

The Silencing of Religious Articulations in the Formal Public Sphere: A Critical
Response to Jürgen Habermas' Conception of a Postsecular Society

By

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Master's Essay submitted in partial fulfillment of the degree Master of Arts in the School
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August, 2017

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Abstract

This paper presents a critical response to Jürgen Habermas' account of a liberal secular state grounded in an independent political ethic known as postsecularism. Postsecularism has gained conceptual relevance in contemporary debates on religion in the philosophical, political, and sociological sciences as a consequence of a scrutiny of classical theories of modernization and secularization. This scrutiny is the result of these theories' inability to grasp the present state of the relationship between religion and contemporary societies and/or political arrangements. The postsecular reflects a need, from a normative point of view, to find more just ways of accommodating religious claims in liberal institutions. Using discourse analysis, this paper problematizes Habermas' postsecular account based on four central claims: (1) that there is a distinctive constructive power in Habermas' argument for the recognition of a specific kind of religion in the public sphere – Protestant Christianity; (2) that Habermas' shift to a postmetaphysical society is not more tolerant of religious language because its this-worldly disclosing functions limit the primary function of religious reasoning, which is founded in otherworldly transcendence; (3) that Habermas' postsecularism simply shifts the tension from the informal to the formal public sphere; and (4) that Habermas' postsecular account is devoid of a conclusive direction or description of the very particularities of his idea of a “postsecular society”. These claims will be demonstrated in the context of the language deployed in the oppositions to same-sex marriage in some American courtrooms in order to demonstrate how Habermas' postsecular account, which is predicated upon the institutionalization of secular legalism, disables religious citizens from presenting their positions authentically. This essay concludes by suggesting that minority or subaltern groups have demanded recognition in formal political processes based on a supposed link between recognition and identity, which are the fundamental defining characteristics of an individual. Using relevant scholarship, I argue that the subversion of religious discourse from formal political processes is, in a similar vein, a subverting of a particular kind of identity.

Acknowledgments

I would like to thank the entire Queen's School of Religion faculty, with special thanks to my brilliant supervisor Dr. Ian Cuthbertson.

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Introduction

The so-called ‘postsecular condition’ was originally formulated by Jürgen Habermas, but has been adopted in a broad range of intellectual as well as theoretical traditions and has gained widespread currency in contemporary philosophical, political, and sociological discourse.¹ The most important starting point for this discourse is the ‘secularization myth’, which so prominent in the West, has been raised as a response to religious resurgence. The myth suggests a linkage between secularism with progress and modernity on the back of religious backwardness.² The contemporary urgency of the postsecular depends in part on the work of scholars who argue that that secularism represents an ideology that can be dangerous for democracy because of its inability to recognize the importance of religious and multicultural identities as well as the implications of this for active citizenship.³ In this framing, the postsecular becomes a counter-discourse to the myth of secularism by developing “a variety of critiques of the myth grounded in discussions on the current political, social, and technological condition in which Europe, in particular, and the Western world more generally finds itself”.⁴ However, what the concept known as the postsecular stands for remains illusive because, although much as been written recently on the postsecular turn or condition, there is no consensus on how the term should be conceptualized nor any widespread agreement on how it necessarily connects to current developments in modern liberal societies.⁵

¹Braidotti, Rosi. 2014. *Transformations of Religion and the Public Sphere: Postsecular Publics*. New York; Houndmills, Basingstoke, Hampshire; Palgrave Macmillan. 1.

²Ibid.

³Ibid.

⁴Ibid.

⁵Ibid.

Jürgen Habermas' "Religion in the Public Sphere" (2005) was published as a response to the rise of religious fundamentalism and the proliferation of religious conflicts in the global arena. The article focuses on the role religion plays in shaping contemporary political life and how religion has been intensified as a result of its surprising political revitalization at the heart of Western society. Habermas develops an account of a liberal secular state grounded in an independent political ethic – *postsecularism*. The term suggests that liberal political thought needs to realize that faith discourses and those of public reason cannot be as clearly distinguished as many liberal democratic political theorists have assumed, which lends itself to the argument that religious forms of reasoning should be incorporated into public political discourses. Habermas' theory of a postsecular society is marked by the *institutional translation proviso* – a clear demarcation of the *informal* public sphere (public deliberations) from the *formal* public sphere (parliaments, courts, ministries and administrations) – which suggests that religious articulations are only acceptable outside of the institutional realm. Thus, the proviso suggests that religious citizens ought to split their religious and political identities in public deliberations at the institutional level if their positions are to be taken seriously. Habermas aims to prevent those acting in the formal public sphere from using religious language to support their claims.

This essay problematizes Habermas' postsecular account as presented in "Religion in the Public Sphere" (2005) both theoretically and practically. I argue that Habermas' postsecular account, which is born out of a need, from a normative point of view, to find more just ways of accommodating religious claims into liberal institutions, does not actually benefit religious citizens. I conclude by suggesting that the implication

of the subversion of religious discourse from formal political processes in Habermas' postsecular account equates to a suppression of religious individual and group identities.

In the first section of the paper I engage with Habermas' postsecular account from a theoretical standpoint. Using relevant scholarship from Baumeister (2007; 2011), Birnbaum (2015), Cooke (2006), Harrington (2007), and Lafont (2007), I make four central claims. First, I argue that there are distinct constructive and productive powers in Habermas' argument for the recognition of religion: Habermas *makes* religion by arguing for its recognition. I also claim that Habermas' overreliance on the modernization of religious consciousness has led him to privilege a Judeo-Christian heritage in his postsecular account because the religion Habermas makes is of a distinct Judeo-Christian flavour. Second, I argue that Habermas' shift to a postmetaphysical society is not more tolerant of religious language because its this-worldly disclosing functions, where metaphysical conceptions are inadmissible, limit the primary function of religious reasoning, which is founded in otherworldly transcendence. Third, I argue that while Habermas' *institutional translation proviso* incorporates the use of religious language into the informal public sphere, his proposal simply shifts the tension to the level of formal democratic deliberation. In so doing, Habermas relegates religious expressions to the opinion-formation stage of the weak publics (non-institutional public deliberations) rather than the organized public space of civil society that is primarily concerned with will-formation and decision-making. Fourth and finally, I argue that because Habermas does not make any normative statements about what the proper direction for modernity is; what a postsecular society ought to look like; or whether the polarization of religious and secular worldviews is actually the result of a lack of cooperative communication on

both parts, Habermas' postsecular account is fraught with normative lacunae. In sum, based on the four central arguments outlined above, I argue Habermas' conception of a postsecular society does not provide sufficient space for religious citizens to have their worldviews protected in public deliberations nor does it provide them with the discursive power to influence formal legislative processes.

In the second section of the paper I put Jürgen Habermas' *institutional translation proviso* to the test in the context of the American legislative debate over same-sex marriage, focusing on the implications of secularizing religious logic in opposition to same-sex unions. Jürgen Habermas' *institutional translation proviso* suggests that religious articulations are only acceptable outside of the institutional realm, meaning that religiously-grounded justifications in the informal public sphere must be secularly framed in order to impact formal judicial processes. Using recent scholarship from Eskridge and Spedale (2007), Schuman (2008), Smith (2010), and Reinbold (2014), I examine the language deployed in opposition to same-sex marriage throughout American courtrooms. In congruence with Habermas' *institutional translation proviso*, which suggests that religious citizens ought to split their religious and political identities in public deliberations at the institutional level in order to prevent the use of religious language in formal public discourse, I demonstrate how the US legal system is unable to tolerate pleas for sexual regulation when such articulations involve explicitly religious sentiments. I demonstrate how, as a consequence of this intolerance, religious pleas in the courtroom mask themselves behind secular language in order to 'smuggle' their convictions into a formal public discourse that rejects explicitly religious ideals. I conclude by arguing that the *institutional translation proviso* proposed by Habermas,

which is predicated upon the institutionalization of secular legalism, inhibits religious citizens from articulating their positions in authentic terms, which ultimately detracts from the efficacy of democratic political discourse.

In the concluding section of the paper, I argue that the demand for recognition in contemporary liberal democratic climates is predicated on a particular conception of identity, which presents these as largely being shaped by recognition or its absence, often by the *mis*recognition of others, thus individuals or groups can develop genuinely damaged or distorted self-images if the society around them reflects back a confining or demeaning identity images. Societal misrecognition, or nonrecognition, of individual or group identities can thus be a form of oppression that inflicts harm on those marginalized by imprisoning them in false, distorted, and reduced modes of being. Based on the writings of Taylor (1997) and Phillips (1994) I demonstrate that, based on this contemporary strand of identity politics that has emerged on behalf of these minority or subaltern groups, the subversion of religious discourse from formal political processes in Habermas' postsecular account equates to the suppression of religious individual and group identities. I conclude by suggesting that Habermas' liberal account of a postsecular society, which is predicated on the supposed linkage of the secular with the neutral, fails to reflect on the fact that the secular is in fact a representation of one specific worldview. In neutralizing the secular worldview (by privileging secular modes of discourse) over the religious worldview (by suppressing religious modes of discourse) Habermas and the postsecular world he imagines cannot account for religious difference and diversity at the institutional level.

Chapter 1 – Overview of Jürgen Habermas’ “Religion in the Public Sphere”

Habermas suggests that the Religious Right in the United States is no longer traditionalist, but rather has reinvented itself through contemporary forms of religious revivalism.⁶ This revival of religiosity has sequestered the American body politic in a polarization between conservative Christianity and secular liberals.⁷ According to Habermas, it appears as if the Occident is moving down a path in isolation from the rest of the world. Modernity appears to be undergoing a transformation where the former ideal of European exceptionalism as a model for the future of all world cultures has suddenly become a special case scenario.⁸

Habermas’ “Religion in the Public Sphere” (2005) reflects on the role of religion in the liberal public realm. Habermas begins his essay by addressing the debates that have arisen in the wake of John Rawls’ political theory, with a specific focus on the “public use of reason” as an indispensable feature of any democratic body politic.⁹ Habermas examines the liberal premises of the constitutional state and the consequences that Rawls’ conception of the use of public reason have on what liberal theorists refer to as *the ethics of citizenship*—the ethics of conferring or withholding citizenship status as well as the ethical rights and responsibilities that are attached to those who are granted such a status. Habermas presents a novel political ethic in order to challenge Rawls’ view that citizens

⁶Habermas, Jürgen. 2005. Religion in the Public Sphere. *Philosophia Africana* 8 (2): 99-109. 99.

⁷Ibid. 100.

⁸Ibid.

⁹See Rawls, John. 1997. The Idea of Public Reason Revisited. *The University of Chicago Law Review* 64: 765-807.

“cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines”.¹⁰

Rawls’ Liberal Conception of Democratic Citizenship

The liberal conception of democratic citizenship as proposed by John Rawls (1997) has developed within the framework of a tradition that relies on “natural reason” based on the assumption that all persons have equal access to a common human reason.¹¹ This framework serves as the epistemic base for public political argumentation to take place within a secular state that no longer depends on religious legitimation.¹² Liberal conceptions of democratic citizenship emerged as a result of religious wars and confessional disputes in early modern times, a viable solution to which was the secularization and democratization of state powers.¹³ The principle of tolerance is therefore accorded through the use of public reason, where the collective is capable of discerning what can and cannot be tolerated. The democratic procedure should be able to produce its own forms of legitimation through the equal participation of its citizenry, where the addressers of the law simultaneously act as its coauthors.¹⁴ In “The Idea of Public Reason Revisited” (1997), Rawls argues that citizens should think of themselves as if they were legislators and ask themselves what statutes, supported by what reasons, they would consider most reasonable to enact.¹⁵ Rawls necessitates the use of public reason as a “duty of civility” based on the principle of reciprocity because, when it comes

¹⁰Rawls. The Idea of Public Reason Revisited. 765.

¹¹Ibid.

¹²Habermas. Religion in the Public Sphere. 101.

¹³Ibid.

¹⁴Ibid.

¹⁵Rawls. The Idea of Public Reason Revisited. 769.

to contentious political issues, citizens owe one another good reasons for their political statements.¹⁶

Objections to the Liberal Conception of Democratic Citizenship

The prima facie obligation not to advocate or support any law or public policy unless citizens are able to justify their positions with secular reasoning has been countered by several objections. Robert Audi and Nicholas Wolterstorff's *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (1997), for instance, focuses on the legitimacy of Rawlsian liberalism in terms of its ability to specify the ways in which a democratic polity should understand both itself and the role of religious beliefs in public life.¹⁷ Wolterstorff presents a challenge to liberalism in general, with a specific focus on Rawls' formulations; he critiques the epistemological underpinnings of Rawls' insistence on isolating religious beliefs from entering the public square.¹⁸ Wolterstorff argues that Rawls' position that religion is incompatible with the liberal criterion of knowledge required for engaging in responsible public debate presupposes that knowledge depends on the individual being able to justify her beliefs according to some shared set of epistemological foundations.¹⁹ Wolterstorff thus problematizes Rawls' conception of a common human reason by questioning whether

¹⁶See Rawls. The Idea of Public Reason Revisited. "Thus citizens fulfill their duty of civility and support the idea of public reason by doing what they can to hold government officials to it. This duty, like other political rights and duties, is an intrinsically moral duty. I emphasize that it is not a legal duty, for in that case it would be incompatible with freedom of speech" (769).

¹⁷Audi, Robert, and Nicholas Wolterstorff. 1997. *Religion in the Public Square: The Place of Religious Convictions in Political Debate*. Lanham, Md: Rowman& Littlefield Publishers.

¹⁸Wilmot, Brett T. 1999. Religion in the Public Square: The Place of Religious Convictions in Political Debate. Robert Audi, Nicholas Wolterstorff. *The Journal of Religion* 79 (2): 325-7. 326.

¹⁹Ibid.

any set of reasons exist that are capable of convincing *all* rational adults within a liberal society.²⁰ Wolterstorff argues that secular reasoning is not an independent source of reason, but rather a specific set of principles developed within the context of a single tradition of thought.²¹ Wolterstorff thus challenges the notion of a universal secular reasoning by concluding that all reasons are subjective in that they are “person relative”, and because of this there can be no assumed epistemic starting point for a legitimation of one reason over another.²² Wolterstorff suggests that the liberal bifurcation between religious beliefs and collective beliefs as a whole has the added effect of creating a hierarchy of knowledge whereby religious convictions are treated as inadequate epistemic starting points.²³ He concludes by arguing for the inclusion of religious beliefs in political debates and discussion, which requires the rejection of knowledge as having to be justified based on some shared criterion of rationality.²⁴ Wolterstorff explains that disallowing religious claims from entering public discourse serves as a direct violation of the liberal principle of reciprocity because its exclusionary tendencies suggest that religious reasons are not sufficient motivators for supporting public policy.²⁵

According to Habermas, the most noteworthy contestation to Rawls’ liberal conception of democratic citizenship is that many religious citizens would not be able to undertake “such an artificial division within their own minds [between the religious and

²⁰Carnahan, Kevin. 2013. Religion, and not just Religious Reasons, in the Public Square: A Consideration of Robert Audi’s and Nicholas Wolterstorff’s Religion in the Public Square. *Philosophia*41 (2): 397-409. 400.

²¹Ibid.

²²Ibid.

²³Wilmot. Religion in the Public Square. 327.

²⁴Ibid.

²⁵Carnahan. Religion, and not just Religious Reasons, in the Public Square. 400.

the political] without destabilizing their existence as pious persons".²⁶ This inability to undertake such cognitive divisions does not have to do with a lack of knowledge or imagination among religious individuals to find secular justifications for religious beliefs. Rather, it relates to the vital role religion plays in the lives of the religious.²⁷ As Audi and Wolterstorff suggest,

It belongs to the *religious convictions* of a good many religious people in our society that *they ought to base* their decisions concerning fundamental issues of justice *on* their religious convictions. They do not view it as an option whether or not to do so.²⁸

In light of criticisms by scholars who suggest that Rawls' liberal conception of democratic citizenship treats religion in an unsatisfactory manner, Habermas develops an independent political ethic that seeks to protect by creating space for the role of religious claim-making within the liberal public realm.

Habermas' Revision of the Liberal Conception of Democratic Citizenship: The Postsecular

Habermas revises Rawls' conception of democratic citizenship through a clear demarcation of the *informal* public sphere (public deliberations) from the *formal* public sphere (parliaments, courts, ministries and administrations).²⁹ Habermas refers to this separation between the formal and informal public spheres as the *institutional translation proviso*, where religious citizens can use religious language to justify their political convictions if they accept that beyond the institutional threshold only secular reasons count. Habermas' revision lightens the burden on religious citizens to isolate their political identities from their religious ones by shifting this cognitive tension to the

²⁶Habermas. Religion in the Public Sphere. 101.

²⁷Ibid. 102.

²⁸Audi and Wolterstorff. *Religion in the Public Square*. 105.

²⁹Habermas. Religion in the Public Sphere. 103.

institutional level. Politicians, for example, are responsible for secularizing religious logic because those who exercise their power within state institutions are obligated to remain neutral in the face of competing worldviews.³⁰ Religious citizens are therefore able to publicly express their convictions through religious language within the informal public sphere when no secular articulations are available. Habermas argues that this is not only beneficial to religious citizens in terms of ensuring their cognitive honesty in matters of political relevance, but that religious language is also intellectually valuable for secular citizens. Habermas suggests that religious traditions have a unique capacity to articulate moral intuitions with regard to communal forms of a dignified human life when they can be secularized from the vocabulary of a specific religious community into a generally accessible language.³¹ Thus, religious articulations on relevant political issues become serious candidates for the creation of potential normative truths when they can be salvaged from their context-specific contents into a universal secular discourse.

Habermas argues that the translation of religious articulations into secular discourse does not place an asymmetrical burden on religious citizenry because sociologists have observed the “modernization of religious consciousness” since the periods of Reformation and Enlightenment as a necessary response to pluralism, the emergence of modern science, and the spread of positive law and profane morality.³² Religious citizens within a secular society must therefore develop three distinct epistemic attitudes: They must (1) recognize competing doctrines while simultaneously maintaining their claims to be the exclusive bearers of truth; (2) recognize

³⁰Habermas. Religion in the Public Sphere. 102.

³¹Ibid.103.

³²Ibid.

the independence of the secular from the sacred as a result of the institutionalized monopoly of modern science in its ability to make sense of states and events in the world; and (3) recognize the priority of secular reasoning in the political arena, which requires religious citizens to “connect the egalitarian individualism and universalism of modern law and morality with the premises of their own comprehensive doctrines”.³³

Habermas contends that secular citizens are likewise not spared a cognitive burden because as long as secular citizens conceive of religious traditions and communities as relics of premodern societies they will not be able to take religious contributions to contentious political issues seriously.³⁴ The secular awareness of living in a postsecular society requires a kind of postmetaphysical thought,³⁵ which enables the secular self-reflectivity required to serve as a legitimate counterpart to a religious consciousness that has also become self-reflective. Habermas’ postsecular account requires secular citizens to adopt a philosophical agnosticism that no longer seeks to rationalize religious claims because it recognizes the metaphysical heritage of Western philosophy, where religious foundations have facilitated the development of contemporary secular discourse.³⁶ Habermas concludes by suggesting that the current polarization of worldviews in the United States between hard secularists and exclusivist religionists is the result of a lack of learning on both sides of the secular/religious divide.³⁷ The civic duty among all citizens in a postsecular society requires cognitive

³³Habermas. Religion in the Public Sphere. 104-5.

³⁴Ibid. 105.

³⁵Give up philosophy’s traditional fixation on theoretical truth and representational functions of language to the extent that moral and expressive functions of language become part of the contextualization of reason

³⁶Habermas. Religion in the Public Sphere. 106.

³⁷Ibid. 107.

preconditions that are pre-political in origin, highlighting the ways in which the liberal constitutive state with its deliberative kind of politics remains an “epistemically demanding” form of government.³⁸

Chapter 2 – Problematizing Jürgen Habermas’ Postsecular Account from a Theoretical Perspective

This section of the paper will appeal to four central claims. First, I argue that there is a distinctive constructive power in Habermas’ argument for the recognition of religion, and that he *makes* religion by arguing for its recognition. This will include a deeper analysis of the kind of religion Habermas envisions entering the public sphere. Second, I argue that Habermas’ shift to a postmetaphysical society is not more tolerant of religious worldviews. This is because its world-disclosing function limits the universal acceptability of religious teachings, where otherworldly transcendence remains an animating feature. Third, I argue that while Habermas’ *institutional translation proviso* incorporates the use of religious language into the informal public sphere, Habermas’ reconstructive proviso simply shifts the tension to the level of formal democratic deliberations – where tangible political changes occur. Fourth, I argue that Habermas’ proposal to integrate the semantic potential of religious worldviews into public deliberations suggests the need, from a normative point of view, for modernity to be refocused. His postsecular account advocates for a more emphatic dialogue with religion in order to help reorient modernity towards its essential destination. However, Habermas does not consider what the proper direction *ought to be*, resulting in the persistence of

³⁸Habermas. Religion in the Public Sphere. 107.

normative questions about the ways in which one might envision a postsecular society to look like.

The Constitutive Effects of Habermas' Argument for the Recognition of Religion and the "Making of" Religion

When Habermas argues for the recognition of religious articulations within the informal public sphere, he does not reflect on the constructive or productive power of his arguments. As Patchen Markell (2003) notes,

‘Recognition’ is sometimes used to refer to the successful cognition of an already-existing thing, but [it also refers] to the constructive act through which recognition’s very object is shaped or brought into being...recognition does not simply know its objects but makes them.³⁹

Habermas’ argument for the recognition of religion in the public sphere does not simply remove religion from its privatized shackles; rather, he constructs religion by drawing boundaries around what is considered recognizably religious. Yet recognition is not merely constructive, it is also conservative: only those subjects that are recognizable are capable of being recognized because only those religious articulations or subjects that are already obviously religious can be recognized. The religion Habermas constructs is therefore necessarily a familiar one.⁴⁰ Additionally, Habermas’ recognition of religion in the public sphere does not necessarily seamlessly incorporate religion into the civic milieu (as Habermas originally intends), but can have the adverse effect of re-engendering its constitutive Otherness by isolating ‘religion’ as something foreign that

³⁹Markell, Patchen. 2003. *Bound by Recognition*. Oxford; Princeton, NJ;: Princeton University Press. 496. *Cited in* Birnbaum, Maria. 2015. Exclusive Pluralism: The Problem of Habermas’ Postsecular Argument and the “Making of” Religion. *Religion as a Category of Governance and Sovereignty* 3. London: BRILL. 182-196.

⁴⁰Birnbaum. Exclusive Pluralism. 187.

deviates from the secular norm.⁴¹In his attempt to accommodate religious citizens, Habermas constructs a monolithic version of religion that negates the pluralistic tendencies of its constituency. This is because pluralizing religious worldviews would directly challenge Habermas' argument that religion is capable of representing a unified voice in dialogue with secular counterparts by providing shared moral intuitions with regard to communal forms of a dignified human life. A more nuanced account of the intricacies of religious worldviews may therefore have the adverse effect of antagonizing the very people he is trying to aid, but in doing so he ignores the ways in which he homogenizes religion's multidimensionality into a singular perspective.⁴² This reductive characterization of religion has serious implications for allowing those religious individuals and worldviews that have remained dominant in political discourse to continue representing religious bodies with divergent views. In his negation of the diversity of religious articulations, Habermas overlooks the performative aspect of the term religion in that religion does not represent a fixed category or a pure state. Rather, religions are comprised of a multiplicity of voices in which identities are constantly shifting. As Roger Brubaker (2013) highlights, "religious pluralism entails deeper and more divisive forms of diversity".⁴³ Habermas' account of a postsecular society presupposes a unified religious ethos within the public sphere when no such unified ethos exists. This homogenization is even more precarious given increased religious pluralism within Western democracies.

⁴¹Birnbaum. Exclusive Pluralism. 188.

⁴²Harrington, Austin. 2007. Habermas and the 'Post-Secular Society'. *European Journal of Social Theory* 10 (4): 543-60. 556.

⁴³Brubaker, Roger. 2013. Language, Religion, and the Politics of Difference. *Nations and Nationalism* 19 (1): 1-20. 1.

In Habermas' negation of the performative aspects of religion, Habermas does not understand religion as "a practice that is lived within the context of particular communities and institutions" but rather as a distinctly intellectual enterprise.⁴⁴ Andrea Baumeister (2011) argues that Habermas' segregation of religion to the intellectual realm is strategic in that it allows him to avoid intervening or commenting on the internal affairs of religious communities. Habermas' conceptualization of religion as a particular mode of thought allows him to ignore the fact that religious communities do not operate on the level of the individual but are marked by distinct hierarchies and power relations. These realities directly implicate the ability of lay practitioners to freely debate and evaluate internal religious doctrines.⁴⁵ In line with this argument, Baumeister adds that what constitutes "true" faith is a question that is highly contested within religious communities and is not necessarily solidified in the implementation of religious doctrines.⁴⁶ Habermas' portrayal of religion systematically ignores these conflicting interests and power relations. Baumeister (2011) highlights the complexity of internal power relations within religious communities within the context of contemporary debates regarding the origin, nature and interpretation of Jewish and Muslim personal and family law.⁴⁷ She explains how female members of these communities repeatedly challenge the dominant interpretations of those aspects of personal law and the religious family that discriminate against women. However, for many of these members, adhering to religious personal and family law remains a vital aspect of religious identity. In an attempt to

⁴⁴Baumeister, Andrea. 2011. The Use of "Public Reason" By Religious and Secular Citizens: Limitations of Habermas' Conception of the Role of Religion in the Public Realm. *Constellations* 18 (2): 222-43. 233.

⁴⁵Ibid.

⁴⁶Baumeister. The Use of "Public Reason" by Religious and Secular Citizens. 234.

⁴⁷Ibid.

secure greater freedom and equality within a religious context, these women push for a reinterpretation of the existing legal traditions based on alternative readings of comprehensive doctrines. They therefore seek to reform rather than reject their religious heritage. This is apparent in movements such as Women Living Under Muslim Law (WLUML), in which women seek to engage their religious communities on their own terms.⁴⁸

Habermas exclusively speaks to the semantic contents of religion and almost never of religious forms – always of message and never of medium. This is because Habermas’ inclusion of religious articulations into public deliberations is in part based on a desire to salvage the discursive and redemptive components of religiosity found in its messages. This dependence on language has the effect of relegating the status of religious form to something peripheral or inessential.⁴⁹ Religious life is bound up with non-discursive and semi-discursive elements, including but not limited to “ritualized action and gesture, music, song, visual representation, and the sensuous space and event of worshipping”.⁵⁰ It is ironic that Habermas demands all citizens in a postsecular society to become self-reflective when he himself does not reflect on his own reductionist positionality and how this informs his understanding of religion. If Habermas’ conception of religion is one of semantic potential, to *which* semantic potential is he referring? More importantly, *whose* voices ought to be respected, acknowledged, and included in a Habermasian postsecular society?

The Amplified Voice of a Judeo-Christian Heritage Based on an Overreliance on the Modernization of Religious Consciousness

⁴⁸Baumeister. The Use of “Public Reason” by Religious and Secular Citizens. 234.

⁴⁹Harrington. Habermas and the ‘Post-Secular Society’. 552.

⁵⁰ Ibid.

Habermas never explicitly defines the type of religions allowed to partake in public deliberations on consequential political issues. He does argue, however, that these religions are required to promote egalitarian individualism, recognize the universalism of modern secular law and morality, accept competing doctrines, and acknowledge the independence of the secular from the sacred as a result of the institutionalized monopoly of modern science.⁵¹ Habermas does not explicitly specify what he means by religion when advocating for its inclusion, but from the aforementioned description it becomes clear that Habermas' postsecular alternative to a hardened secularism is one in which the traditions capable of moulding themselves to fit within the confines of a certain genealogy of liberal reasoning are given more space to exercise their discretion than those that do not adhere to liberal principles. As Baumeister (2007) notes, every legal system is grounded in a specific historicity that is ethically patterned according to those conditions.⁵² The liberal democratic framework is no exception and depends upon its Judeo-Christian heritage. Habermas recognizes this when he explains that concepts of Greek origin such as "autonomy" and "individuality" or Roman concepts such as "emancipation" and "solidarity" were originally formulated based on their Judeo-Christian origin.⁵³ Emphasizing the importance of the Judeo-Christian heritage in the formation of liberal reasoning and values necessarily privileges those traditions that lay the groundwork for their development. Thus, Habermas does not undertake any sort of positional self-reflection when it comes to his articulation of the ideal religious type,

⁵¹Habermas. *Religion in the Public Sphere*. 105

⁵²Baumeister, Andrea. 2007. Diversity and Unity: The Problem with Constitutional Patriotism. *European Journal of Political Theory* 6 (4): 483-503. 486.

⁵³Habermas. *Religion in the Public Sphere*. 106.

where Habermas' postsecular account benefits a Judeo-Christian heritage simply because it is that specific heritage that influenced his own work.⁵⁴ However, Habermas uses the term 'religion' loosely so as to suggest that the cultural particularities of the Judeo-Christian heritage are not strictly relevant to what it is meant by the societal universality of modern structures of functional differentiation. However, Habermas' explanation of how the normative legal structures of contemporary global social systems emerged under the initial impetus of Christianity implies that it is within this framework that contemporary moral and political consciousness must be formed.

Habermas' optimism with regards to achieving overlapping consensus in a postsecular society relies heavily on the process of modernization based on a continued commitment to rational consensus as a regulative ideal.⁵⁵ This is because Habermas argues that contemporary religious consciousness has already undergone a process of modernization since the periods of Reformation and the Enlightenment.⁵⁶ That Habermas considers this self-reflective process to be quintessential to the modernization of religious consciousness suggests that only those traditions capable of engaging their faith with a certain level of critical rationality are allotted full and equal participation in political discourse. Habermas' assertion that religious articulations are valuable to the public deliberative process rests heavily on the assumption that such worldviews have been modernized. Thus, Habermas' nuancing of Rawls has a similar effect of discrediting those religious worldviews that are unable to meet the 'burdens of reasons' because they have yet to develop a modernized self-reflective attitude. For Habermas, the

⁵⁴Habermas. *Religion in the Public Sphere*. 106.

⁵⁵Baumeister. *Diversity and Unity*. 486.

⁵⁶Habermas. *Religion in the Public Sphere*. 103.

modernization of religious consciousness refers to those religions that have incorporated into their worldviews the normative principles underlying the liberal democratic culture – a commitment to autonomy and a decentred, self-reflective attitude as it relates to their own beliefs and values. Habermas’ commitment to liberalism is made palpable by requiring religious citizens to differentiate themselves from the wider body politic in order to develop from within their own worldviews the normative principles of a secular society.⁵⁷

Habermas’ commitment to liberal democratic culture is problematic for his postsecular account because it remains doubtful whether religious citizens, with doctrines that claim universal validity, could ever accept the demands associated with a liberal political culture without having to completely revise or forego the very substance of these ethical commitments.⁵⁸ Andrea Baumeister (2007) uses contemporary abortion debates in order to illustrate the difficulty religious citizens face when forced to redefine their worldviews according to a particular liberal framework. For many Catholics and other pro-life supporters, the right to life of the foetus outweighs the right to self-determination on the part of the mother. Citizens who subscribe to religious worldviews will consider their claims regarding abortion as universally valid and applicable to everyone because these ethical commitments align with their conception of the good. For these citizens to relegate abortion to a matter of individual choice would require a significant revision of either the substance of their ethical commitments or the manner in which they hold their beliefs. Although religious worldviews may allow for the exercise of a certain degree of autonomy, the level of individual autonomy mandated through the liberal democratic

⁵⁷Baumeister. *Diversity and Unity*. 492.

⁵⁸*Ibid.* 493.

culture would always be at odds with religious modes of thought. This is because religious worldviews typically do not regard individual autonomy as central to their way of life.⁵⁹ In religious worldviews individual autonomy is often limited in terms of ethical and behavioural prescriptions and prohibitions set, not by the individual for herself, but by an external source such as that of divine commandments. Similarly, the liberal democratic culture, which requires developing a decentred, self-reflective attitude as it relates to one's own beliefs and values, is also at odds with the way in which religious individuals hold their beliefs and values.⁶⁰ Typically certain beliefs and values (i.e. those mandated by religious authorities, texts, or gods) should not be questioned or reflected upon too closely because they remain outside the realm of rational inquiry. The critically reflexive manner with which religious individuals must hold their beliefs that is mandated in Habermas' postsecular account places an enormous burden on religious citizens. This is because rational criticism places unreasonable cognitive limitations on religious individuals so long as belief is understood as a confidence in the truth or existence of something not susceptible to rigorous proof. Belief falls outside the intellectualizing realm of reason and Habermas' commitment to rationalization is counter-intuitive to religious conceptualizations of life. Habermas' privileging of a Judeo-Christian heritage and his overreliance on the modernization of religious consciousness to fit within a liberal political culture results in his failure to appreciate the challenges cultural diversity poses to the idea of developing a shared political identity or overlapping consensus. The march of modernization as rationalization is neither as all encompassing nor as inevitable as Habermas' postsecular account assumes.

⁵⁹Baumeister. *Diversity and Unity*. 493.

⁶⁰*Ibid.*

The Impediments of Postmetaphysical Thinking as it Relates to Religious Worldviews

According to Habermas, a postsecular society requires a kind of postmetaphysical thought. Postmetaphysical thought requires secular citizens to adopt a philosophical agnosticism that no longer seeks to rationalize religious claims, because it recognizes the metaphysical heritage of Western philosophy in shaping contemporary secular discourse. However, postmetaphysical thinking draws a strict separation between faith and knowledge, where all philosophical truth-claims, from those of scientific empirical discovery to those of a universalistic morality, must be capable of being supported by reasons that everyone, everywhere could come to accept.⁶¹ A second and closely related feature of postmetaphysical thinking is its rejection of metaphysical, otherworldly transcendence. The reference point of postmetaphysical thought is therefore inner-worldly, where claims to validity must remain internal to human practices and history rather than beyond them.⁶² Postmetaphysical thought benefits religious worldviews in that it does not seek to rationally assess their claims and therefore strives to rescue the profane this-worldly meanings of interpersonal and existential experiences that religious traditions have articulated.⁶³ The question becomes whether it is possible to salvage the semantic potential of religious claims through a this-worldly conceptualization of the world order? This process is not as seamless as Habermas' postsecular account presupposes it to be because otherworldly transcendence remains an animating feature of religious life. The very metaphysical elements that Habermas attempts to curtail are

⁶¹Cooke, Maeve. 2006. Salvaging and Secularizing the Semantic Contents of Religion: The Limitations of Habermas's Postmetaphysical Proposal. *International Journal for Philosophy of Religion* 60 (1/3): 187-207. 188.

⁶²Ibid.

⁶³Baumeister. The Use of "Public Reason" by Religious and Secular Citizens. 225.

exactly what give most of religion's intellectual contributions potency and meaning for its adherents.

Both elements of a postmetaphysical society – that truth claims must be capable of being supported by reasons that everyone, everywhere could come to accept and a commitment to inner-worldly transcendence – raise questions as to the potential efficacy of salvaging religious discourse from its metaphysical roots. For instance, divine commandments can no longer be considered universally acceptable truth claims unless everyone everywhere had undergone an analogous world-disclosing experience that resulted in each individual envisioning the world in a similar novel way.⁶⁴ When divine providence is stripped from the semantic potential of religious claimants, the entire source of religious energy loses its persuasive potential. Whether or not the contents of that religious claim can be translated or reformulated to fit within a discursive secular framework, notions of the otherworldly are at the crux of these claims and the source of their unquestioned validity. Habermas does not provide a concrete explanation of how the foundations of religious language, which are primarily bound to the otherworldly, can actually be salvaged from their metaphysical origins. The benefits of Habermas' proposed shift to a postmetaphysical society are ambiguous at best: although religious statements no longer have to undergo a process of rationalization in order to have their voices heard, much of religion's narrative efficacy is silenced in a postmetaphysical society where conceptions of the divine are rendered inadmissible.

Additionally, secular citizens are supposed to assess the validity of religious articulations based on whether their ideals represent versions of a good life that everyone

⁶⁴Cooke. *Salvaging and Secularizing the Semantic Contents of Religion*. 191.

everywhere could reasonably accept. Postmetaphysical thought can be used to achieve overlapping consensus if the issues in question are ones that fit within a liberal operative framework of what is good for everyone, but this becomes problematic given that there is no solidified understanding of what the good life is. For religious adherents, the good life means following divine commandments, and given their commitment to otherworldly transcendence in a society that understands the limitations of rational assessment, conceptions of the divine represent claims as valid as those of their secular counterparts.

As Jeremy Waldron (2007) writes,

...Suppose the decision we are considering is a decision to abolish all welfare assistance for the poor: the proposal is that we let them starve, hoping that will act as a deterrent to irresponsible choices. Some of us, however, believe that neglecting to help the poor is a way of turning one's back on the Son of God. Maybe there is no Son of God, or maybe it is a myth that he requires this of us. But, if what St. Matthew's gospel says is true, then there is a staggeringly important reason in favour of a duty to help the poor.⁶⁵

Even if a Habermasian translation programme were capable of transposing the fundamental moral intuitions that underpin the gospel of Matthew into a generally secular language, it would be an intellectually dishonest account of the reasons underlying these convictions. Inner-worldly translations are incapable of grasping the exceptional weight that divine providence commands in reasoning from a religious perspective.⁶⁶ Therefore, while secular translations may well be accessible to religious citizens, these articulations will miss the most pertinent reasons of all from a religious point of view.

⁶⁵Waldron, Jeremy. 2007. Public Reason and "Justification" in the Courtroom. 1 *J. L. Phil & Culture* 107-134. 118-9.

⁶⁶Baumeister. The Use of "Public Reason" By Religious and Secular Citizens. 229.

From the Informal Public Sphere to the Formal Public Sphere: How Religious Voices Get Lost

Habermas' *institutional translation proviso* revises Rawls' (1997) duty of civility necessitated by the use of public reason in the public sphere by bifurcating the public sphere into the informal (public deliberations) and the formal (parliaments, courts, ministries and administrations) public spheres. The *institutional translation proviso* incorporates the use of religious language into the informal public sphere in order to free religious citizens from the burden of splitting their religious and political identities. However, in order to safeguard the institutional separation between organized religion and the state, Habermas argues that religious language is only acceptable in non-institutional public deliberations, which means that religiously grounded justifications expressed in the informal public sphere must be secularized if they wish to have an impact on formal political processes. In this section, I argue that the *institutional translation proviso* does not actually benefit religious citizens in that it continues to restrict religious worldviews from entering and ultimately influencing the political processes that serve to enact tangible legislative changes.

The *institutional translation proviso* appears to give religious citizens the ability to articulate their positions in religious terms, but in reality the proviso simply shifts the tension to formal democratic deliberation. This forces religious communities to abandon their claim to comprehensively shape life and, more fundamentally, attempts to force religious citizens to undergo a self-reflexive process with the hope that they realize the limits of their own worldviews given the fact that alternative ones exist.⁶⁷ Baumeister (2011) explains how secular moral and political philosophy has been engaged in a long-

⁶⁷Baumeister. The Use of "Public Reason" By Religious and Secular Citizens. 224.

standing translation programme of religious terminology, where key articulations of secular discourse such as “human rights”, “freedom” and the very concept of “democracy,” represent demystified secular expressions rooted in Judeo-Christian tenets.⁶⁸ Yet if this is the case it seems unreasonable to ask religious citizens to articulate their moral claims in a discourse that is itself religiously inspired.

In order to better understand the practical consequences of the *institutional translation proviso*, Maeve Cooke (2006) examines the difference in content production between the informal and formal public spheres.⁶⁹ Cooke distinguishes between ‘weak publics’ and the organized public space of civil society. For Cooke, the weak publics of civil society, as represented in informal public deliberations, are primarily concerned with opinion-formation. This space is where citizens are able to dialogue about contentious political propositions in order to formulate their own opinions on those issues. The organized public space of civil society, as represented in formal institutional debates, is primarily concerned with will-formation and decision-making.⁷⁰ This space is where those individuals in positions of political ascendancy come to make tangible legislative changes as it relates to contentious political issues. If, following Habermas, religious articulations can only be made in the informal sphere and Cooke is correct in asserting that the informal sphere is primarily concerned with opinion-formation then religious citizens are only capable of articulating their worldviews in public deliberations so long as they are at the whims of unrestricted public persuasion. This is crucial because it highlights how Habermas’ attempt to salvage religious articulations has the adverse

⁶⁸Ibid. 225.

⁶⁹Cooke. *Salvaging and Secularizing the Semantic Contents of Religion*. 193.

⁷⁰Ibid.

affect of placing religious individuals in vulnerable positions, susceptible to the opinions and expressions of their secular counterparts so that they can be convinced otherwise.

If a postsecular society is one that is epistemically demanding in order for religious and secular individuals to be able to take each other's claims seriously, why would secular citizens take religious citizens seriously given the limitations of the *institutional translation proviso* on the expendability of religious language in processes of actual political significance? Religious language is excluded from formally organized public spaces so that its articulations are incapable of sifting through the weak publics in order to become viable mechanisms for enacting legislative change. More fundamentally, the *institutional translation proviso* underwrites Rawls' and Habermas' entire legitimation of the democratic procedure, where the addressers of the laws also act as the authors of those laws. The *institutional translation proviso* imposed by Habermas "considerably weakens the regulative force of the idea of political autonomy for those who hold religious (and other metaphysical) worldviews".⁷¹ It imposes an asymmetrical cognitive burden on religious citizens because it is doubtful whether secular translations of religious articulations are capable of tapping into the transformative potential required to engender the postmetaphysical politics and philosophy to which Habermas aspires.⁷² More fundamentally, Habermas' strict regulation of religious language beyond the institutional sphere belies the constitutional right to freedom of speech. The *institutional translation proviso* denies religious individuals the right to express their opinions without censorship or restraint, which entirely negates the premise underpinning Habermas'

⁷¹Cooke. *Salvaging and Secularizing the Semantic Contents of Religion*. 198.

⁷²Baumeister. *The Use of "Public Reason" by Religious and Secular Citizens*. 228.

postsecular account – a philosophical attempt to carve out a space for religious individuals to speak freely.

Habermas’ neat division between the informal and formal public spheres is not as differentiated as he would suggest. Formal public spaces set the precedent for the kind of conversations permissible in informal public deliberations. In “Legal Discourse and the *de facto* Disestablishment” Steven D. Smith (1998) demonstrates how religious discourse has been marginalized in the legal sphere *beyond* the judicial realm.⁷³ Smith notes the virtual absence of religion—“of religious authorities, and of ideas and perspectives that we associate with ‘religion’”—in law school curriculums and in legal discourse generally.⁷⁴ But what happens within the courtrooms of a country directly and necessarily impacts the debates that take place within the informal public realm: the political is, after all, personal. The *institutional translation proviso* is not as bifurcated as Habermas’ account suggests. The two systems bleed into one another, where the former sets the precedent for the latter. This means that as long as religion is excluded from the formal public sphere, from articulating its narratives in the legislative arena, secular citizens will never be able to take religious contributions to public discourse seriously. A truly postsecular society, according to Habermas, requires cognitive preconditions that are pre-political in origin. This mutual self-reflectivity is only possible if both religious and secular worldviews are allowed to discourse freely in formal public spaces.

The Persistence of Normative Questions in Habermas’ Account of the Postsecular

⁷³Smith, Steven D. 1998. Legal Discourse and the *De Facto* Disestablishment. *Marquette Law Review* 81 (2): 203-227. 205.

⁷⁴Ibid.

Habermas' introduction of the phrase 'postsecular' signifies some kind of self-correction process, where the postsecular represents a necessary revisionist account of modernity. The secularization thesis was based on the hypothesis that there was a close linkage between the modernization of society and the secularization of its population.⁷⁵ However, in the wake of scholarly criticism such as that from Swatos and Christiano (2000) that the secularization thesis represents a narrow Eurocentric perspective, scholars such as Stark (1999) have begun to argue for the "end of the secularization theory".⁷⁶ The contemporary United States challenges the secularization theory because it represents the spearhead of modernization while maintaining an undiminished vibrancy of religious communities and constant proportion of religiously committed citizens. The United States has been long regarded as an exception to the secularizing trend, but when examples of highly religious modernizing nations are extended globally, the United States now seems to exemplify the norm.⁷⁷ This global reality led Habermas to develop his postsecular account – a proposal to reincorporate religious worldviews into public deliberations. This proposition implies that modernity needs, from a normative point of view, to be refocused or put back on its tracks, and that presumably a more emphatic dialogue with religion will help reorient modernity toward its essential destination.⁷⁸

The problem with Habermas' account of the postsecular is that, aside from identifying a need for both secular and religious citizens to develop more cooperative epistemic dispositions for mutual understanding, Habermas does not present his

⁷⁵Habermas, Jürgen. 2008. Notes on Post-Secular Society. *New Perspectives Quarterly* 25 (4): 17-29. 17.

⁷⁶Ibid. 18.

⁷⁷Ibid.

⁷⁸Harrington. Habermas and the 'Post-Secular Society'. 547.

readership with any normative statements about what that dialogue should look like. This leaves the reader with normative questions as to what Habermas envisions of a postsecular society – how it will take shape, and in which direction it is going. What would be the rules of engagement and codes of good conduct in public deliberations? Where would these rules and codes come from and who would be their authors? These are particularly important questions for Habermas to address given that his postsecular account necessitates a sort of conflict of faculties of the mind, a more primordial conflict than those between bearers of different cultures, identities and religions.⁷⁹

Habermas' postsecular society is grounded in postmetaphysical thinking, which is founded on the presumption that all cosmological thought should begin from some form of anthropocentric perspective. This commits us to an ethically presumptuous project of the 'self-made man,' that we as individuals are capable of constructing our own identity and that the *good* society is one that we as individuals create.⁸⁰ Habermas does not question the limits of this presumption nor does he provide any suitable justification why anthropocentrism is a more suitable form of governance than theocentrism.⁸¹ Habermas' unquestioned commitment to liberalism results in the persistence of normative questions as to whether overlapping consensus is even possible in a democratic society, as well as whether it is possible for both secular and religious citizens to not just converse but feel *heard* and capable of effecting real political change through dialogue.

Another important normative question Habermas leaves unaddressed is what it actually means to take religious or secular contributions to contentious political issues

⁷⁹Harrington. Habermas and the 'Post-Secular Society'. 548.

⁸⁰Ibid. 555.

⁸¹Ibid. 556.

seriously. As Cristina Lafont (2007) argues, if the political obligation of taking each other's contributions seriously in the public sphere obliges one to evaluate these contributions strictly on their merits and then engage them with counter arguments to expose the faults in their claims, then it should not matter whether secular citizens conceive of religious communities as archaic relics of premodern societies so long as they fulfil this obligation of citizenship.⁸² For example, defenders of evolution must be fulfilling their political obligations towards their fellow citizens by investing an incredible amount of work in providing counter evidence for the claims that defenders of creationism bring to the informal public sphere. They are fulfilling their obligations of citizenship "*regardless of what their personal cognitive stance towards the cognitive substance of religion may be*" because they have provided their best arguments and reasons for public deliberation into the discourse, just as everyone else who participates in the debate does.⁸³ For this reason, Lafont (2007) argues that Habermas' postsecular account does not actually require any cognitive obligations by secular citizens to take seriously religious claims, but rather his insistence on reintegrating religious expressions into the informal public sphere is strictly political.⁸⁴ Habermas' vision of a postsecular society was formulated as a response to rising religious fundamentalism. If this fundamentalism is in fact a result of feelings of exclusion from the dominant secular political processes, then Habermas' postsecular society serves as a political strategic move for having religious individuals *feel* as though their voices are being heard,

⁸²Lafont, Cristina. 2007. Religion in the Public Sphere: Remarks on Habermas' Conception of Public Deliberation in Postsecular Societies. *Constellations* 14 (2): 239-59. 249.

⁸³Ibid.

⁸⁴Ibid. 250.

regardless of whether they are actually taken seriously, as a means of curtailing religious extremism. Additionally, to return to the evolution versus creationism example, Habermas' inability to provide a clear understanding of what this mutually constitutive dialogue should look like is worrisome given the fact that both ideological camps are conversing in two ostensibly different languages. The critique presented by Lafont begs another important normative question – does simply allowing religious articulations to be expressed within the informal public sphere actually provide them with the opportunity to have their views taken seriously in the first place?

Chapter 3 – Problematizing Jürgen Habermas' Postsecular Account from a Practical Perspective: The American Legislative Debate Over Same-Sex Marriage

Jürgen Habermas' *institutional translation proviso* suggests that religious articulations are only acceptable outside of the institutional realm, meaning that religiously-grounded justifications in the informal public sphere must be secularly framed in order to impact formal judicial processes. In this section of the paper, I put Habermas' theoretical proposition to the test in the context of the American legislative debate over same-sex marriage, focusing on the implications of secularizing religious logic in opposition to same-sex unions. Using recent scholarship from Eskridge and Spedale (2007), Schuman (2008), Smith (2010), and Reinbold (2014), I examine the language deployed in opposition to same-sex marriage throughout American courtrooms. In congruence with Habermas' *institutional translation proviso*, which suggests that religious citizens ought to split their religious and political identities in public deliberations at the institutional level in order to prevent the use of religious language in formal public discourse, the US legal system is unable to tolerate pleas for sexual regulation when such articulations involve explicitly religious sentiments. I demonstrate

how, as a consequence of this intolerance, religious pleas in the courtroom mask themselves behind secular language in order to smuggle their convictions into a formal public discourse that rejects explicitly religious ideals. I conclude by arguing that the *institutional translation proviso* proposed by Habermas, which is predicated upon the institutionalization of secular legalism, inhibits religious citizens from articulating their positions in authentic terms, which ultimately detracts from the efficacy of democratic political discourse.

Why Same-Sex Marriage?

There are three reasons for looking at the contemporary same-sex marriage debate in the United States. First, in the United States, public discussions about sex often equate to public discussions about religion. This is not simply because religion is the platform through which sex has historically been regulated, but rather because the secular state's regulation of sex can be understood as a form of religion by other means.⁸⁵ Second, the contemporary conversation on same-sex marriage in the United States proves that "secularization has not so much meant the *retreat* of religion from the public sphere as its *reinvention*".⁸⁶ Third, the contemporary conversation on same-sex marriage in the United States highlights the tumultuous relationship between religion and government. In their book *Love the Sin: Sexual Regulation and the Limits of Religious Tolerance* (2003), Janet R. Jakobsen and Ann Pellegrini demonstrate how Protestantism serves as the dominant framework of morality in the United States. They argue that this conflation of religion and morality is the result of the forgotten lineage of Protestantism as having shaped

⁸⁵Jakobsen, Janet R., and Ann Pellegrini. 2003. *Love the Sin: Sexual Regulation and the Limits of Religious Tolerance*. New York; London;: New York University Press. 31.

⁸⁶Ibid. 34-5.

America's moral foundations.⁸⁷ This historical amnesia is largely the product of Protestantism serving as the moral foundation upon which a burgeoning secular state took shape. The intertwining narratives of Protestantism and secularism are made clear in Max Weber's *The Protestant Ethic and the Spirit of Capitalism* (1930), in which he notes the religious architecture of both the secular state and the free market.⁸⁸ Weber explains how the Enlightenment, which was marked by "religion's retreat, [and] reason's advance", only happened as a direct result of the Protestant Reformation.⁸⁹ Weber writes,

[It] is necessary to note, what has often been forgotten, that the Reformation meant not the elimination of the Church's control over everyday life, but rather the substitution of a new form of control for the previous one. It meant the repudiation of a control which was very lax, at that time scarcely perceptible in practice and hardly more than formal, in favour of a regulation of the whole conduct which, penetrating to all departments of private and public life, was infinitely burdensome and earnestly enforced.⁹⁰

The fact that even at the moment of its inception the secular is never free from the religious is important in terms of understanding contentious political and moral issues in the United States as it is within this framework that traditional conceptions of civic morality originally developed. The interconnected relationship existing between religion and government, despite the strict separation of church and state, is made palpable in contemporary debates on same-sex marriage in the United States.

⁸⁷Jakobsen and Pellegrini. *Love the Sin*. 36.

⁸⁸Ibid. 46.

⁸⁹Ibid.

⁹⁰Weber, Max. 2001; 1930; *The Protestant Ethic and the Spirit of Capitalism*. 2nded. New York; London;:Routledge. 36. Cited in Jakobsen and Pellegrini. *Love the Sin*. 46-7.

The Unified Voice of Conservative Christianity Against Same-Sex Marriage

As of 2003, nearly six-in-ten Americans considered homosexual behaviour to be a sin.⁹¹ These numbers increase exponentially when religion is factored in. Eighty-eight percent of white evangelicals, sixty-four percent of white Catholics, and seventy-four percent of black Protestants believe that homosexual conducts is sinful.⁹² In no major religious group do the majority express favourable views towards same-sex marriage, and the most common reasons provided for objecting to same-sex marriage are moral and religious ones.⁹³ When asked in an open-ended format for their main reason behind opposing same-sex marriage, twenty-eight percent of opponents explicitly cited the view that homosexuality is immoral, sinful, or inconsistent with biblical teachings, and an additional seventeen percent stated that the idea is simply in conflict with their religious beliefs. Only one-in-five Americans who oppose same-sex marriage explain their positions in amoral terms, citing that the constitutional definition of marriage involves a man and a woman (16%), or that the purpose of marriage is reproduction (4%).⁹⁴ By contrast, six-in-ten seculars (those who say they have no religious affiliation) hold positive views of homosexual relationships.⁹⁵ As a general rule, religious individuals in the United States oppose same-sex marriage. The overwhelming majority of this constituency is made up of Christians, and these Americans have dominion over the religious public sentiment in the United States. As of 2015, the United States remains

⁹¹Pew Research Ctr. For the People & the Press. 2003. Pew Forum on Religion & Public Life, Republicans Unified, Democrats Split on Gay Marriage: Religious Beliefs Underpin Opposition to Homosexuality. Web.

⁹²Ibid.

⁹³Pew Research Ctr. For the People & the Press. Pew Forum on Religion & Public Life, Republicans Unified, Democrats Split on Gay Marriage.

⁹⁴Ibid.

⁹⁵Ibid.

home to more Christians than any other country in the world, where roughly seven-in-ten Americans continue to identify with some branch of the Christian faith.⁹⁶ Therefore, when I address the religious opposition to same-sex marriage in the United States, I am referring to a unified voice of conservative Christianity, as this large portion of the body politic is what has given rise to the discordance on the issue of same-sex marriage in contemporary American political and judicial climates.

Biblical References in Judicial Opinions on Same-Sex Marriage

Before opponents of same-sex marriage became cognizant of the political dangers posed by articulating overtly religious arguments to support their positions, scriptural passages and biblical exegeses served as the main line of argumentation for opposing same-sex marriage in early judicial opinions. One of the earliest Supreme Court cases revolving around the issue of same-sex marriage is the 1971 Minnesota case of *Baker v. Nelson*. The Supreme Court held the position that defining marriage as a heterosexual union between one female and one male was not unconstitutional because it reflected notions of procreation and child rearing within a familial context as articulated in the book of Genesis.⁹⁷ The case uses the 1965 *Griswold v. Connecticut* case⁹⁸ as its reference point, where a Connecticut criminal statute prohibited the use of contraceptives by married couples was held invalid for violating the due process clause of the Fourteenth Amendment. The basic premise of the decision was that the state did not have the

⁹⁶Pew Research Ctr. For the People & the Press. 2015. America's Changing Religious Landscape. Web.

⁹⁷*Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971). Cited in Schuman, Ben. 2008. Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective. *Georgetown Law Journal* 96 (6): 2103-41. 2112.

⁹⁸*Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1676, 14 L.Ed.2d.510 (1965).

authority to intrude upon the right of privacy inherent in the marital relationship.⁹⁹ The court cites Mr. Justice Douglas, author of the *Griswold v. Connecticut* majority opinion, that this criminal statute “operates directly on an intimate relation of husband and wife”, and that the very idea of its enforcement by police search of “the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives...is repulsive to the notion of privacy surrounding the marriage relationship”.¹⁰⁰ These “sacred precincts” Mr. Justice Douglas is alluding to, and what serves as the backbone for defining marriage in the *Baker v. Nelson* case as that between one man and one woman, are found in biblical exegesis. The 1980 *Adams v. Howerton* federal district court case in California ruled that English civil law, upon which the American constitution was originally formulated, is grounded in the basic attitudes and principles of Judeo-Christian canonical law. The court found that because Judeo-Christian canonical law could not support marriage of the same sex as a result of the overt condemnation of homosexual practices in scripture, neither could the US judicial system. Marriage was therefore understood as a traditional enterprise based on the amalgamation of scriptural and canonical teachings, making it inconceivable to constitutionally sanction same-sex unions.¹⁰¹ The court states,

The definition of marriage, the rights and responsibilities implicit in that relationship, and the protections and preferences afforded to marriage, are now governed by the civil law. The English civil law took its attitudes and basic principles from canon law, which in early times, was administered in the ecclesiastical courts. Canon law in both Judaism and Christianity could not possibly sanction any marriage between persons of the same sex because of the vehement condemnation in the scriptures of both religions of all homosexual relationships. Thus there has been for centuries a combination of scriptural and canonical teaching under which a

⁹⁹*Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

¹⁰⁰381 U.S. 482, 85 S.Ct. 1680, 14 L.Ed. 2d 513.

¹⁰¹*Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980). *Cited in* Schuman. *God & Gays*. 2112.

“marriage” between persons of the same sex was unthinkable and, by definition, impossible.¹⁰²

An additional application of biblical scripture in judicial opinions against same-sex marriage appeared in the 1991 case of *Dean v. District of Columbia*, where in a rejection to the plaintiff’s challenge of D.C.’s prohibition against same-sex marriage, Superior Court Judge Shellie Bowers “issued an opinion replete with passages from Genesis, Deuteronomy, Matthew, and Ephesians”.¹⁰³ The use of biblical references in same-sex marriage legislation highlights how, in addition to the nation’s pervasive religious character, many “Americans have historically conceived of marriage in both law and society as a sacred, religious, and pre-political institution that is the foundation of society”.¹⁰⁴ This belief in the power of traditional marriage began in the United States in the late 18th century as a result of the homogenized monopoly of Judeo-Christian values in conjunction with the fact that the American founders believed there to be “[a] symbiotic connection between family virtues and civic virtues”. Maintaining traditional marriage would therefore ensure the smooth running of the Republic.¹⁰⁵

However, the application of biblical text and opinion in judicial decision-making processes drastically changed when conservative Christians began to realize the constitutional dangers of overtly religious argumentations against same-sex marriage in both litigation and legislation. This is because these articulations were believed to challenge the provision in the First Amendment to the US Constitution known as the

¹⁰²*Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980).

¹⁰³*Dean v. District of Columbia*, 653 A.2d 307 (D.C.App. 1995). *Cited in* Schuman. *God & Gays*. 2113.

¹⁰⁴Bold Fredric J. 2009. Vows to Collide: The Burgeoning Conflict Between Religious Institutions and Same-Sex Marriage Antidiscrimination Laws. *University of Pennsylvania Law Review* 158 (1): 179-230. 185.

¹⁰⁵*Ibid.*

Establishment Clause, as well as that of the Lemon Test.¹⁰⁶ The Establishment clause states that “congress shall make no law respecting an establishment of religion”¹⁰⁷, and the Lemon Test, which was formulated as a result of the 1971 *Lemon v. Kurtzman* case, resulted in the creation of a three-prong test for determining whether a statute has violated the Establishment Clause.¹⁰⁸ The statute must pass the following three prongs in order to be upheld: (1) it must have a secular legislative purpose, (2) neither privilege nor enhance religion, and (3) not foster an excessive entanglement with religion.¹⁰⁹ For present purposes, the Establishment Clause and the Lemon Test can be understood as practical applications of Habermas’ *institutional translation proviso*, as they confine judicial proceedings to fit within the iron cage of secular discourse.

These provisions did not, however, result in the timid retreat of conservative Christianity to the sidelines of political discourse. In *The Disenchantment of Secular Discourse* (2010), Steven D. Smith explains how although metaphysical notions such as a purposive cosmos, or providential designs, are inadmissible according to a modern secular vocabulary, they continue to enter United States courtrooms. They do so through a process of smuggling: conservative Christians play by secular rules in order to effect tangible political changes that fall in line with their beliefs. Religious citizens are able to introduce their deepest convictions, convictions that lose their sense and substance when divorced from their metaphysical heritage, through linguistic manipulations of their

¹⁰⁶Schuman. *God & Gays*. 2113.

¹⁰⁷U.S. CONST. amend. I.

¹⁰⁸*Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *Cited in* Schuman. *God & Gays*. 2113.

¹⁰⁹Schuman. *God & Gays*. 2129.

arguments under a secular guise.¹¹⁰ When Smith (2010) refers to this process of smuggling he is speaking metaphorically. Smuggling is not a technical term, but refers to a sort of discursive shortcoming. Smuggling implies that an argument is strategically importing something that is left hidden or unacknowledged, such as an undisclosed premise or assumption.¹¹¹ Conservative Christians, I argue, strategically smuggle their religious arguments against same-sex marriage under the guise of a modern secular vocabulary.

Secular Arguments Against Same Sex-Marriage

In their comprehensive book *Gay Marriage for Better or for Worse: What We've Learned from the Evidence* (2007), William Eskridge and Daren Spedale divide secular arguments against same-sex marriage into three main categories. The first category is what they refer to as the “definitional argument.” Its basis is the traditional conception of marriage where marriage is understood as a union between one man and one woman because that is the way it has always been.¹¹² Eskridge and Spedale note that “[t]hrough the 1970s, this argument and its corollaries were usually the only arguments advanced”.¹¹³ The second category is what the scholars refer to as the “stamp-of-approval argument”, which suggests that court approval of same-sex marriage will be perceived as a state endorsement of homosexuality – a privileging of homosexual unions over

¹¹⁰Smith, Steven D. 2010. *The Disenchantment of Secular Discourse*. Cambridge, Mass: Harvard University Press. 25.

¹¹¹Ibid. 35.

¹¹²Eskridge, William N., and Darren R. Spedale. 2007. *Gay Marriage: For Better or for Worse?: What We've Learned from the Evidence*. New York; Oxford;: Oxford University Press. 20.

¹¹³Ibid. 21.

heterosexual ones.¹¹⁴ By adopting policy *x* (incorporating homosexual unions) and abandoning policy *y* (strictly heterosexual unions), the state would be promoting homosexual conduct. The argument being that if the role of the state is to promote the most favourable conduct possible for its citizenry, homosexual conduct is not as favourable as heterosexual conduct and therefore policy *y* should be retained and policy *x* should be abandoned.¹¹⁵ The stamp-of-approval argument is linked to the idea that same-sex couples are seeking “special rights” in their legal battles.¹¹⁶ Eskridge and Spedale refer to the third category as the “defense-of-marriage argument”, which suggests that a society’s moral ethos rides on the preservation of traditional marriage.¹¹⁷ The defense-of-marriage argument is psychological in nature, where civic society has direct interest in maintaining the institution of marriage in order to protect conceptions of responsible parenting and child rearing.¹¹⁸ Accordingly, the government should be concerned with protecting the institution of marriage as a heterosexual union if such government has a vested interest in protecting children. Similar to any psychological argument that seeks to evoke fear, the defense-of-marriage argument is consequentialist. This fear of consequence often expands the defense-of-marriage argument to encompass the “slippery slope argument.” If same-sex marriage no longer remains a morally contentious issue for the courts, it will serve as the first step in a long list of morally compromising unions that will inevitably be legalized following homosexual unions; if the Supreme Court makes

¹¹⁴Eskridge and Spedale. *Gay Marriage*. 21.

¹¹⁵Schuman. *God & Gays*. 2115.

¹¹⁶*Ibid.*

¹¹⁷Eskridge and Spedale. *Gay Marriage*. 21.

¹¹⁸Schuman. *God & Gays*. 2119.

same-sex unions permissible, then bigamy, polygamy, incest and bestiality will follow.¹¹⁹ Eskridge and Spedale (2006) explain that in contemporary courtroom debates, these three arguments are not presented as distinct from one another, but rather build on each other through a process of sedimentation.¹²⁰ A defense-of-marriage argument will therefore incorporate both a stamp-of-approval argument and a definitional argument.

Why These Arguments are Vehicles for Smuggling

How can one confidently say that these three lines of secular argumentation as outlined by Eskridge and Spedale (2006) serve as vehicles for smuggling conservative Christian convictions into courtrooms? The answer is that these arguments against same-sex marriage share one fundamental logic flaw. They all start from the assumption that homosexuality is intrinsically wrong – a religious idea. Ben Schuman (2008) writes,

Why don't we want to put a stamp of approval on homosexual conduct? Because it's bad. Why do we believe that same-sex marriage will undermine the integrity of the American family unit? Because it's bad. Why has marriage always been defined as the union of a man and a woman? Because anything else would be bad.¹²¹

The secularization of religious logic therefore results in arguments that are entirely circular. Religious arguments disguised in secular articulations become syllogisms where secular conclusions are contained in religious premises: Homosexuality should not be condoned because homosexuality is the kind of bad behaviour that does not deserve condoning.

Though there are secular grounds for ethical decision-making, the assumption that same-sex marriage is intrinsically unethical has biblical roots. *Leviticus* 18:22 and 20:13

¹¹⁹Schuman. *God & Gays*. 2121.

¹²⁰Eskridge and Spedale. *Gay Marriage*. 21.

¹²¹Schuman. *God & Gays*. 2121.

serve as the underlying justification for the Judeo-Christian belief that homosexuality is sinful. *Leviticus* 18:22 reads, “thou shalt not lie with mankind, as with womankind: it is abomination”. Similarly, *Leviticus* 20:13 reads, “if a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them”. These passages have been interpreted and debated for centuries, but serve as the scriptural backbone upon which this sexual regulation has been understood.¹²² Moreover, passages elsewhere in the Old Testament have been understood to lend credence to the verses in *Leviticus*. These include statements that endorse heterosexual marriage, the first of which comes immediately after the creation of the first woman in *Genesis*: “therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh”.¹²³ The downfall of Sodom and Gemorrah in *Genesis* has long been attributed to the role of homosexuality in the people’s lives, where the city of Sodom became the basis for the word “sodomy”.¹²⁴ Lastly, the Old Testament story of Onan is used as the linkage between sexual amorality and non-procreative sexual acts. Onan was slain by God “for choosing to spill his seed on the ground rather than impregnate his dead brother’s wife”.¹²⁵ This scriptural passage has therefore been interpreted to suggest that homosexuality is wrong because it involves sexual acts that do not create life.¹²⁶

The New Testament takes this Old Testament understanding of homosexuality being sinful and makes it even more explicit. One of the earliest and most strident

¹²²Schuman. *God & Gays*. 2110.

¹²³*Genesis* 2:24 (King James). *Cited in* Schuman. *God & Gays*. 2110.

¹²⁴*Genesis* 19:4-5 (King James). *Cited in* Schuman. *God & Gays*. 2110.

¹²⁵*Genesis* 38: 4-10 (King James). *Cited in* Schuman. *God & Gays*. 2110.

¹²⁶*Ibid*.

adversaries of homosexuality was Paul of Tarsus, who similar to many early Jewish writers, viewed homosexual acts as a clear indication of divine betrayal and a rejection of the sexual distinctions created by God. If the Old Testament is too vulnerable to alternate interpretations, Paul does not miss the opportunity to make his views abundantly clear when he describes the actions of the Romans: “and likewise also the men leaving the natural use of the woman, burned in their lust toward another; men with men working that which is unseemly, and receiving in themselves that recompense of their error which was meet”.¹²⁷ And if this condemnation of homosexual acts is not sufficient, Paul also includes the Greek terms *malakoi* (effeminate) and *arsenokoitai* (male copulator) in his writing. Paul uses such vocabulary to refer “to the passive and active participants in a homosexual tryst” as being unworthy recipients of salvation because of their deplorable sexual conduct.¹²⁸ Furthermore, although Jesus never explicitly condemned homosexuality, some opponents of same-sex marriage have referred to Jesus’ discussion of marriage in Matthew 19:1-12 in order to support the religious prohibition against homosexual conduct. In these verses “Jesus quotes the Genesis language about cleaving to one’s wife and becoming one flesh, and suggests that one should remain faithful in marriage or celibate in singleness”.¹²⁹

The Old and New Testament are therefore replete with passages condemning homosexual conduct. Coupled with the fact that 57% of Americans have stated that “faith in God is a prerequisite for morality,”¹³⁰ it seems reasonable to conclude that the underlying arguments for homosexuality being *bad* are religious. This reveals, in effect,

¹²⁷*Romans 1:27* (King James). Cited in Schuman. *God & Gays*. 2111.

¹²⁸*1 Corinthians 6:9-10*. Cited in Schuman. *God & Gays*. 2111.

¹²⁹Schuman. *God & Gays*. 2112.

¹³⁰Schuman. *God & Gays*. 2122.

the process of smuggling – the strategic importing of the notion that homosexuality is bad based on scripture that is left unacknowledged and hidden because it is rendered inadmissible by our modern secular vocabulary. Under the fog of secular semantics the most influential belief underpinning all anti-homosexual rhetoric in United States courtrooms is the same one suggested by the Supreme Court of Minnesota nearly half a century ago in *Baker v. Nelson*: “therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh”.¹³¹

Case Study: In re Marriage Cases

In her article “Sacred Institutions and Secular Law: The Faltering Voice of Religion in the Courtroom Debate over Same-Sex Marriage” (2014), Jenna Reinbold examines the language deployed in opposition to same-sex marriage in three California courtrooms. The *In re Marriage Cases* were three California Supreme Court cases in which the court held that treating persons differently based on sexual orientation should be subject to strict judicial scrutiny. The court ruled 4 to 3 that same-sex couples having equal access to marriage is a fundamental right.¹³² In this section I briefly look at some of the arguments made by Mathew Staver in defense of the Campaign for California Families. Staver’s arguments are just one example of a series of “secular” arguments made in opposition to same-sex marriage. However, I focus on Staver’s arguments for three reasons. First, Staver is an American lawyer and former Seventh-Day Adventist pastor who became a Baptist.¹³³ He is therefore representative of the conservative Christian majority discussed in section 5.2 above. Second, the Campaign for California

¹³¹*Genesis 2:24* (King James). Cited in Schuman. *God & Gays*. 2124.

¹³²*In re Marriage Cases*, 43 Cal. 4th 757 (2008).

¹³³<https://www.lc.org/mat-staver>

Families is a non-for-profit Christian organization that seeks to promote socially conservative public policy in California,¹³⁴ making them similarly representative of this conservative Christian majority. Third, one of Staver's arguments is a poignant example of the sedimentation of secular arguments as articulated by Eskridge and Spedale (2007).

Staver makes the argument that if same-sex marriage is legalized in the United States it might go the way of "some of the Netherlands," where "once [marriage] has been redefined, the institution starts to further denigrate or disintegrate [such that] less people of opposite sex enter into that relationship because it's no longer what it has historically been understood to mean."¹³⁵ This argument fits under the category of Eskridge and Spedale's defense-of-marriage argument because it is psychologically motivating. It is both protectionist and consequentialist in nature, where legalizing same-sex marriage causes a similar predicament to "some of the Netherlands" in which marriage ultimately disintegrates as an institution. Within this defense-of-marriage argument the stamp-of-approval argument is also made apparent. If same-sex marriage is legalized, "less people of the opposite sex enter into that relationship", meaning that court approval of same-sex marriage will necessarily be perceived as a state endorsement, and therein privileging, of homosexual unions. Within the stamp-of-approval argument the definitional argument is present. If same-sex marriage is legalized, less heterosexual unions will take place because the institution of marriage will no longer embody "what it has historically been understood to mean".

¹³⁴<https://www.savecalifornia.com/>

¹³⁵Oral arguments for *In re Marriage Cases*. Cited in Reinbold, Jenna. 2014. Sacred Institutions and Secular Law: The Faltering Voice of Religion in the Courtroom Debate over Same-Sex Marriage. *Journal of Church and State* 56 (2): 248-68. 253.

Staver endeavors to convince the court that “the state has a compelling interest to be able to channel [sex] into responsible procreation, to channel [it] into having these children protected in a way that same-sex relations would not produce”.¹³⁶ Staver uses a series of quasi-natural-scientific terms centered on the phenomenon of procreation. According to Staver, procreation is the driving logic behind marriage and should therefore “serve as the primary point of orientation for the government’s deliberation regarding marriage evaluation”.¹³⁷ Staver uses the principle of procreation to provide traditional marriage advocates with a means of shifting the opposition towards same-sex marriage to a scientific idiom. When compelled by the court to expound on the connection between procreation and the state interest in preserving traditional marriage, Staver decides to use a chemical analogy. He states,

I think it would undermine opposite-sex marriage, in the same way that, if you were to have—and this is just an illustration—to have one atom of sodium and one atom of chlorine create salt... You can’t change that name without having consequences. You can’t simply redefine the definition of marriage to include what it’s never included—same-sex relationships—and have it have the same beneficial impact that is underlining the reasons for the institution in the first place.¹³⁸

Staver’s sodium chloride truism “that a shift in the composition of a substance will result in a shift in its nature” highlights the lengths to which opponents of same-sex marriage will go to frame their argument in secular terms.¹³⁹ Procreation becomes the central argument in Staver’s case because the language of procreation allows him to articulate

¹³⁶Closing arguments for *In re Marriage Cases*, 43 Cal. 4th 757 (2008) *Cited in* Reinbold, Jenna. 2014. Sacred Institutions and Secular Law: The Faltering Voice of Religion in the Courtroom Debate over Same-Sex Marriage. *Journal of Church and State* 56 (2): 248-68. 253.

¹³⁷Reinbold. Sacred Institutions and Secular Law. 253.

¹³⁸Oral arguments for *In re Marriage Cases*, 43 Cal. 4th 757 (2008) *Cited by* Reinbold. Sacred Institutions and Secular Law. 254.

¹³⁹Reinbold. Sacred Institutions and Secular Law. 254.

the idiosyncrasy of heterosexual unions in ostensibly amoral terms, and maintain the secular discourse that Habermas postulates is necessary at the institutional level.¹⁴⁰

Lastly, Staver makes a surprising reference to integration in order to invoke rational principles. He states,

Not only are there rational, plausible, reasons for a rational basis, but there's compelling reasons as well for marriage, not the least of which is integrating of the sexes, not segregating them in single-sex relationships, but integrating the sexes.¹⁴¹

Staver suggests that this principle of integration is directly related to “the natural interest that societies always have [in]...having children with the right to have biological parents”.¹⁴² This last argument is especially telling of the iron cage of legal secularism for two reasons. Firstly, Staver says the word ‘rational’ twice, ‘plausible’ once, and ‘reasons’ twice in the same sentence. Staver places more emphasis on the rational basis for his argument than on the argument itself. Secondly, Staver evokes the rhetoric of children’s rights to equal parenting, which directly parallels the arguments *for* same-sex marriage of rights to equal marriage. This highlights the ease with which the modern secular vocabulary can be manipulated to achieve a desired outcome.

At no point in Staver’s oral argument does he defend traditional marriage on the grounds that many Californians have longstanding moral (religious) codes prohibiting the broadening of the category of marriage. Not only was Staver incapable of convincing judges that the threat of same-sex marriage is sufficient to warrant the state’s interest in prohibiting it, but more importantly, his lack of explicit religious justification highlights

¹⁴⁰Reinbold. *Sacred Institutions and Secular Law*. 254.

¹⁴¹Closing arguments for *In re Marriage Cases*, 43 Cal. 4th 757 (2008) *Cited in* Reinbold. *Sacred Institutions and Secular Law*. 256.

¹⁴²Reinbold. *Sacred Institutions and Secular Law*. 256.

how the arguments he advances inadequately reflect his religiously-inspired opinions, as well as the authentic opinions of the conservative Christian group he represents. The same-sex marriage debates in the contemporary United States do not allow for religious argumentation to present itself in authentic terms by limiting the vocabulary allowed to engage in such discourse. Habermas' *institutional translation proviso* places similar limitations on religious citizens. In a Rawlsian fashion, the proviso forces conservative Christians to bracket their most fundamental convictions about what is true in "reasoning" over public matters. The debate on same-sex marriage in United States courtrooms puts Habermas' *institutional translation proviso* to the test and in doing so demonstrates how secular legalism renders religious articulations incapable of influencing legislative processes.

A Case for Religious Articulations in the Formal Public Sphere

In the article "Why Political Reliance on Religiously Grounded Morality is not Illegitimate in a Liberal Democracy" (2001) Michael J. Perry argues that based on a true understanding of the fundamental moral commitments of a liberal democracy, religiously grounded justifications are permissible. He supports this position on the basis that the two commitments at the heart of liberal democracy are (1) a commitment to the true and full humanity of every person, without regard to race, sex, religion etc. and (2) a commitment to certain basic human freedoms such as speech, press and religion.¹⁴³ These commitments are axiomatic for liberal democracies, and in the United States almost all Americans cherish these two commitments by trumpeting them to the world as inviolable

¹⁴³Perry, Michael J. 2001. Why Political Reliance on Religiously Grounded Morality is not Illegitimate in a Liberal Democracy. *Wake Forest Law Review* 36 (2): 217-249. 226.

human rights.¹⁴⁴ Moral arguments, such as the debate over the legalization of same-sex marriage, do not necessarily take place between liberals and non-liberals. Many self-identifying liberals differ in their approaches to moral and political matters. Some citizens religiously justify their commitments to liberalism, while others do not associate their morals with religious ideals. Liberals can be morally conservative, unwilling to abandon longstanding moral orthodoxies in favour of alternative positions, while others are less reluctant to abandon moral tradition.¹⁴⁵ Similarly, some liberals are wary of the capacity of the centralized national government to benefit the world order, while others are more optimistic of the government's role in mitigating domestic and foreign affairs.¹⁴⁶ Perry (2001) thus asks whether, according to the morality of liberal democracy, it is legitimate for the citizen, legislator or any other policymaker who is a religious believer, in deciding whether to outlaw or otherwise disfavor conduct, to proceed on the basis of his or her religious belief that the conduct is immoral?¹⁴⁷ Perry concludes that there is nothing in either of liberal democracy's two constitutive commitments that suggests that it is illegitimate for religious believers to introduce religiously grounded moral beliefs into public argumentation.¹⁴⁸ Additionally, due to the role that religiously grounded moral beliefs invariably play in the political process, it is important to recognize that religious beliefs have as much authority in political deliberations at the institutional level as secular convictions.¹⁴⁹ Perry (2001) concludes that allowing explicit

¹⁴⁴Perry. Why Political Reliance on Religiously Grounded Morality is not Illegitimate in a Liberal Democracy. 227.

¹⁴⁵Ibid.

¹⁴⁶Ibid. 228.

¹⁴⁷Ibid.

¹⁴⁸Ibid. 230.

¹⁴⁹Ibid.

religious perspectives to enter public discourse is beneficial because when individuals are free to present their positions authentically, their propositions can be tested in formal deliberative processes.¹⁵⁰

According to Perry there are two main reasons advanced for keeping religiously grounded arguments within the confines of the weak publics: (1) religiously grounded arguments are too divisive and sectarian¹⁵¹, and (2) religious believers are incapable of engaging their faith critically as detached observers.¹⁵² With regard to the former, the very notion that religious arguments are too divisive misses the point that it is actually the *issues themselves* that create divisions rather than a single perspective on that issue. Removing one worldview from the equation simply privileges and insulates the secular perspective from critique, and in doing so, discursively tyrannizes the way in which a controversial political-moral issue can be framed.¹⁵³ Additionally, religiously grounded moral discourse can actually be less sectarian than secular moral discourse. The basic moral premises of the Judeo-Christian traditions continue to represent the basic moral framework of most Americans, “much more so than do Kantian (or neo-Kantian) premises, or Millian premises, or Nietzschean premises, and so forth”.¹⁵⁴ With regard to the latter, many religious observers are capable of engaging their faith critically. Habermas’ entire postsecular account relies quite heavily on the “modernization of religious consciousness” as having been observed by sociologists since the periods of Reformation and Enlightenment as a necessary response to the fact of pluralism, the

¹⁵⁰Perry. Why Political Reliance on Religiously Grounded Morality is not Illegitimate in a Liberal Democracy. 230.

¹⁵¹Ibid. 231.

¹⁵²Ibid. 235.

¹⁵³Ibid. 231.

¹⁵⁴Ibid. 233.

emergence of modern science, and the spread of positive law and profane morality.¹⁵⁵ More fundamentally, with the rise of nationalism, fascism, communism and other ideological movements, the twentieth century has made clear that one need not be a religious believer to be close-minded or even fanatical when it comes to fundamental beliefs.¹⁵⁶

Perry (2001) closes by arguing that religiously grounded justifications should be capable of entering formal democratic deliberative processes because in a society as overwhelmingly religious as the United States, people *do* present and discuss religious beliefs in the informal throngs of public culture. In fact, public culture *depends on* unconstrained discussion in which “the merits of competing moral, religious, aesthetic, and philosophical values are given a fair opportunity for hearing”.¹⁵⁷ Therefore, rather than maintaining a strict separation between religious moral articulations, which inevitably take place in public culture, and public deliberations, liberal democracies should welcome religiously-grounded justifications in all areas of public life, including formal discourse on contested political choices.¹⁵⁸ For Perry, such discourse should not just be welcomed, but encouraged, so that these modes of thought can be tested, and so that they can test us.¹⁵⁹ In a democratic society, with its deliberative politics, there is surely virtue in allowing oneself to be confronted with positions with which one may

¹⁵⁵Habermas. Religion in the Public Sphere. 103.

¹⁵⁶Perry. Why Political Reliance on Religiously Grounded Morality is not Illegitimate in a Liberal Democracy. 233.

¹⁵⁷Ibid. 238.

¹⁵⁸Ibid.

¹⁵⁹Ibid. 239.

disagree. As Perry (2001) writes, “we must, in short, resist the temptation of infallibilism”.¹⁶⁰

In a separate but related article, Michael J. Perry seeks to answer the question of whether the United States’ constitutional morality of religious freedom—in particular, the requirement for government not to “establish” a religion—forbids the government from disfavoured conduct on the basis of a religious belief.¹⁶¹ This is at the crux of the issue because the Establishment Clause serves as the basis upon which the application of biblical text and opinion in United States’ judicial decision-making processes came to a halt. The First Amendment to the Constitution of the United States reads, “congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press or the right of the people to peaceably assemble, and to petition the government for a redress of grievances”.¹⁶² Yet, according to authoritative law, the Establishment Clause does not just apply to Congress, but to all three branches of the national government, as well as the government of every state.¹⁶³

The first question that Perry (2001) seeks to answer is what it means to say that the government may not establish a religion? More specifically, what sort of limitations does the nonestablishment norm place on government?¹⁶⁴ According to Perry (2001), the

¹⁶⁰Perry. Why Political Reliance on Religiously Grounded Morality is not Illegitimate in a Liberal Democracy. 239.

¹⁶¹Perry, Michael J. 2001. Why Political Reliance on Religiously Grounded Morality does not Violate the Establishment Clause. *William and Mary Law Review* 42 (3): 663-683. 665.

¹⁶²Ibid. 666.

¹⁶³Ibid.

¹⁶⁴Ibid. 667.

nonestablishment norm was put in place so that government may not bestow legal favour on or privilege one or more church(es). Perry (2001) writes,

Government may not take any action that favours one or more churches in relation to one or more other churches, or to no church at all, on the basis of the view that the favoured church(es) is, as a church—as a community of faith—better along one or another dimension of value (truer, for example, or more efficacious spiritually, or more authentically American).¹⁶⁵

Simply, the government does not have the jurisdiction to make decisions about whether one church is better than another church.

The question thus becomes, “[d]oes the nonestablishment norm forbid legislators or other policymakers, in voting to ban or otherwise disfavour a conduct...to act on the basis of their religiously grounded belief that the conduct is immoral?”¹⁶⁶ Based on a legal understanding of the nonestablishment norm, it does not. The norm forbids government from privileging one church over another. It does not forbid legislators or policymakers from making a political choice disfavouring certain conduct on the basis of their religious convictions that this conduct is immoral.¹⁶⁷ Douglas Laylock in “Freedom of Speech that is Both Religious and Political” (1996) argues that the US Constitution is not meant to limit the arguments free people can make in judicial debates, but rather limit what the government can do to the people.¹⁶⁸ The Establishment Clause was enacted in order to limit political outputs, not political inputs, and moral constraints on arguments are ostensibly more burdensome on religious citizens than legal constraints.¹⁶⁹ The right

¹⁶⁵Perry. Why Political Reliance on Religiously Grounded Morality does not Violate the Establishment Clause 668.

¹⁶⁶Ibid. 670.

¹⁶⁷Ibid.

¹⁶⁸Laylock, Douglas. 1996. Freedom of Speech that is Both Religious and Political. *U.C. Davis Law Review* 29 (3): 793-813. 795.

¹⁶⁹Ibid. 795.

to make an argument in the legal sphere does not depend on what conclusions those arguments would support, but there is a pervasive assumption among secularists about the tendency of religious arguments to articulate a certain set of political positions they reject.¹⁷⁰ Religious arguments are not, however, a singular entity that necessarily preclude a particular result. Not all religious individuals feel the same way about any given issue. Religious worldviews do not represent a static entity - there is room for argumentation and subsequent interpretation even within the religious realm. Additionally, religious argumentation can fall in line with secular argumentation. The scriptural verse “thou shalt not kill”¹⁷¹ emerges from a different epistemic disposition than secular reasoning, but still results in the shared conclusion that killing others is wrong. Habermas astutely notes in his own argument that “concepts of Greek origin such as “autonomy” and “individuality” or Roman concepts such as “emancipation” and “solidarity” have long since been shot through with meanings of a Judeo-Christian origin”.¹⁷² I concur with Laycock (1996) when he suggests, “there might be individual citizens, or legislators, or religiously homogenous counties” persuaded by scriptural arguments even when other arguments are considered implausible. “Religious arguments may be loving or hateful, tolerant or intolerant. They cut in all directions, and often speak to fundamental values. Democracy would be impoverished without them”.¹⁷³

Conclusion: The Subverting of Religious Discourse from Formal Political Processes as a Subversion of Identity

¹⁷⁰Laycock. Freedom of Speech that is Both Religious and Political.800.

¹⁷¹*Exodus 20:13.Cited in*Laycock. Freedom of Speech that is Both Religious and Political. 800.

¹⁷²Habermas. Religion in the Public Sphere. 106.

¹⁷³Laycock. Freedom of Speech that is Both Religious and Political. 800-801.

In this paper, I have thus far problematized Jürgen Habermas' account of a postsecular society both theoretically and practically. I have demonstrated the ways in which Habermas' *institutional translation proviso* disallows religious articulations from entering formal political processes, and in doing so, forces religious individuals to present their opinions in inauthentic terms at the institutional level. In the following section I articulate the consequences of subverting religious articulations from formal political processes. I argue here that our identities are partly shaped by their recognition, or the absence thereof, in both the formal and informal political spheres; furthermore, nonrecognition, or misrecognition, can be a form of oppression, as it distorts the quality of representation that such identities receive publicly and damages the self-perception of those who hold such identities. Using recent scholarship from Taylor (1997) and Phillips (1994) I demonstrate that, based on the contemporary strand of identity politics that has emerged on behalf of minority or subaltern groups, the subversion of religious discourse from formal political processes equates to a suppression of religious individual and group identities. I conclude that Habermas' liberal account of a postsecular society fails to meet the standards of a liberal democracy that seeks to account for difference and diversity at the institutional level.

In contemporary political discourse there is a growing demand for recognition. This demand, it can be argued, is one of the driving forces behind nationalist movements in politics. This demand for recognition that has come to the fore in a number of ways on behalf of minority or subaltern groups has become increasingly important in today's

political climate.¹⁷⁴ The demand for recognition is given urgency by the supposed link between recognition and identity, where identity reflects a person's understanding of who they are, of their fundamental defining characteristics as a human being.¹⁷⁵ The thesis behind this demand for recognition is that our identities are largely shaped by recognition or its absence, often by the *misrecognition* of others, and so an individual or group can develop genuinely damaged or distorted self-images if the society around them reflects back a confining or demeaning picture of themselves. Societal *misrecognition*, or *nonrecognition*, of an individual or group's identities can be a form of oppression that inflicts harm on those marginalized by imprisoning them in false, distorted and reduced modes of being.¹⁷⁶

A number of minority or subaltern groups in today's politics have emerged in what is today called the politics of multiculturalism, and have begun to demand recognition at the institutional level. Feminists have argued that women in a patriarchal society have been induced to adopt a depreciatory image of their own identities by internalizing a vision of their own inferiority.¹⁷⁷ The same point has been made in relation to the blacks, whose self-image has suffered as a result of having a demeaning image projected onto them for generations by white society.¹⁷⁸ An analogous point has also been made in relation to indigenous and colonized people in general, where, since 1492, Europeans have projected a vision of these individuals as inferior and uncivilized, an image that has been imposed through the force of conquest that has been embodied by

¹⁷⁴Taylor, Charles. 1997. The Politics of Recognition. *New Contexts of Canadian Criticism* 98: 25-73.25.

¹⁷⁵Ibid.

¹⁷⁶Ibid.

¹⁷⁷Ibid.

¹⁷⁸Ibid. 26.

the conquered.¹⁷⁹ For each of these minority or subaltern groups, the internalization of these depreciatory images has become one of the most potent instruments of their own oppression. Misrecognition is thus more than just a lack of due respect; it can inflict sustained wounds by “saddling its victims with a crippling self hatred”.¹⁸⁰ Due recognition of identity becomes not just a courtesy we owe people, but a vital human need.

The same point can be made in relation to the formation of individual religious identities in Jürgen Habermas’ postsecular account, where the suppression of religious articulations from the institutional level stifles religious individuals from being able to actively participate in the institutional formations of their societies, and this absence of recognition causes religious individuals to develop depreciatory and skewed self-perceptions fuelled by feelings of exclusion and inadequacy. In Habermas’ postsecular account, religious individuals participating in democratic deliberations become responsible for secularizing religious logics because those who exercise their power within state institutions are obligated to remain neutral in the face of competing worldviews.¹⁸¹ Religious traditions therefore only become useful modes of discourse when they can be salvaged from their context-specific origins and translated into a generally accessible language. The problem with this in terms of its effects on shaping religious individual and collective identities is twofold. First, it presupposes that the secular is equal to the neutral, yet this liberal assumption is misguided in that the secular is in fact a reflection of one hegemonic culture. Second, and more fundamentally to the

¹⁷⁹Taylor. *The Politics of Recognition*. 26.

¹⁸⁰*Ibid.*

¹⁸¹Habermas. *Religion in the Public Sphere*. 102.

question of recognition and identity formation, Habermas' account relegates religious discourse (and thus religious identities) to the informal level of the weak publics, and in doing so suppresses religious individuals from being able to develop a sense of self-efficacy and autonomy beyond the institutional threshold. Based on the association of recognition and identity that has been advocated for on behalf of other minority or subaltern groups, it becomes clear that a similar process occurs on behalf of religious individual and group identities that would necessarily develop genuinely damaged or distorted self-images because, in Habermas' account, the society around them reflects back a confining or demeaning picture of themselves.

Charles Taylor (1997) attributes two changes that together have made the contemporary preoccupation with identity and recognition inevitable. The first transformation is the collapse of social hierarchies.¹⁸² According to Taylor, social hierarchies served as the basis of honour. This necessarily led to inequalities – a selected group of individuals obtained honour by establishing superiority over other individuals. This ancient notion of honour was replaced with the modern notion of dignity, which is predicated on conceptions of universalism and egalitarianism that spoke to the inherent dignity shared by all human beings. This concept of dignity is the birthing grounds for democracy. In modern times human dignity has superseded the inherent inequalities imposed by the honour system. Democracy has thus “ushered in a politics of equal recognition, which has taken various forms over the years, and has now returned in the form of demands for the equal status of cultures and of genders”.¹⁸³

¹⁸²Taylor. *The Politics of Recognition*. 26.

¹⁸³*Ibid.* 27.

The second transformation that occurred was the development of a new understanding of individual identity that emerged at the end of the eighteenth century.¹⁸⁴ This notion of an individualized identity came about as a result of the eighteenth century notion that human beings are endowed with an innate moral compass, an intuitive understanding of right and wrong.¹⁸⁵ Individualized identities meant that the source we have to connect with for our moral understandings is ourselves and we must therefore be in touch with ourselves in order to be true and full human beings. The notion that “our moral salvation comes from recovering authentic moral contact with ourselves”¹⁸⁶ serves as the background for understanding the modern ideal of authenticity “and to the goals of self-fulfillment and self-realization in which the idea is usually couched”.¹⁸⁷ This new ideal of authenticity took place at both the personal and cultural levels, where Herder writes that a Volk should be true to itself, and that European colonialism ought to be rolled back in order to give people in what we now call the Third World the opportunity to define themselves unimpeded.¹⁸⁸ However, Taylor argues what this monological ideal forgets to take into account is the fundamentally dialogical character of human life.¹⁸⁹ What he means by this is that the genesis of the human mind is not something that is constructed in a self-contained vacuum, but is rather accomplished through our experience of others. We may be expected to develop our own opinions, outlooks and stances towards things, but when it comes to understanding important personal issues, like the definition of our identities, our self-definitions are formulated in reaction to how

¹⁸⁴Taylor. *The Politics of Recognition*.28.

¹⁸⁵Ibid.

¹⁸⁶Ibid. 29.

¹⁸⁷Ibid. 31.

¹⁸⁸Ibid.

¹⁸⁹Ibid. 32.

society views us.¹⁹⁰ Recognition is thus built into the very fabric of identity formation “by virtue of the very fact that it was based on social categories that everyone took for granted”.¹⁹¹ Therefore, unlike in premodern times when people did not consider “identity” and “recognition”, as social hierarchies suppressed the development of these categories in the institutional sphere, the modern age, with the emergence of individual identities, has created an environment where efforts to be recognized can fail.¹⁹² The importance of recognition is now universally acknowledged, and identities can be formed or malformed through the course of contact with others. Understanding that identities are formed in open dialogue, rather than shaped by a predefined historical script, makes the politics of equal recognition more central and more consequential.¹⁹³

According to Taylor, the politics of equal recognition in the public sphere has come to mean two different things connected to the two major changes described. First, with the shift from honour to dignity, the politics of equal recognition has come to mean a politics of universalism based on the equal dignity of all citizens. The content of this politics has been the equalization of rights and entitlements.¹⁹⁴ Second, with the advent of the modern notion of identity, the politics of equal recognition has come to mean a politics of difference, where everyone and each group should be recognized for their distinct identities in the public sphere.¹⁹⁵ The politics of difference grows out of the politics of dignity, but the problem with this is that when dealing with universal equalities we often only acknowledge that everyone has an identity, rather than recognizing what is

¹⁹⁰Taylor. *The Politics of Recognition*.33.

¹⁹¹Ibid. 34.

¹⁹²Ibid.

¹⁹³Ibid. 36.

¹⁹⁴Ibid. 37.

¹⁹⁵Ibid. 38.

peculiar in each.¹⁹⁶ This conflict can be seen at the level of “difference-blindness”, where the politics of universal dignity sought forms of non-discrimination that were blind to the ways in which citizens differ. The politics of difference redefines non-discrimination to mean that rather than homogenizing bodies in the cloak of a shared humanism, we must make distinctions on the basis of differential treatment according to individual and/or group history.¹⁹⁷ These differing treatment tactics include reverse discrimination measures such as those that afford people from previously unfavoured groups with a competitive advantage for jobs or in universities based on the grounds that historical discrimination has created a pattern within which those unfavoured struggle at a disadvantage.¹⁹⁸ According to Taylor, this is where the politics of universalism and the politics of difference come in conflict, where the politics of universalism based on equal dignity is found in the idea that all humans are equally worthy of respect, whereas the politics of difference seeks to identify and celebrate what distinguishes us.¹⁹⁹ The charge levelled by some of the most radical forms of the politics of difference is that the politics of universalism ends up representing a particular culture, and in doing so negates identity by forcing people to blend into a homogenous mould that is untrue to them. Taylor (1997) writes,

The claim is that the supposedly neutral set of difference-blind principles of the politics of equal dignity is in fact a reflection of one hegemonic culture. As it turns out, then, only the minority or suppressed cultures are being forced to take alien form. Consequently, the supposedly fair and difference-blind society is not only inhuman (because suppressing

¹⁹⁶Taylor. *The Politics of Recognition*.39.

¹⁹⁷Ibid.

¹⁹⁸Ibid. 40.

¹⁹⁹Ibid. 41.

identities) but also, in a subtle and unconscious way, itself highly discriminatory.²⁰⁰

Habermas' postsecular account is guilty of the politics of universalism beyond the institutional threshold. His inability to recognize competing forms of dialogue outside of the secular realm highlights the ways in which his account is predicated on a form of "difference-blindness" that refuses to recognize the identities of religious individuals. Based on the distorted self-image that can be internalized as a result of misrecognition, or lack thereof, religious individuals can develop genuinely damaged or distorted self-images as a consequence of feelings of exclusion from formal political processes as outlined in Habermas' postsecular account. In a similar vein to those feminist thinkers who have argued that women in patriarchal societies have been induced to adopt a depreciatory image of their own identities by internalizing a projected vision of their own inferiority, religious individuals undergo an analogous process of self-depreciation based on experiences of nonrecognition (systematic exclusion) and misrecognition (forced secular translation) in Habermas' postsecular account.

In her article "Dealing with Difference: A Politics of Ideas or a Politics of Presence?" Anne Phillips (1994) argues that in the post-communist world of the 1980s and 1990s, "liberalism and liberal democracy achieved an impressive ascendancy, and can more plausibly present themselves as the only legitimate basis for equality, justice or democracy."²⁰¹ Phillips suggests that critics of liberalism and liberal democracies remain but the grounds of these criticisms have shifted considerably. For a number of years the central arguments against liberalism fell into three broad categories: (1) the liberal

²⁰⁰Taylor. *The Politics of Recognition*. 43.

²⁰¹Phillips, Anne. 1994. *Dealing with Difference: A Politics of Ideas or a Politics of Presence?*. *Constellations* 1 (1): 74-91. 74.

emphasis on individual rights and freedoms reflects a certain “self-protective and competitive egotism” that negates the need for any sort of wider community; (2) the liberal focus on political equalities systematically ignores, overlooks or even encourages large scale social and economic inequalities; and (3) the liberal consolidation of representative democracy has reduced the importance of and demand for more active citizen participation.²⁰² These criticisms remain prominent, but each one has been reformulated in terms of diversity and difference. Feminist theorists suggest that liberalism’s abstract individualism ignores its own gendered content. This gender-blindness is the result of the homogenizing ideals of equality that requires each of us be viewed the same. Similar criticisms of race- or ethnicity-blindness have added weight to the claim that liberalism is blind to class difference. Liberalism is thus accused with erasing diversity and difference by ignoring each group’s specific historicity in favour of a unified vision of human beings as one in the same.²⁰³

These criticisms of liberalism make sense when the original impetus to liberalism is considered. Liberalism is based on the perception that “neither nature nor tradition guaranteed political order” and therefore there was a need, from a normative point of view, to “search for a contractual basis for political authority that would bind these different individuals into a coherent whole”.²⁰⁴ The defining characteristic of liberal democracy is the pluralism embedded into the societies from which it grew. It was this diversity of the civic milieu that resulted in the creation of a system that took issue with the homogenizing presumptions of a “common good” or “common purpose” and made

²⁰²Phillips. *Dealing with Difference*. 74.

²⁰³*Ibid.*

²⁰⁴*Ibid.*

diversity a central organizing theme.²⁰⁵ Constitutional and representative democracies are systems that encourage and disseminate diversity because they promote the procedures of electoral competition, which lends itself to “a more sceptical attitude towards the basis on which competing claims are resolved”.²⁰⁶ This cultivated a general tolerance of and affection for diversity as the source of regulated content and competition.²⁰⁷

Phillips (1994) argues that although difference may not be something new to us, it has been overly intellectualized in that it commonly equates to differences in opinions and beliefs, what Phillips refers to as a “politics of ideas” that has inadequately dealt with the politics of exclusion.²⁰⁸ Phillips writes,

The diversity most liberals have in mind is a diversity of beliefs, opinions, preferences and goals, all of which may stem from the variety of experience, but are considered as in principle detachable from this.²⁰⁹

The problem with relegating diversity to a politics of ideas is that *what* is to be represented takes priority over *who* does the representation. This is because issues of political presence—who it is representing the range of ideas—are discounted in terms of intellectual diversity. This means that “one person may easily stand in for another; there is no additional requirement for the representative to “mirror” the characteristics of the person or people represented”.²¹⁰ The only thing that concerns a politics of ideas is that the representative reflects a congruity of political beliefs and ideals, where the role of the

²⁰⁵Phillips. *Dealing with Difference*. 75.

²⁰⁶*Ibid.*

²⁰⁷*Ibid.*

²⁰⁸*Ibid.*

²⁰⁹*Ibid.*

²¹⁰*Ibid.* 76.

politician is to carry a message. Therefore, the actual person representing that message becomes irrelevant so long as the message is reflective of those she is representing.²¹¹

The notion of representation as a matter of ideas was challenged in 1789 by a group of Frenchwomen who laid claim to a place in the Estates General. They argued that similar to how a nobleman cannot duly represent a plebeian, so too a man, no matter how intellectually honest he may be, cannot duly represent a woman.²¹² The argument these Frenchwomen were making has resurfaced in a contemporary strand of identity politics, which is that there must be a shared “identity of interests” between the represented and the representatives. Shared experience thus takes precedence over shared ideas because no amount of thought or sympathy can jump the barriers of experience.²¹³ Phillips argues that although the politics of ideas plays an important role in democratic processes, when it is taken in isolation from the politics of presence it cannot deal adequately with the experiences of those social groups, who by virtue of their race, ethnicity, religion or gender, have felt themselves excluded from democratic processes.²¹⁴ She therefore argues that the only way to tackle political exclusion is through the politics of presence, which requires that society develop a more nuanced understanding of the relationship between ideas and experience, between who is being represented and what is being represented.²¹⁵ Rather than a subordination of who is being represented to what is being represented, the two must be understood in dialectical terms. Phillips writes,

The classically liberal treatment of difference allows for private spaces within which people can get on with their own chosen affairs and a public

²¹¹Phillips. *Dealing with Difference*. 76.

²¹²*Ibid.*

²¹³*Ibid.*

²¹⁴*Ibid.* 77-8.

²¹⁵*Ibid.* 78.

realm ordered around a set of minimum shared presumptions. But the relegation of difference to the private world of private variation has been experienced as an injunction to keep peculiarities a secret, and the shared presumptions that control the public world have proved less than even-handed in their treatment of different groups. The separation of church from state has long been considered the solution to the problem of religious difference, but it achieves this by requiring all religions to adopt a similarly self-denying ordinance that will limit the relevance of religious precepts to practices in the private sphere.²¹⁶

Habermas' postsecular account does not reflect on the linkage between ideas and experiences, where silencing religious articulations in the formal public sphere is not only anti-liberal, a system that is predicated upon intellectual diversity, but additionally discredits the experiences of religious individuals and how those experiences influence the distinct ways in which religious individuals see the world. The prevalence of this is made palpable in the contemporary debate on same-sex marriage in the United States referenced earlier in this paper. The lawyer for the opposition, Mathew Staver, is incapable of having his experiences reflected upon in his line of argumentation because of secular legalism's disallowance of religious claim-making in the courtroom. The direct linkage between ideas and experiences are made palpable when Staver is forced to abandon the experiences that comprehensively shape his worldviews in order to present a line of reasoning detached from his own understanding of the world. The fact that Habermas' postsecular account requires religious citizens to adopt secular articulations beyond the institutional threshold is an assault on the politics of presence, a relegation of experience to the private sphere, and detracts from the self-understanding of religious individuals at the institutional level. If the politics of presence is the only way to tackle political exclusion, then religious individuals should not only be allowed to represent

²¹⁶Phillips. *Dealing with Difference*. 78.

themselves in formal political processes, but should demand that these representations truly reflect the shared experiences that shape their ideas and construct their identities.

In his article “Liberalism and Multiculturalism: The Politics of Indifference” (1998), Chandran Kukathas argues that diversity poses a challenge for societies of the liberal democratic West and for philosophers who are looking to find common ground among difference, because society’s institutions have been challenged when a number of groups have demanded recognition.²¹⁷ This recognition is more than just the demand for a seat at the political table, but reflects the need for recognition of their unique identities as members of distinct cultural communities within society. The conflict that emerges for liberal societies is one between two demands – recognition of the individual by respecting fundamental human rights and recognition of the groups or communities to which these individuals belong.²¹⁸

Kukathas (1998) challenges the arguments outlined by Taylor (1997) and Phillip (1994) that the demand for recognition poses a problem for liberalism by arguing that it is liberalism’s counsel to resist the demand for recognition, and that when it comes to the politics of difference liberal political ethics recommends that nothing be done.²¹⁹ According to Kukathas, liberalism cannot have a problem with multiculturalism because it is fundamentally a theory of pluralism, and multiculturalism is a species of pluralism. Liberalism is one of the modern world’s responses to the fact of moral, religious and

²¹⁷Kukathas, Chandran. 1998. Liberalism and Multiculturalism: The Politics of Indifference. *Political Theory* 26 (5): 686-99. 686.

²¹⁸Ibid. 686-7.

²¹⁹Ibid. 687.

cultural diversity. It argues that diversity should be accommodated and difference should be tolerated in order to attain a more complete social unity.²²⁰ Kukathas writes,

While liberalism is a term that is properly used to identify a particular movement of European thought [historical liberalism], it also denotes a philosophical outlook whose primary concern is to articulate the terms under which different ways may coexist [philosophical liberalism].²²¹

He thus argues that liberalism is not concerned with granting recognition to individual identities or the identities of a group. Liberalism does not offer recognition at all. It takes no interest in cultural, religious, ethnic, linguistic and other interests or attachments that people may have. It has no collective projects, it expresses no group preferences, and it promotes no particular group or individual interests. The only concern liberalism has is to uphold the framework of law within which individuals and groups can function peacefully. This may require intervening into the affairs of individuals and groups, but liberal politics is not concerned with these affairs unto themselves. For this reason Kukathas refers to liberalism as the “politics of indifference”.²²² Liberalism assumes that no resolution for the competing claims of different groups and different identities, it thus recommends that political institutions try to resist attempts to put issues of recognition at the center of political debates.²²³

The problem with Kukathas’ understanding of the politics of indifference is that it presupposes that the liberal state will operate under a normative neutral framework. However, there is no such thing a completely neutral framework, and, as Taylor (1997) argues, the claim that the supposedly neutral set of difference-blind principles of the

²²⁰Kukathas. *Liberalism and Multiculturalism*. 689.

²²¹Ibid. 691.

²²²Ibid.

²²³Ibid. 693.

politics of equal dignity is in fact a reflection of one hegemonic culture.²²⁴ In the case of Habermas' liberal postsecular account, the supposedly neutral set of principles operating at the institutional level are that of the secular, and the secular is not a neutral domain but representative of a specific worldview with distinctive principles and forms of discourse. The very fact that religious modes of thought and discourse are being systematically excluded from participating in the institutional realms of deliberative democracy highlights the fact that the secular represents a distinct mode of thought and discourse that benefits certain individuals and marginalizes others. Habermas' privileging of the secular beyond the institutional threshold is thus an affront to the politics of difference because it presupposes that the secular agenda coincides with that of the neutral agenda. However, since the religious agenda is necessarily underprivileged as a result of the secular's dominance, the secular cannot represent a neutral operative framework but one perspective isolated from critique based on the subordination of religious modes of thinking.

²²⁴Taylor. *The Politics of Recognition*. 43.

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