? This discussion causes my students to take questions related to their counseling obligations much more seriously, and I submit it might have equal or greater applicability in the law and religion context. Even if such an analysis might not change the law—I argue in many contexts that it would—it would certainly cause us to take the issues much more seriously, which would be a benefit in and of itself.

In a forthcoming note in the Harvard Law Review, Nathan Oman asserts that our law or legal system has largely failed to take religion seriously on its own terms:

Ultimately, current justifications of religious freedom fail because they do not take religion seriously on its own terms. No Muslim believes that he should make a pilgrimage to Mecca in order to raise the general level of civic virtue. He does it because his faith that “there is no God but Allah and Mohammed is his Prophet” teaches that only by completing the hadj can he qualify to entry into paradise. Likewise, Orthodox Jews are not interested in creating mediating institutions but in faithfully fulfilling the conditions of the covenant God made with Moses and Israel on Mount Sinai. Buddhist temples are not factories for the production of social capital but places where people attempt to follow the example of Buddha to nirvana. Christian churches are meetings of “fellow citizens with the saints, and of the household of God” seeking salvation through Jesus Christ the Son of God. In short, the current arguments generally offered in favor of religious liberty have

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11. Sandy desires a multicultural society "whose members are nonetheless bonded by mutual respect and, if this is not too completely utopian, affection." Id. at 997.

12. It is clear that an essay such as this is an insufficient forum for developing a complete legal theory based on "friendship." Accordingly, it is not intended to explore fully how application of the notion of friendship might impact our legal system. Indeed, it must be acknowledged that law, with rules that necessarily regulate and limit human behavior, may not, by its very nature, be fully susceptible to a legal theory based on friendship, because such limitations are often viewed as being unfriendly by the person whose activity is being restricted. Additionally, this essay does not delineate how notions of friendship, based on "treating the other as our own," and justice, which applies to strangers and even enemies, might intersect. For the purposes of this essay, it is enough that the reader get a sense of how the notion of friendship might influence the manner in which religion is accorded space in the public square.
nothing to do with the ultimate concerns that are at the heart of religious belief. They simply do not take such concerns seriously.\textsuperscript{13}

Nathan goes on to argue that “despite the cosmic, spiritual, intellectual, and practical significance of religion, the modern state cannot seem to take account of religion’s self-understanding of its own importance.”\textsuperscript{14} Sandy, however, does seem to take religionists and religion seriously in his contributions to the scholarly dialogue in the law and religion area, even though he does not share their epistemology of faith. His approach is enlightening, I believe.

In examining how viewing religionists and religion in a friendly light—treated as our own—might influence law in the church and state area, I will draw on themes explored in Sandy’s work in this area. In Part II, I will examine, in a rather personal way, what Sandy describes as the “confrontation [between] religious faith and [our] civil religion,”\textsuperscript{15} as played out in the confirmation process regarding Roman Catholic Justices. Part III, in turn, focuses on the role of religious dialogue in the public square. Based on observations drawn in Parts II and III, Part IV will take the friendship model and argue for the need for exemptions from so-called neutral laws or laws of general applicability in the religious liberty area.\textsuperscript{16} Finally, Part V is a brief conclusion and final tribute to Sandy, as a friend to religion and the Constitution.

\textsuperscript{13} Nathan Oman, Student Author, \textit{Pensees on Religious Liberty}, 116 Harv. L. Rev. ___ (forthcoming 2003) (manuscript at 11-12, on file with author).

\textsuperscript{14} Id. at 19. Building on themes akin to those noted in Pascal’s Wager, Oman endeavors to develop a justification for taking the views of religionists seriously and on their own terms. For our purposes, however, it is enough to focus on the premise that treating religionists as friends, as Sandy seems to do, necessarily entails taking their views seriously in a legal sense.


\textsuperscript{16} So-called neutral laws in the religious context may not be neutral, in fact, given that majority religionists can either obtain legislative exemptions from such laws or can prohibit the passage of such laws in the first instance. They may be textually neutral but they generally are neither neutral in their genesis nor neutral in their application. Michael Perry describes this form of religious discrimination or lack of neutrality:

Government bans a practice that is, for some who want to engage in it, a religious practice and, for others, a nonreligious practice. Moreover, government refuses to exempt religious instances of the practice. However, government would have exempted religious instances of the practice had government not been hostile or indifferent to the religious group for which the practice is religious—hostile or indifferent to the group because of its specifically religious beliefs. Government thereby discriminates against the group in violation of free exercise.

Michael J. Perry, Lecture, \textit{What Do the Free Exercise and Nonestablishment Norms Forbid? Reflections on Constitutional Law of Religious Freedom} (Minneapolis, Minn., Oct. 17-18, 2002) (manuscript at 13, on file with author) (paper delivered at a conference at the University of St. Thomas School of Law (Minneapolis)). Michael offers the following specific example:

if C is the ingestion of peyote, and if the sacramental ingestion of peyote is a ritual of the Native American Church, then though a legislature may well have banned C even if C were not, for members of the Native American Church, in certain circumstances, a sacramental act, it may still be the case that the legislature would have exempted the sacramental ingestion of peyote from the ban on C if the legislature had not been hostile or at least indifferent to the Native American Church as a religious group. We know that a racial group can be victim of a policymaker’s racially selective sympathy and indifference, just as we know that women can be victims of a policymaker’s sexually selective sympathy and
II. RELIGION AND THE JUDICIAL SELECTION PROCESS

Over a decade ago, Sandy "examine[d] some of the implications of the subsuming of religious identities within the more secular—or at least non-sectarian—culture of American constitutionalism."\(^\text{17}\) In particular, Sandy focused on "exchanges occurring during confirmation hearings held in regard to [Roman] Catholic nominees for the United States Supreme Court."\(^\text{18}\) Sandy's conclusion is not heartening:

What is interesting is not whether law and morality are inevitably and inextricably connected in the practical doing of constitutional analysis, for surely the answer is yes, but how we come to terms with this fact on those occasions when it is most important to state the fundamental creed of our constitutional order, such as confirmation ceremonies. Generally speaking, I think we do a fairly terrible job of it. A process that leads men and women of undoubted intelligence and integrity to say things that they cannot possibly wish to have represented as their genuine reflections on complex and important matters scarcely provokes admiration.\(^\text{19}\)

I relate this sobering conclusion made by one of our nation's most thoughtful constitutional scholars at the outset of this part of this essay because I want to draw attention to the problem addressed in Sandy's article regarding the confirmation of Catholic Justices. He notes that all three Catholic Justices confirmed by the Senate were asked a version of the following question, which was addressed to Justice Brennan:

"You are bound by your religion to follow the pronouncements of the Pope on all matters of faith and morals. There may be some controversies which involve matters of faith and morals and also matters of law and justice. But in matters of law and justice, you are bound by your oath to follow not papal decrees and doctrines, but the laws and precedents of this Nation. If you should be faced with such a mixed issue, would you be able to follow the requirements of your oath or would you be bound by your religious obligations?"\(^\text{20}\)

Sandy then notes William Brennan's response to this question, which was similar to answers given by Justices Kennedy and Scalia when asked versions of that same question:

"Senator, I think the oath that I took is the same one that you and all of the Congress, every member of the executive department up and down all levels of government take to support the Constitution and laws of the United States. I took that oath just as unreservedly as I know you did . . . . And I say not that I recognize that there is any obligation superior to that, rather that there isn't any obligation of faith superior to that. And my answer to the question is categorically that in

\(^{\text{17}}\) Levinson, supra n. 15, at 1048.
\(^{\text{18}}\) Id.
\(^{\text{19}}\) Id. at 1080.
\(^{\text{20}}\) Id. at 1062 (citation omitted).
everything I have ever done, in every office I have held in my life or that I shall ever do in the future, what shall control me is the oath that I took to support the Constitution and laws of the United States and so act upon the cases that come before me for decision that it is that oath and that alone which governs."

Sandy is troubled, as I am, by both the question and the answer given by Justice Brennan. Indeed, Sandy sadly concludes that Brennan’s answer “reduce[s] his Catholicism to a ‘hobby.’”

Sandy also fears that a dialogue of this sort has the potential of “strip[ping] law of any necessary connection to morality,” because religious commitment is but one form of moral commitment. Dallin H. Oaks, who currently serves as a member of The Quorum of Twelve Apostles of the Church of Jesus Christ of Latter-day Saints, and formerly served as a state supreme court justice, law professor, and educator, made a similar observation: “[S]ome secularists argue that our laws must be entirely neutral, with no discernible relation to any particular religious tradition. Such proposed neutrality is unrealistic, unless we are willing to cut away the entire idea that there are moral absolutes.”

Cast in that light, the question certainly is not friendly either to the nominee or the Constitution itself. It is not friendly to a nominee, because friends do not demand that those close to them choose between their religious conscience and something dear to them, as clearly the rule of law would be in the case of Justices Brennan, Kennedy, and Scalia. By the same token, given that such questions are designed to equate moral commitment with opposition to the Constitution, they can hardly be said to benefit the Constitution, because great constitutional questions certainly raise moral issues that must be dealt with in a sensitive manner. When King Nebuchadnezzar demanded that Daniel either cease to pray, in keeping with a silly law that had been passed at the behest of conniving advisors, or suffer the penalty attached to the law—death—it was not a friendly question. It certainly was not friendly to Daniel, and it was not friendly to Nebuchadnezzar’s Kingdom, because the law would result in the King losing a trusted and highly moral advisor. Although the penalty of answering the Senate’s question in keeping with one’s religious conscience is not physical death, it does result in a major deprivation to the individual or to the moral legitimacy of the Constitution.

21. Id. at 1063 (citation omitted).
22. Levinson, supra n. 2, at 1896. Sandy may be engaging in a bit of an overstatement. Justice Brennan noted that the oath itself is an obligation of great significance in his faith. As such, keeping the oath is more than a hobby for Justice Brennan—it is also a matter of faith.
23. Levinson, supra n. 15, at 1075.
25. Answering such a question by indicating that one’s faith might take precedence could substantially diminish the likelihood that the nominee would be confirmed by those who do not share the nominee’s faith. The cost of unfriendly questions can be high. There may be occasions when such questions are warranted; but, a friendly Senator would be sensitive to the personal costs to and the potential for discrimination against the speaker. A friendly Senator would, therefore, indicate why such a question had to be asked and answered.
Nevertheless, endeavoring to recognize, as Justices Brennan, Kennedy, and Scalia surely did, that one’s answer to such an ill-advised question might well determine his or her fate as a Supreme Court nominee, I have given considerable thought as to how I would answer such a question, in light of my own religious tradition. Of course, given that the odds against my ever being asked such a question are infinitesimally greater than the odds offered in April of 2002 that the California Angels would win the World Series in October, my answer is merely academic and does not carry the consequences that attended the raising and answering of the question by actual nominees. It is surely easier, therefore, for me to give an answer that takes greater account of the higher moral ground than did the answers offered by our three Catholic nominees discussed in Sandy’s article.

The question posed to me, as a committed member of the Church of Jesus Christ of Latter-day Saints (“LDS Church”), would be framed a bit differently. It might be asked in the following form:

You are bound by covenant to work to build the Kingdom of God. Additionally, you “believe all that God has revealed, all that He does now reveal, and . . . that He will yet reveal many great and important things pertaining to the Kingdom of God.” Indeed, you believe that God still speaks through living prophets and that you should be obedient in heeding those commands. As such, there may be controversies that involve matters of your revealed faith and morals and matters of law and justice. But in matters of law, you are bound by your oath to follow not prophetic decrees and doctrines, but the laws and precedents of the Nation. If you should be faced with such a mixed issue, would you be able to follow the requirements of your oath or would you be bound by your religious covenants, your duty to God?

Given that I can think of just such an issue—the conflict between my church and the government regarding the religiously mandated practice of polygamy in the nineteenth century—I would be duplicitous if I were to try to avoid it by clever argumentation.

The LDS Church, based on latter-day revelation, permitted the practice of polygamy under specified circumstances. The LDS Church asserted, as well, that the practice was constitutionally protected by the Free Exercise Clause of the First Amendment. On three occasions, however, the Supreme Court rejected our free exercise claim. In the first case, the imprisonment of members of the LDS Church for practicing polygamy was upheld. In the second case, the Court upheld an Idaho law that prohibited members of the LDS Church from voting because they were members of a church that recognized polygamy, regardless of whether individual would-be voters in fact practiced polygamy. Given that even these rather draconian efforts to enforce the law against polygamy failed to keep

members from continuing to espouse polygamy, the Court upheld the government's taking of the Salt Lake Temple, other property, and the corporate charter of the LDS Church itself. Members of the LDS Church remained true to their covenant to God and continued to support the practice of polygamy, until Wilford Woodruff, who was revered by members of the LDS Church as the Lord's prophet, received a revelation from God. In his words:

The Lord showed me by vision and revelation exactly what would take place if we did not stop this practice. If we had not stopped it, you would have had no use for... any of the men in [the Temple, where sacred work could be done for our kindred dead]; for all ordinances would be stopped throughout the land of Zion. Confusion would reign... and many men would be made prisoners. This trouble would have come upon the whole Church, and we should have been compelled to stop the practice. Now, the question is, whether it should be stopped in this manner, or in the way the Lord has manifested to us, and leave our Prophets and Apostles and fathers free men, and the temples in the hands of the people, so that the dead may be redeemed....

I saw exactly what would come to pass if there was not something done. I have had this spirit upon me for a long time. But I want to say this: I should have let all the temples go out of our hands; I should have gone to prison myself, and let every other man go there, had not the God of heaven commanded me to do what I did do; and when the hour came that I was commanded to do that, it was all clear to me. I went before the Lord, and I wrote what the Lord told me to write.

The words of the Lord that President Woodruff was commanded to reveal included the declaration that the LDS Church was no longer teaching or practicing polygamy and that: "Inasmuch as laws have been enacted by Congress forbidding plural marriages, which laws have been pronounced constitutional by the court of last resort, I hereby declare my intention to submit to those laws, and to use my influence with the members of the Church over which I preside to have them do likewise."

The Lord's Prophet had spoken and LDS Church members were no longer bound, under the covenant, to accept the doctrine of polygamy. Indeed, since the date when the revelation was received and officially accepted by the LDS Church membership, we have not lived the law of polygamy. In fact, Church discipline—excommunication—is extended to any members who continue to teach or practice polygamy.

For the purposes of answering the question, however, the experience with polygamy may be unrepresentative, but it remains enlightening. As members, we

continued to espouse the practice until the Lord, through his living Prophet, declared that it was no longer the will of the Lord and we were no longer bound by it. The following is a sketch\textsuperscript{32} of my answer:

At the outset, I believe that the question is inappropriate, constitutionally and as a matter of prudence; but, I will answer it. In our Twelfth Article of Faith, as members of the Church of Jesus Christ of Latter-day Saints, we make clear our strongly held belief, which I wholeheartedly share, that we should obey, honor, and sustain the law.\textsuperscript{33} Indeed, we believe that the Constitution itself is inspired of God. As such, I am committed to the rule of law. But like Daniel of old, I believe that my obligation to God takes precedence over my obligations to the law. Having said that, I must emphasize that I can think of few if any instances when my obligations to God would be in sufficient conflict with the constitutional law of the land that I would be forced to choose between the two. But, if such an instance arose, I believe, with Daniel of old, that my duty to God would take precedence over my oath. In such an instance, I would either recuse myself from hearing the case or, if absolutely necessary, resign my position on the Court.

My response would be friendly. When a friend asks a difficult question, one may indicate why he finds the question to be inappropriate and might even explain why the question should be withdrawn in the interests of friendship. But, if a friend persisted, desiring a response, I would assume that the question was being asked in furtherance of an important dialogue, and an answer would be given, if at all possible. Friends discuss difficult issues openly. Even though I might not be treated as a friend, in turn, I would not rationalize away my obligation to treat the Senator and the Constitution under which he or she is operating with respect and affection.

Actually, given the extreme unlikelihood that any such conflict between my duty to God and my oath to abide by the Constitution would arise during my tenure,\textsuperscript{34} I might even suggest a better question. The question I believe the Senator really wants to ask is whether my religious views or background would influence my decisionmaking on a regular basis. In other words, when the decision in a given case is open to question, and my religious views might prompt me to lean in one direction or another, would I give heed to my religious views. In some measure, the answer to that question also has to be yes, although I am, in

\textsuperscript{32} If I were in fact involved in the confirmation process, my answer would be more elaborate, including examples. For present purpose, however, a sketch should suffice.

\textsuperscript{33} Talmage, supra n. 26, at 3.

\textsuperscript{34} The potential for a genuine conflict between religious views and the daily work of a Justice is quite limited. In those instance where such a conflict might arise, recusal would normally suffice to remedy the conflict. In exceedingly rare instances, resignation might be required. For example, a polygamist Justice who felt compelled to continue the practice, as a matter of religious conscience, would no doubt have to resign his position on the Court after it upheld the constitutionality of laws making the practice legal. Today, since my religious faith does not ascribe to the practice of polygamy, this would present no conflict in my case. It is, however, illustrative, as an exceedingly rare instance in which resignation and not recusal would be required to resolve a conflict between one’s religious faith and one’s constitutional oath. At any rate, such a question hardly seems worth asking, since there are remedies that could be invoked in those very rare occasions when a true conflict between one’s religious conscience and his or her oath to abide by the Constitution would arise.
some measure, religiously committed to the rule of law and would have to weigh that commitment in the balance. This question—whether one’s religious views ought to be a part of the public dialogue and permitted to influence decisionmaking in the public square—raises the issues discussed in the next part of this essay.

III. RELIGION IN THE PUBLIC SQUARE: A FRIENDLY APPROACH

Sandy and one of my dearest friends in the academy, Professor Robert Justin Lipkin ("Bobby"), are committed to treating those who hold religious beliefs in a friendly manner. Despite the fact that they both desire to treat me, and other religionists, in a friendly manner, they disagree as to the nature and extent to which religious dialogue is welcome in the public sphere. I will briefly examine their differences and the relative merits of their arguments through the lens of the friendship analysis suggested in this essay. After doing so, I will indicate how I would like to be treated in a public square that takes my religious views seriously and offers the hand of friendship in the process. Realizing, as well, that friendship is necessarily reciprocal, I will discuss obligations I feel toward my friends—other participants in the public square who do not hold my religious beliefs or any religious beliefs at all.

In responding to the work of another friend of mine, Michael Perry, Sandy has articulated a view that is quite congenial to involvement by the religious in the public dialogue:

One might well wonder why any citizen of a democratic republic should have to engage in epistemic abstinence. Why doesn’t liberal democracy give everyone an equal right, without engaging in any version of epistemic abstinence, to make his or her arguments, subject, obviously, to the prerogative of listeners to reject the arguments should they be unpersuasive (which will be the case, almost by definition, with arguments that are not widely accessible or are otherwise marginal)? It seems enough for those of us who are secular to disagree vigorously with persons presenting theologically-oriented views of politics. To suggest as well that they are estopped even from presenting such arguments seems gratuitously censorial rather than wise, especially in a country as remarkably pluralistic as is the United States, where it is simply unthinkable that the members of a particularistic religion could ever capture national political institutions.35


no longer find[s] compelling the premise that the prohibition of certain substantive religious intrusions by government also means that even conscientious legislators, let alone citizens, must, as a constitutional matter, concern themselves with examining their motivations or the arguments that they offer in behalf of non-prohibited legislative ends. Prudence will, of course, often counsel against making non-sectarian arguments, but this is far different than arguing that such arguments are required as a matter of basic principle.

_Id._ at 2078.
However, Sandy makes it clear that he believes that it is necessary to restrain some religious expression or activity in the public square under the auspices of the Establishment Clause:

Accepting religious arguments as appropriate for the public square does not mean abandoning the Establishment Clause. I would interpret the Clause to prohibit the use of the state apparatus to declare theological positions or otherwise infuse an overtly religious sensibility into public life. I would, therefore, not hesitate to hold unconstitutional the placement of “In God We Trust” on our coins and “under God” in the pledge of allegiance to the flag, as well as the appointment by a state legislature of an official chaplain or the sponsorship by government of creches and other religious symbols. This does not mean, however, that I would interpret the Amendment to bar voucher or tax credit systems that include as possible recipients religiously affiliated schools and day care programs.36

Particularly in the latter educational context, in characteristic and charming candor, Sandy acknowledges that his accommodationist stance is based, in part, on an ulterior motive, and should not be read as an indication that he takes religionists’ views seriously on the merits. In his words:

I have... tried, quite self-consciously, to present myself as a wonderfully tolerant person who genuinely wishes to reach out to persons of decidedly different sensibility from my own. Yet candor requires me to admit that one reason I would prefer... children... to [feel welcome in attending] public schools is precisely to increase the likelihood that they might be lured away from the views—some of them only foolish, others, alas, quite pernicious—of their parents. Perhaps they will meet and begin talking with, and learning from, more secular students.37

Sandy’s largely friendly accommodationist view has been viewed as being quite friendly by many religionists and might have been one of the reasons that Professor French referred to him as one of the “New Religionists.”

After quoting Sandy’s point—“Why doesn’t liberal democracy give everyone an equal right, without engaging in any version of epistemic abstinence, to make his or her arguments, subject, obviously, to the prerogative of listeners to reject the arguments should they be unpersuasive (which will be the case, almost by definition, with arguments that are not widely accessible or are otherwise marginal)?”—Bobby, counters,

isn’t this a rather hollow commitment to religion in the public square? If such views are likely to be unpersuasive “which will be the case, almost by definition,” is one truly engaging religious citizens in democratic debate or merely paying lip service to such engagement? Would Levinson permit the secularist to simply reject the religionist’s argument out of hand on the grounds of inaccessibility?38

36. Id. at 2077-78.
37. Levinson, supra n. 7, at 1019.
38. See text accompanying supra note 35.
Put in the terms of this essay, Bobby does not find Sandy's views to be particularly friendly to the religionist. Bobby argues that:

To be fair, Levinson continues: "It seems enough for those of us who are secular to disagree vigorously with persons presenting theologically-oriented views of politics." The question is how does one "disagree vigorously" with arguments that one is almost by definition inclined to find unpersuasive. When one finds a position unpersuasive "almost by definition" one cannot vigorously disagree, although one certainly disagrees. Vigorous disagreement can only occur when one appreciates the force of one's opponent's views. Surely, some common ground might be gained if both the parties seek to reconstruct their arguments in a more listener-friendly fashion. Levinson's conclusion is, I think, the reason some secularists and progressives reject the exclusionist [or strict separation] argument. Levinson writes "[t]o suggest . . . [that religionists] are estopped even from presenting such argument seems gratuitously censorial rather than wise, especially in a country as remarkably pluralistic as is the United States, where it is simply unthinkable that members of a particularistic religion could ever capture national political institutions." The "gratuitously censorial" seems to indicate that it is simply bad form to exclude religion in a country that could not experience a religious coup d'etat. But why should that be relevant? And is not Levinson's assertion that religious views are "almost by definition" unpersuasive worse than assertions that are gratuitously censorial?; it patronizingly "accepts" religious arguments but doesn't really take them seriously. We need a conception of the public square that takes all citizens seriously[,] even the conscientious objector who seems to get an equally bad deal from both exclusionists and inclusionists like Levinson. Further, does Levinson’s argument then rest on the assumption that since religion could never achieve the unthinkable in the United States—especially religions that might intend to capture these institutions—there is no harm in letting religionists blather? Rather than courting religious voices, this view, in the guise of democratic community, appears to be patronizing.

In declaring Sandy's views to be "patronizing" in some measure, Bobby seems to be warning the religionist that Sandy may not be the friend he appears to be on first blush. Bobby goes on to assert a view that would limit participation by the religionist in the public dialogue, but does so in a manner than he claims is friendly toward religionists and non-religionists alike.

Bobby argues that dedicated arguments, including but not limited to many faith-based or religious arguments, should be "translate[d] or reconstruct[ed] . . . into deliberative discourse in the public square." He defines dedicated arguments as:

arguments [that] are committed to the following elements: (1) The existence of canonical texts, unalterable foundations such as nature or history, or authoritative persons; (2) Moral knowledge is given in experience and reasoning and is more or less complete; (3) There exists one true set of moral values; (4) Conflicts are

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40. Id. at 40-41 (citations omitted).
41. Id. at 53.
resolved by reference to canonical authority; and (5) Criticism, if permissible at all, is strictly limited.42

In turn, he describes deliberative arguments as arguments:

committed to these elements: (1) Authority consists in the most normatively attractive and best-defended judgments that the moral community embraces; (2) Moral knowledge is incomplete and evolutionary; (3) Values must be continuously refined and even sometimes abandoned; (4) Deliberation is required for consensus and disagreement; and (5) Deliberation is perennially pragmatic, fallibilistic, and revisable.43

Bobby, however, would not apply his deliberativist theory in a draconian manner. He would permit exceptions to his requirement that the public dialogue be deliberativist:

if someone judges that, for conscientious reasons, he or she cannot reconstruct the relevant dedicated arguments into a deliberative one, so be it. At this point, any good faith deliberativist would attempt to translate his or her deliberative discourse into the dedicativist's language. Rather than defeat the point of deliberativism, it reveals some additional virtues. Above all else, deliberativism is committed, through empathy, humility, and accountability, to reaching (communicating with and understanding) other citizens. Typically this involves a shared deliberativism language, but in the case of the conscientious objector, the deliberativist gladly turns the table by translating, if possible, the deliberativist discourse into a dedicated one.... However, it should be kept in mind that widespread conscientious objection to deliberative discourse is incompatible with democracy.44

With this conscientious objector exception for the dedicativist, including many religionists, Bobby's argument begins to track more closely with the form of accommodation envisioned by Sandy, even though Bobby and Sandy differ in particulars and in some substantive ways.

I have other friends, some of whom are deeply religious, who advocate much less accommodation for religion in the public square. These strict separationists, or "exclusionists," to use Bobby's terminology,45 are wary of any religious involvement in the public dialogue. For them, the Establishment Clause may be read to "preclude religion from controlling the state because doing so inevitably inhibits the religious freedom of minority religions as well as the freedom of nonreligious individuals."46 Bobby adds:

The general reason for disestablishment is freedom of conscience. Indeed, freedom of conscience—and the joint fear of religion in government and government in religion—constitutes the general reason for both religion clauses.... [Some] religion[s] historically [have] sought dominion over other religions with the result of persecuting the unfaithful.... Religious domination through control of the

42. Id. at 45.
43. Id. at 45-46.
44. Lipkin, supra n. 39, at 54-55.
45. Id. at 40.
46. Id. at 30.
government causes direct and unavoidable injury. Religious domination through the control of the public square can become even more unavoidable and oppressive.\textsuperscript{47}

It is not surprising, therefore, that there are religious and non-religious groups and individuals alike who oppose accommodating religion in the public square. Some religious groups have historically advocated that religion and government be strictly separated.\textsuperscript{48}

In articulating my position—what I believe to be a friendly position toward the role of religion in the public square—I will focus on insights drawn from Sandy and Bobby's respective views. In the process, I will also endeavor to be sensitive to those who hold less accommodationist views. In doing so, I will focus on how I, as one who takes my religion seriously, would want to be treated in the public square and how I should be sensitive to the views of others. In particular, I will examine the circumstances under which I would want to address issues or articulate views from my religious perspective; or, if you will, in my religious voice.\textsuperscript{49}

A. Speaking in a Religious Voice

Of great importance to me, and I suspect to most religionists, is a desire to be treated with respect and to be taken seriously as one whose religion is central to one's self-definition and one's sense of the world itself. If I am respected and taken seriously in that regard, I will not be told that I may address issues but may only do so in a non-religious way. Put otherwise, I do not want to be told that I may speak or participate actively in the public sector, but am precluded from addressing that which is of most importance to me—my religion or the core of my self-definition, which is religious. No friend would demand so much; friends do not ask their friends to yield up that which is of greatest importance to them in their lives in order to engage in an important dialogue.

Having said this, I acknowledge that the instances when I would want to speak in a religious voice would no doubt be quite limited for a number of reasons. First, when I speak from my religious perspective, or in a religious voice, I may alienate, or at least confuse, friends who do not share that voice or perspective. Friends typically develop a shared language, a language that each understands. The same is true of friends engaging in a public dialogue—

\textsuperscript{47} Id. at 32.


\textsuperscript{49} What is friendly for one religious person or group might not be considered friendly by another religious individual or group. It is not surprising, therefore, that religious individuals and groups hold a wide variety of positions regarding the role of religion in the public square. Given that this is the case, the points I make regarding friendship in the public square are personal and may not be generalized to include other individuals, even within my own religious faith. Nevertheless, I trust that they will be illustrative of how one might use the notion of "friendship" to examine the role of religion in the public square.

\textsuperscript{50} By religious voice, I simply mean speaking or participating in an openly religious manner.
should want to be understood and to understand the other. Friends have conversations, not monologues.

In a related sense, in the public square one generally desires to exert influence upon the decisionmaking process. This is hardly possible when one speaks in an alien or inaccessible voice, as many religionists do when they speak the tongue or canon of their religion. Even if the words are understandable, absent a common understanding and perhaps even commitment to the underlying religious beliefs, the words cannot be fully understood. Given that one’s religious tongue is often as inaccessible to the nonbeliever as a foreign language, it is imprudent for a religionist to speak in his or her religious voice if he or she desires to influence the ultimate decision. The religious language or voice may have to be translated into a more accessible secular voice if it is to carry any weight in a decisionmaking process that includes those who do not share the underlying faith that gives the religious language its special life.

There remain, however, occasions when it is appropriate and perhaps even necessary to speak in a religious voice in the public square. If, for example, one believes that God would have them speak in their religious voice, despite its general inaccessibility, it is incumbent—a matter of religious duty or conscience—on that individual to speak in that voice. The speaker may even feel duty-bound to make others aware of the fact that the religious voice is being used.

As one who considers himself to be deeply religious, and believes in the possibility of speaking in a manner that conveys a special spiritual feeling, there may also be occasions when using the religious tongue makes it possible for the speaker to speak with added force, even to the non-believer. One of my children relates that when he first arrived in Jerusalem for a study abroad program, he was unable to sleep, so he wandered out of his room during the call to early morning prayers in the Mosque. As the sound of the call to prayer drifted to my son, tears filled in his eyes. He felt a special force in the religious voices drawn out in prayer, even though he did not share the faith or language of those praying. By the same token, however, I have a dear friend, who, as a child, had a much different experience with the very same call to prayer. He felt a fear that a call was being issued that did not include him. He was apprehensive that the call might ultimately be issued for the purpose of harming him. It is, therefore, critical that the religionist speaking be aware of the differing ways in which his or her religious voice may be interpreted. Having acknowledged this, it is arguable that both Gandhi and Martin Luther King, Jr. were able to combine their religious voices with matters of public concern and connect in special ways with many listeners, including many who did not share their respective religious beliefs.

There are also practical reasons why resorting to the use of the religious voice may be worthwhile. Use of the religious voice conveys a sense to the

51. My three eldest sons speak three different languages: French, Portuguese, and Spanish. They each delight in their respective second language, but when they are involved in making a collective decision, they speak in their native and common tongue, English. Given their desire to permit access to the dialogue, they select a tongue common to all.
friendly listener of the importance of what is being said to the speaker, even if the listener cannot understand fully what is being said. A religionist, therefore, might resort to the religious tongue for the purpose of having the listener understand that the matter being addressed is of "ultimate concern" to the speaker. An individual seeking to persuade others (e.g., a legislative or administrative body) that he or she ought to be exempted from a law that adversely violates his or her religious conscience might, therefore, utilize the language of his or her religion to persuade the listener of the law's gravity as applied to the speaker. When I was nineteen, I became convinced, as a religious and philosophical matter, that I could not kill another and found it necessary to seek an exemption from our draft laws. I prepared a document setting forth the conflict between my personal religious conscience and the obligation potentially to kill another, if drafted. In setting forth my position, it was necessary for me to draw upon the religious reasons that motivated my seeking of an exemption. I found it necessary to speak in the religious voice, and draft law actually required that I do so, by mandating the giving of religious reasons for my convictions.

A final, and for me far more questionable, reason for using the religious voice is to mobilize those who share one's belief and obtain their support in the public decisionmaking process. This effort to persuade or dissuade fellow religionists from taking a particular position is potentially pernicious. When the religious voice is used to commandeer the political decisionmaking process, it alienates others from the dialogue and the ultimate decision. Sadly, however, I believe it must be conceded that, where a particular religion predominates, religionists will often mobilize, either in public or in private. In our system, therefore, which often disfavors religious mobilization in the formal or public decisionmaking process, such mobilization may simply shift to private rooms, where the uninitiated are not permitted access. When such decisions are made in a private caucus, controlled wholly by the religionists, all benefits of public dialogue dissipate. As pernicious, therefore, as such decisionmaking based on the religious voice may be, it may be more friendly to do it openly where at least the non-religionists is able to react and hopefully cause the religionists to take care to provide basic due process, an opportunity to be heard, on the part of those being excluded. Furthermore, the friendly remedy in that context might simply be to permit exemption of the non-religionists from any such law passed by the majority.

Whatever the best response to the problem of religious commandeering of the public decisionmaking process may be, it is clear that such commandeering is unfriendly to the person who does not share the religious beliefs of the majority. Religionists would do well, in a purely prudential sense, to realize, however, that they and their children generally live in a system where religionists are often a minority. When they are a minority, the religious want to be treated in a friendly

manner and to be taken seriously as religionists by the majority who do not share their religious perspective. Those who are religious, therefore, would do well to take a more friendly approach to those who do not share their religious beliefs in instances when the religious hold power and could commandeer the process to their own ends. In short, true friendship is reciprocal. If the religious want to be taken seriously, then they must take seriously those who do not share their religious beliefs. Being taken seriously in this context mitigates against excluding others from the dialogue or commandeering the process without providing due process and possibly even an exemption from decisions that are traceable to a religious commandeering of the process.

B. An Example of the Problem: "Under God" and the Flag Salute

In respecting religion and the religious voice in the public square, Professor Levinson offers a caveat:

Accepting religious arguments as appropriate for the public square does not mean abandoning the Establishment Clause. I would interpret the Clause to prohibit the use of the state apparatus to declare theological positions or otherwise infuse an overtly religious sensibility into public life. I would, therefore, not hesitate to hold unconstitutional the placement of “In God We Trust” on our coins and “under God” in the pledge of allegiance to the flag. ...  

Sandy, therefore, offers two reasons for holding the inclusion of the words “under God” in the Pledge of Allegiance to be unconstitutional: (1) It is a declaration of a theological position; and (2) It “infuse[s] an overtly religious sensibility into public life.” It is evident that Sandy would agree with Judge Goodwin’s recent decision for the Ninth Circuit in Newdow v. U.S. Congress, in which the court held that the inclusion of the words “under God” in the Pledge and the school district’s policy and practice of teacher-directed recitation of the Pledge violated the First Amendment’s establishment limitation.

In that opinion, Judge Goodwin found that the use and recitation of the phrase “one nation under God” in the Pledge constituted an unconstitutional endorsement of religion:

In the context of the Pledge, the statement that the United States is a nation “under God” is an endorsement of religion. It is a profession of a religious belief, namely, a belief in monotheism. The recitation that ours is a nation “under God” is not a mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic. Rather, the phrase “one nation under God” in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism. The text of the official Pledge,

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53. See Levinson, supra n. 35, at 2077.
54. 292 F.3d 597 (9th Cir. 2002).
In applying the endorsement test, Judge Goodwin added that, "The Pledge... is an impermissible government endorsement of religion because it sends a message to unbelievers 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" He also found that the policy and Act mandating the recitation of the Pledge and its "one nation under God" language violated the coercion test: "[T]he Act place[s] students in the untenable position of choosing between participating in an exercise with religious content or protesting." Goodwin concludes, on similar grounds, that both the policy and the Act "fail[ ] the Lemon test." Professor Levinson and Judge Goodwin apparently agree that inclusion of the phrase "under God" in the Pledge ought to be unconstitutional because, through it, the government effectively declares or endorses a theological position (monotheism) and "infuse[s] an overtly religious sensibility into public life" that has the effect of sending a necessarily coercive message to non-believing school children that they are outsiders.

Sandy and Judge Goodwin's position that the phrase "under God" ought to be excised from the Pledge seems to be a friendly act. A friend would generally recognize that commandeering the government to declare one's own religious belief superior to that of a friend, who does not share that belief, is an unfriendly act. First, it has the effect of shutting down dialogue among disagreeing friends (it has the government declaring one side a winner before the dialogue has come to an end). Secondly, it requires that a friend and his or her children go through the agonizing process of either (1) acquiescing to the government declaration of belief contrary to their own religious consciences, or (2) taking a public and generally unpopular position by either refusing to recite the words or by sitting during the recitation of the Pledge. Indeed, the religionist who favors inclusion of the phrase over the conscientious views of a "friend" would also do well to remember that any government that can require the recitation of one religious belief (monotheism in the Pledge) might also one day require recitation of some other belief that might be offensive to the religionist—an act that the religionist would surely find unfriendly. Thus, inclusion of the phrase "under God" in the Pledge may be viewed as failing the reciprocal nature of friendship.

55. Id. at 607.
57. Id. In a footnote, he added that, "The 'subtle and indirect' social pressure which permeates the classroom also renders more acute the message sent to non-believing schoolchildren that they are outsiders." Id. at 609 n. 8.
58. Id. at 611 (discussing Lemon v. Kurtzman, 403 U.S. 602 (1971)). The Lemon test requires that for government conduct to survive an Establishment Clause claim, the conduct "(1) must have a secular purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion." Id. at 605 (citing Lemon, 403 U.S. at 612-613).
59. See Daniel 3:1-20 (King James).
There is more to the analysis, however. In his dissent in the Newdow case, Judge Fernandez disagrees with Judge Goodwin and the court and concludes: “I cannot accept the eliding of the simple phrase ‘under God’ from our Pledge of Allegiance, when it is obvious that its tendency to establish religion in this country or to interfere with the free exercise (or non-exercise) of religion is de minimis.”

After asserting that the tendency of the inclusion of the language to “establish religion (or affect its exercise) is exiguous,” Judge Fernandez recognized “that some people may not feel good about hearing the phrases recited in their presence, but, then, others might not feel good if they are omitted.” Judge Fernandez observed that the impact of inclusion of the phrase “under God” in the Pledge is minimal. He also recognized that, regardless of whether the phrase is excised or included, it is likely to offend someone’s religious or non-religious sensibilities. The need for evaluating the impact on the believer of excising “under God” and the impact on the non-believer by continuing to include the phrase, therefore, merit further exploration in determining how friends with differing religious views should treat one another in this context.

In examining whether the impact is de minimis among friends, it is not enough to ask whether the practice of including “under God” in the Pledge tends to lead to the establishment of a religion or group of religions to the exclusion of others. It is necessary to examine the impact on individuals as well—those who favor excising the phrase and those who would disfavor its excision. Indeed, a focus on individuals and the harm to them is critical in assessing how a friend ought to proceed in this case.

Newdow is clearly concerned about whether his child will have to recite the phrase “one nation under God” in the school setting. In requiring recitation of this phrase, the government seems to place its stamp of approval on a religious view other than the one he, as a parent, seeks to teach in the home. Friends would surely be quite sensitive about forcing religious teachings on children of parents who hold differing views as a matter of conscience. The religionist who is concerned about the government placing its imprimatur on a view regarding the origin of this world, evolution versus creation, a view that contradicts his own, should be sensitive, in a reciprocal and friendly sense, when the government requires Mr. Newdow’s children to pledge their allegiance to a “nation under God.” By the same token, however, the impact of the excising of the phrase “under God” on the believer must also be weighed in the balance. Many religious parents believe that the school system is pervasively secular and excision of the phrase “under God” from the Pledge would be a final confirmation for them that

60. Newdow, 292 F.3d at 615 (Fernandez, J., concurring and dissenting). He responds to those who fear the effects of inclusion of the language “under God” in the Pledge: “Those who are somehow beset by residual doubts and fears should find comfort in the reflection that no baleful religious effects have been generated by the existence of similar references to a deity throughout our history. More specifically, it is difficult to detect any signs of incipient theocracy springing up since the Pledge was amended in 1954.” Id. at 614 n. 4.
61. Id. at 614.
62. Id.
the public square and schools are unfriendly to them and their beliefs—that their beliefs are disfavored and ignored on a regular basis.

Newdow, Judge Goodwin, and Sandy also argue that requiring the recitation of the phrase “one nation under God” is coercive, placing inappropriate pressure on impressionable school children who do not believe in the phrase “one nation under God” and who must either sit or stand while others recite the words. Either act is noticeable and may bring in its wake unwelcome attention on the child who declines to engage in pledging his or her allegiance to “one nation under God.” In third grade, I sat next to a girl whose family were Jehovah’s Witnesses. Each day as we would rise as a class to recite the Pledge, Patricia would sit. She was ridiculed and indelibly, it seemed, marked as an outsider. I still feel poignantly for her and I regret that I was not more courageous and understanding, that I was not a better friend. I admired her exercise of conscience even then, but not enough to extend a true hand of friendship by trying to find a way to accommodate her religious conscience in a less conspicuous and friendly manner. While it is better to permit a student to sit, as opposed to forcing them to stand and recite in opposition to their conscience, sitting or declining to participate in all or a portion of the Pledge may not be a de minimis or inconsequential act for a school child, as Patricia’s experience evidenced to me.

The case, therefore, for excising the language “under God” from the Pledge seems particularly strong in the context of a mandatory recitation of the Pledge of Allegiance by school children. Once again, however, the answer is not so simple. One reason the words “under God” were added to the Pledge was to recognize that, at least for many citizens, our nation is great in part because it has not forgotten God or ignored those who believe in God. For many of those believers, pledging allegiance to our flag and nation, without recognizing the hand of God in our lives and the life of our nation, would constitute a serious affront to their religious conscience. To purge “under God” from the Pledge would, therefore, force them to pledge allegiance to their nation to the exclusion of their God. Frankly, one would hope those whose first allegiance is to their God would not stand to recite a Pledge that had formally excised recognition of their God. Thus, we cannot avoid the problem of Patricia—in today’s world, some students are going to be harmed by having to demonstrate their opposition to the recitation of the Pledge, whatever form it may take.

The friendly approach does not offer much of an answer to the quandary, because excising the language will harm some and refusing to excise it will harm others. Simply not reciting the Pledge may not be fully acceptable either.

63. Michael Perry has recently wrestled with the issue of the inclusion of “under God” language in the Pledge of Allegiance, on grounds of principle and prudence, and has explicated arguments on both sides of the issue. Perry, supra n. 16, at 30-40. Michael concludes that inclusion of the “under God” language should be held to be nonviolative of the nonestablishment norm for the following reasons:

Since 1954, the Pledge of Allegiance has echoed Abraham Lincoln’s Gettysburg Address in declaring that we are “one nation under God” . . . . In affirming, with Lincoln, that ours is a nation that stands under the judgment of a righteous God, it seems clear that government is not treating any church (or any range of the theologically kindred churches) as the official
Certainly, we can avoid reciting some things, including the Pledge,64 but we cannot avoid involving students in ways that impact adversely on their consciences or their parents’ consciences. As evidenced by the evolution versus creation description of the origins of the earth, however, schools do enter the fray, perhaps of necessity, from time to time. Indeed, in our increasingly diverse world, a school system would potentially be left with little to teach if it simply refused to teach or require recitation of material that violated the consciences of a student or parent. Sensitivity to student and parental conscience, however, should always be weighed in the balance in determining whether something ought to be taught, the manner of such teaching, and whether students should be permitted to opt out regarding teachings that violated their right of conscience.

Thus, while the friendship model of analysis does not yield a clear answer in the debate over whether the words “under God” should be purged from the Pledge or whether the Pledge should be recited by impressionable school children, it does offer a helpful process for evaluating such seemingly intractable issues. If we examine such issues with the intent of treating others as our own, as friends, despite our differences in beliefs, we are sensitized to concerns and will be more ardent in our efforts to find meaningful accommodations. The governing body of a school district will, I suggest, be less likely to act reflexively in adopting a policy that impacts someone’s conscience if they have heard the anguished voice of those harmed. Even if the school leaders are unable or unwilling to make friendly accommodations, a friendly process should expose the broader community, including other students, to the plight of those harmed. And the person harmed will have been afforded some due process and the respect that comes from having

church of the political community; government is not bestowing legal favor or privilege on any church in relation to any other church; government is not taking any action that favors any church in relation to another church on the basis of the view that the favored church is, as a church, as a community of faith, better along one or another dimension of value; government is not privileging either membership in, or a worship practice of, any church.

Now, the second reason that the more restrictive understanding is problematic: Very few citizens of the United States would take seriously—very few would tolerate—a constitutional provision according to which having “under God” in the Pledge, or “In God We Trust” as the national motto, or beginning a session of court with “God save the United States and this Honorable Court,” is unconstitutional. Such a provision would be widely regarded, and dismissed, as extreme.

Id. at 33-35.

64. It might be argued that the Pledge is quite different from the teaching of evolution or some other material that may violate the religious consciences of some students or parents. Evolution, with its basis in scientific theory, is pedagogical in a way that reciting the Pledge may not be. Thus, refusing to require recitation of the Pledge would not compromise the academic mission of schools in the way that refusing to teach evolution might. Nevertheless, purging all that is religious from schools—e.g., refusing to permit students to sing Handel’s Messiah—may impinge on the academic mission of schools. Furthermore, purging all that is religious from the public square, simply because it may either constitute a theological declaration or be overtly religious, makes a statement about religion in itself. Students observing the purging of that which is religious from schools may well conclude, wrongly perhaps, that the purging is the result of some animus toward things religious. If Newdow, who is an atheist, succeeds in purging the words “under God” from the Pledge, he will have won the cultural or religious battle—his view will have prevailed. Purging all that is religious from the public square and schools, therefore, also sends an unfriendly message of winners and losers, insiders and outsiders.
Courts will also have a better record to evaluate in determining whether the action taken was based on animus toward the harmed individual's conscience. The Court should intervene if the act of requiring or refusing to continue to require the recitation of the Pledge was based on an intent to disfavor someone's religious conscience. Furthermore, failure to look for meaningful ways to accommodate those who may be harmed may constitute evidence of animus and inappropriate insensitivity and may be sufficient grounds for finding an intent to disfavor.

The treating of others as our own—as friends or worthy members of our human family—analytical model, like all process-driven models, does have a major drawback. It involves high transaction costs. If there is a bright-line rule that either permits or prohibits a given act—e.g., recitation of the Pledge in a public school setting—transaction costs are low. A party knows where he or she stands and would be foolish to spend the resources necessary to challenge a clearly accepted rule. Where animus is contextual and can be proven, however, transaction costs increase because a party may be able to establish a case on the facts presented. Being given the opportunity to speak out—to give voice to one's conscience, whether on Newdow's side or on the religionist's side of the question, and to engage others in a dialogue—is a friendly act, even though it must be acknowledged that it may carry costs for all concerned.

The Pledge of Allegiance, regardless of whether it includes the phrase “under God” or not, is not neutral as to matters of religious conscience. Some governmental acts may well be, or at least appear to be, neutral, however. We are left to examine how a friend would respond in that context.

C. Neutral Laws of General Applicability: A Friendly Approach

In Employment Division, Department of Human Resources of Oregon v. Smith,66 the Supreme Court, in an opinion authored by Justice Scalia, held that neutral laws of general applicability that incidentally limited acts of religious conscience were not subject to heightened scrutiny and did not violate the Free Exercise Clause of the First Amendment. This decision may be unfriendly to religious persons, as evidenced by the following example.

Two young men I know graduated from a public high school last year near the top of their class. A major trust associated with that school provided funds for scholarships for students near the top of the class and both of the young men qualified for scholarships of $12,000, payable at the rate of $3,000 per year over a period of four consecutive years. Each of them were elated and stood to benefit greatly from the scholarships. The young men were aware of a possible problem,

65. It must be acknowledged, however, particularly with impressionable school children, that asking them to step forward and explain publicly why a given action violates their conscience may itself be insensitive, a cause for substantial embarrassment and discomfort. Generally, however, it is the parents who step forward and they are less timid, although their very lack of timidity may result in substantial discomfort for the children, when they face their peers after their parents have spoken.

however. The scholarships were to be paid consecutively over the four-year period, beginning in the fall or summer after their graduation from high school, but the young men intended to interrupt their education by serving a two-year mission for their church and would not be attending school continually during the four-year period. They wrote letters to the trustees asking for an exemption from the facially neutral rule of general applicability that required them to take the funds over the four-year period immediately following their graduation.

Without a hearing of any sort, their requests for an exemption on the ground of religious conscience were perfunctorily denied and the scholarships were offered to students whose academic records were not as strong. Indeed, their honest request for an exemption led to their being denied any part of the award. Had they simply been dishonest or refused to disclose their intentions to serve missions, they could have received at least a portion of the award. These young men were deeply hurt by both the failure to respond positively to what they considered to be reasonable requests for exemptions and by the callous insensitivity of the board in rejecting their requests. Thus, rather than graduating with pride in their accomplishments and their school, they left with a distaste for the school and its administration, a sense they had been treated in an unfair and, to use our terminology, unfriendly manner.

When a parent of one of the young men called the lawyer for the board to express his concerns over the insensitive rejection of the young men's request for an exemption, the lawyer went out of his way to assure the parent that the exemption was not denied on religious grounds (i.e., that it was not based on animus against the young men or their religion). This neutral rule of general applicability, as applied to the young men, was unfriendly to them. Instead of building bridges between the young men and their school, the rule was divisive, by its terms and as applied.

By way of contrast, an example of a friendly act, in extending an exemption in a very sensitive area, is in order. As previously noted, as a young man, over thirty years ago, I was opposed to war on the grounds of religious conscience and sought an exemption from the draft on those grounds. Once again, a letter initiated the process. The writing of the letter gave me an opportunity to share my reasons with the draft board that would ultimately determine whether an exemption would be granted. I was apprehensive, because I knew that if the board did not grant my request for an exemption, my conscience might require me to go to prison. I was also worried because I knew that the chairman of the board was a retired military officer and another member was the mother of one of my

67. The young men are members of the Church of Jesus Christ of Latter-day Saints (commonly and sometimes derisively referred to as “Mormons”). Clergy from other religions in the area often preach against the “Mormons,” and the young men and the chairman of the board were both well aware of this fact. While the young men harbor doubts about whether the board was acting out of animus—it had granted an exemption to another young man for personal reasons in the past—it would have been difficult, if not impossible, to prove animus or an intent to discriminate on religious grounds. It is not easy to prove discrimination of any sort, because people are disinclined to admit that they are racists or bigots. It is not so difficult, however, to see that the insensitivity displayed by the board and the school was unfriendly.
classmates who had given his life in Vietnam. I appeared before the board and answered a series of questions that evidenced the board's sensitivity to my plight. A few weeks later, a letter arrived from the draft board. With great concern, I opened the envelope, the contents of which would indicate whether my nation would recognize my sincere religious conscience. As I read the letter granting my exemption, I wept in gratitude. I trace my patriotism, which is palpable, more to that single moment than to any other. The board and the nation it represented had acted in a friendly manner to my request for an exemption. I have since viewed this nation in a very favorable—we might say friendly—manner.

These examples evidence that the granting of exemptions from neutral laws of general applicability, on the ground of religious conscience, is clearly a friendly act. The failure to do so is a less friendly act. At a minimum, if we want to have a legal system that is friendly to persons of religious conscience, a process needs to be developed whereby the religious person is given an opportunity to present his or her case and the body deciding whether to grant the exemption is required to give reasons for its decision. The failure to provide such a process and to seek to accommodate religious conscience where possible is surely an unfriendly act. Sadly, after its decision in the Smith case, the Supreme Court decided to follow an unfriendly course.

IV. CONCLUSION

Professor Sandy Levinson's friendly approach toward religious conscience is worthy of emulation, on a personal and a professional level. Sandy's friendship extends beyond the personal to the professional, as he seeks to contribute to the dialogue on the role of religion in the public square. Knowing Sandy, and being edified by his scholarly work, has been a source of inspiration in my life. He will surely disagree with some of my conclusions. I trust, however, that we will remain friends and he will continue to encourage my contributions, feeble as they may be, to a dialogue we both consider to be very important.

In a world where values clash and important issues appear to be difficult to resolve, what we need more of are approaches that are friendly, that encourage dialogue, and take differences seriously. In short, we need more of Professor Sandy Levinson.