

2008

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Recommended Citation

Mark D. Yochum, *On Ledewitz: A Review of American Religious Democracy by Bruce Ledewitz [Book Review]*, 46 Duq. L. Rev. 311 (2008).

Available at: <https://dsc.duq.edu/dlr/vol46/iss2/10>

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On Ledewitz:
A Review of *American Religious Democracy*
by Bruce Ledewitz

Mark D. Yochum*

The *Duquesne Law Review* has permitted me this space to write on Professor Bruce Ledewitz. Do not judge too harshly this journal for allowing one with apparent conflicts of many interests to engage in what should be a dispassionate and uninterested academic exercise. The reader might judge after my disclosures whether my interests fatally wound my persuasiveness. I freely confess I aim to persuade that one should read Ledewitz's book, *American Religious Democracy* (Praeger 2007). I hate many of its parts wholly; I could not put it down.

I have known Ledewitz for all my days here at Duquesne University School of Law, since Reagan was President, before the first shuttle disaster. He is my neighbor in our offices. Our wonderful secretary who helped make his book has typed this piece out for me. We have lived a harmonious academic life, rarely disagreeing about the vertiginous molehills of administration in a law school. Even when on matters of such policy we disagree, we discuss with civility, frankness, and affection. He sings with a lovely tenor. He is a wonderful caring person. He is a resource of unquestioned expertise on all things constitutional, state and federal. Despite my affection, I must reveal that I find *American Religious Democracy* a profoundly disturbing view of American politics and constitutional law.

As a professor of Professional Responsibility, I am by trade attuned to evaluating interests in conflict. To that end, in preparation of this piece, I reviewed the literature of the ethics of reviewers. I found no standards—merely complaints that the reviewer had personal, professional, or financial animosity or the reviewer engaged in mere careerism, fulsome flattery, to brighten prospects with the author or in the field. There is even a body of literature

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that suggests biased reviews are better or, maybe, just more fun. Disclosure of my affection for the author reveals my chief bias.

I am also disinclined to put much faith in contemporary observance of events that conclude with an assessment of the historicity of those events. Our judgments are clouded by living in the time. Even descriptions of the events themselves are but misted first representations of what in a significant sense happened. Contemporary observation in the matter of religion, politics, law, war and peace lacks perspective.

Ledewitz and many others do not share my historian's timidity. Ledewitz sees a body politic in America swayed by religious values. He sees a resurgence of traditional American religious values articulated as a wholesome and right reason to have the state support those values. The banishment of the discussion of transcendent in public was temporary and has ended. Ledewitz jousts with the other tillers in this field, the philosophers of the now. Ledewitz holds that for awhile (say, mid-seventies to late nineties) Godliness was not seen as something discussable, shunned by academics and secularist commentators. Ledewitz tilts with the stars of the anti-God field. He says that religion must be part of public discourse, if for no other reason, because, in a democracy, we may choose religion as we may choose any theme for public discourse.

Now, a moment's pause on religion and democracy. Ledewitz has two senses, perhaps more, for the notion of religion. In his prose that set me to steam, religion (the American religion) is of a type of evangelical Christian, not literally, but in limine. His book has a dust jacket, with the photo of a cleric (his head is cropped at the chin and you cannot see his knees) holding a crucifix and a Holy Bible. He thought that the representation may offend my co-religionists; a Catholic priest, as evidenced by the crucifix, is not the sign he had intended. But, to me, Catholic from cradle to the impending grave, I told him that the image was not of a Catholic priest. I knew because he was holding the Bible. Catholics pray prayers. We are encouraged to read the Bible for comfort, not personal interpretation. A Catholic priest would hold a breviary, not the Bible. For Ledewitz (his publisher got this right) the Bible serves as inspiration, the breath, of *American Religious Democracy*.

Religion for Ledewitz also has a second sense that is, I fear, idyllic. Since the religious Christian has triumphed, now all must come together in a religious way, an American religious way. And here I fear is his greatest error—that that American religious way

must be tolerant, patient, giving, and kind. Nonetheless, he would conclude that these are truths, truths about religion, that all would agree to at root. And here he deftly surveys those thinkers and jurists as to whether the state can support a Great God without quibble.

Tolerance and religion qua religion are rarely harmonious in Western Civilization and pervasive tolerance, a fairly recent achievement. The Romans, the Mongolians, the Ottomans and their imperious Islamic cousins, are all empires noted for their fair tolerance of domestic religious differences; the Catholic Church did not formally endorse freedom of religion until Vatican II. While Ledewitz is four square with the anti-abortion position, he is four square for civil gay marriage. Gay marriage is a matter of justice and, one would suppose, democracy.

When Ledewitz writes of democracy, he is writing about the law and more specifically, how the law changes. This piece itself is evidence of a growing genre, contemporary commentary with an admixture of social criticism, global theories, and philosophies of all sorts. Works of this type have been inhibited in the academic setting because of a lack of discipline in the classic sense. Is this journalism, history, autobiography, sociology, theology, rhetoric or law? For *American Religious Democracy*, the answer is yes. And, undeniably, as such, the book is evidence of legal scholarship. The book, too, with its range and fervor, is evidence of the author's will and courage to advocate for the law, as good professors of law have done for at least 500 years.

American Religious Democracy is adamantine. Written through and after President Bush's reelection in 2004, Ledewitz's book posits that the democratic sway in our country is held and will be held by the Church, people of God. This democratically decisive role will allow for religious rhetoric on issues to be respected, if not necessarily to prevail in an election. Communal exercises of religious feeling will be less restricted. The Church's view on dominant issues that have religious import will certainly prevail, in the courts and in every law-making institution. The irreligious values of the Enlightenment will be rejected, like excessive individualism, materialism, sour rationality.

While I have written in future tense, for Ledewitz, the future is now. The elections of 2006 were an inevitable trough in history's uneven but sure progress to this Church-dominated state. Even he admits that essentially bad war gets 'em every time. So we live in a religious democracy. What are we to do? For Ledewitz, we of the church and we of the world must recognize the inevitability of

the triumph of the Church. For Ledewitz, history has a shape, shaped by the hand of God. We are ineluctably drawn to follow that curve and we will be judged, judged as a whole nation, if we stray from God's good hand.

Know, dear reader, that I envision you contemplating with either vague horror or positive warmth the foregoing paragraphs. Ledewitz chops American Democracy in two. My secularist reader's blood simmered with a promise of boiling later. My religious reader recognized truth (or, maybe, Truth) and felt a satisfied glow in the testimony of Ledewitz. For Ledewitz, a secularist is one who makes choices in public life based on lame Enlightenment rationality. Faith-based rhetoric does not move you, save possibly to offense. A religionista gives primacy to faith in public life. The sermon moves you more and galvanizes your resolve to bring to pass a polity pleasing to God.

As this piece of mine on Ledewitz has been kindly nestled in a law journal (albeit Catholic), I must suspect (as he would) that in plurality most of my readers are secularist. Professor Ledewitz recognizes that his duality is unclear: there is religion for the secularist, and there are rationalists among the religious. Yet for him and many contemporary observers, a sort of taxonomy of each type can be drawn ordered by the type's resolution of a gradient of issues. Many might believe the economy primarily determines elections, but that pocketbook matter only obliquely is used as a discriminator for Ledewitz. No, the package of core issues that divide us for Ledewitz is abortion, gay rights, and government-sponsored communal religious experience. Furthermore, a religious voter votes based on these core issues as being the most important issues. A voter who detests abortions but voted based on our current war is probably not a religious voter.

Concurrent with the inevitable political triumph of the religious voter will be the triumph of the Republican Party. The Democrats have experienced no religious revival and do not convincingly use the rhetoric of religious thought or feeling to advance their positions. Indeed, secularists are taken to task not only for their unjust intellectual ban on religious discourse in the public square, but also because they are uneducated or just plain stupid about religion. Secularists cling foolishly to the Enlightenment dodge that you should have "reasons" for public actions. And mere unvariegated Deism will not make the cut; religion for Ledewitz in our democracy means the Bible.

This general posture causes the contemporary reader who is not religious to blanch. That is, the most problematic portion of the

work is his observation of current politics and his predictions for the near term. I found it most difficult as a practicing Catholic to find myself irreligious and marginalized politically. Thus, for me, no single issue determines my vote and it is my understanding that formally my Church has no such requirement. For example, a candidate supporting our current War that our previous pope condemned yet is anti-abortion does not deserve my vote over a candidate with the opposite views on both issues. In practice, however, I will admit as a suburban Church goer, in 2004, virtually every homily I heard was a barely undisguised speech to vote Republican and the only issue was abortion. I am still waiting in the parishes I visit to hear of John Paul II's condemnation of the War. I will be old and gray before I hear a homily condemning the death penalty in my local church (although it is the Church's position), even with the most horrible example of the penalty hanging there before us. To be fair, I have heard from other co-religionists (Republican religious voters) that they are tired of their parish priest praying for peace, viewed by them as a call to vote Democratic. And please know that I do not yearn for political homilies of any sort. Wisely, most speeches in most years properly turn on the simple virtues of the Faith, Hope, and Charity.

Professor Ledewitz recognizes these dislocations and contemplates another book called "Hallowed Secularism." For now, Ledewitz is very deft and challenges the legal faith of the religious in an unexpected way. Ledewitz takes to task the jurisprudence of Justice Scalia and his faithful, with their devotion to plain language. Ledewitz argues that this dead reading of our living document inhibits full development of the religious polity. For Ledewitz, the Constitution breathes. For example, the textualist approach may overrule *Roe v. Wade* but provides no basis for protecting the fetus or, for that matter, the homosexual, or the crèche. His analysis of the Establishment Clause cases provides a jurisprudence to allow the state in some measure to support religious expression without having a state that punishes blasphemers.

Professor Ledewitz believes that religion—and, more specifically, the Bible—is foundational to democracy. His charitable reading of the Bible (both Old and New Testament) avoids two millennia of sins committed in the name of religion. He asserts the Bible is about the worth of the individual (but not too much)—that is, democratic. In fact, this small measure of individual autonomy, in the judgment of some, comes from the Protestant Revolution, disposing of the cleric as a necessary interlocutor between you and God. He asserts (in a full whopper) that Marxist

forces, not religious ones, subjugated women although he quotes without irony the Biblical dictum that man and woman are one. He asserts that we collectively are responsible for the sins of others, the sins of the nation. And that it is proper and just that citizens in a religious democracy may regulate, indeed, must regulate the sinful conduct of all, even non-believers.

That there will be a judgment upon a nation for allowing evil is a difficult proposition to follow. We secularists do not believe that the United States has been ordained by God for a particular mission. I note that our previous national sins have not caused us to be visited with Sodom-like destruction. To be fair, God's judgment will not be visited upon us (forgive me) Biblically. Ledewitz calls Pat Robinston a "clown" for his horrible pronouncement that modern scourges (Katrina, AIDS) are punishment for sin. Maybe slavery was punished by the Civil War. But I would argue that America had no Democracy until the real suffrage, unfettered by race, occurred circa 1964. Was there judgment for the murder of the Native Americans, our subjugation of the Philippines, our imperialist wars, our labor practices, our support of a reduced status for women, our environmental insensitivities? While philosophically Ledewitz's arguments that we are a religious democracy may persuade, he naturally has some trouble explaining practice. Pornography is freely available. Popular culture celebrates sinful lifestyles, from *Sex and the City* to *The Sopranos*, even to the uncabled *Friends*. Divorce is common and nearly expected. Religious people argue that property is an unfettered right, really God-given. Indeed, free enterprise is frequently offered as part of the story of God, although maybe unleashed enterprise produces oppression, systemic poverty, and denigration of individual work roles.

Professor Ledewitz wonders whether this provocative work is a work of legal scholarship. Emphatically, I say yes. If nothing more, the work should encourage us moderns to recognize that religious analysis of our legal structures is critical to seeing those structures clearly. Law and laws are built on a 1000 year old structure of Western Civilization. Religion is everywhere in our law, so engrained, so recessed, we fail to see it. Our President still takes an oath, our juries are a mystical twelve. Notions of sin, rather than secularism, fashion our laws on drugs, sex, welfare, poverty, the environment.

I have called this short piece "On Ledewitz" as I did not just want to comment on his book, but upon him. The book is difficult, dazzling, infuriating, and risky. He is at once polymath and

prophet. The book is a hard suggestion, at many points, for further study, for citizens, lawyers, and judges. This style of writing is out of fashion in the legal academy, maybe since Erasmus called for tolerance and peace in the age of Martin Luther. Yet, Professor Ledewitz, a victim of duty, felt compelled to speak.

At once with his efforts with this controversial book, Professor Ledewitz is conducting a very public campaign with respect to (what I will call) reform of the Pennsylvania judiciary, particularly our Supreme Court. I will not here recount the points in his proposals, although they are all rational, with nary a hint of prayer. With this campaign, Professor Ledewitz has been greeted with abuse, some from the courts, some from poobahs of the domestic bar associations. It is hard to say at this point whether he will in sum gather more vitriol from the campaign or the book. Bravely, fearlessly, he persists. I cannot defend the positions of *American Religious Democracy*. I support most of his proposals for judicial change. But I do support all his work, his public work, against an evil canard thrown at him now that this sort of advocacy (the book and the campaign) is not what law professors are supposed to do.

I have argued that Ledewitz's work with *American Religious Democracy* is at once an attempt at prophecy and an endeavor of legal scholarship. But, is this prophecy, this advocacy, this call to a particular vision of justice, is that what law professors are supposed to do? To write on Ledewitz requires a fuller description of his range beyond this book, a book itself which is but a signpost as to what is ahead. Professor Ledewitz is a crack scholar of the United States Constitution. He has retired from a long and draining career as an anti-death penalty advocate. He is a master guru of the Pennsylvania Constitution and state constitutional law generally. His leadership created our Pennsylvania Constitution website, a work of scholarship with intense, almost scholastic thoroughness and detail. For those not privileged to practice in the Quaker State, know that our Constitution is a mess. Older than the Republic, our Constitution has had more iterations than wise and now exists as a chunky lumbering thing with a misshapen, ill thought-out jurisprudence to match. And Ledewitz, fearless Ledewitz, has decided to act for change, for reform, for rational justice.

Suffice for this story of bravery and boldness the knowledge that his program specifically challenges Supreme Court decisions and, much more cutting, Supreme Court practices. The former activity is the stock-in-trade of the Professor, discussing cases and why they are wrongly decided. Yet, the Professor rarely takes to the

streets to proclaim the errors. We the timid are content to carp concealed with the eternal anonymity of law review publications. Ledewitz, however, sees these decisions (which, again for another place, are decisions which arrogate to the Supreme Court a stupendous level of control over such issues as taxation or law's practice) and the manner of Supreme Court rule (our Supreme Court has declared legislation unconstitutional by using a rule rather than hearing a case) as modes of thinking and practice that will not be changed without a dose of democracy. Our judges are elected and once elected subject every decade to a yea/nay vote on retention. If the citizens know the judges' positions on the issues he raises, democracy will take its course. *American Religious Democracy* seethes with the belief that religion underlies human polity, with religion bubbling to the top. But Ledewitz is no less a democrat, with a faith in public advocacy and discussion. If we are going to vote for judge, let us not ballot in the haze; for Ledewitz, we need more light.

A second aspect of Ledewitz's public proposals deals with the corruptive influence of the Supreme Court's behavior in the new political realm. Ledewitz's criticism is that this democratic institution, our Supreme Court, operates with unneeded secrecy. The lurid example was the Court's participation in the so-called scandal of the midnight pay raise wherein our otherwise politically divided legislature enacted a raise for itself, the courts, and their clerks under cover of darkness. Key to the visceral oomph of this tale is that the bill was passed in the wee hours, as if that which is done in the dead of night is necessarily suspect, predatory, an act that would wither in the light of day. Our respect for the legislature itself has so far fallen. When I was a law student at Georgetown, my bedroom window offered a view of the dome of the Capitol, rising above the endemic squalor that was Capitol Hill in the mid-seventies. And as I squinted at my texts in late and small hours, I could raise my glance to see the beacon lit at the pinnacle of the Dome. This beacon of light, by tradition, shone in those dark hours, to let all within sight know that Congress was in session, working for the Republic, tireless, eternal, laboring through the night. Now, this small bit of inspiration is lost on Pennsylvanians as even now there is clamor to prohibit legislating in the dark. But, perhaps, this distaste and suspicion for politicians, legislators and judges, are just the wages of sin.

Less lurid but equally secretive is our court's exercise of its administrative role, non-public politicking with the legislature, non-public appointment to any number of regulatory boards, non-

public rule making. Professor Ledewitz believes that this conduct is anti-democratic and corruptive of virtue. The Catholic might call it the near occasion of sin.

With the populace riled by citizens' grass-roots movements in response to the pay-raise hoo-hah, a sitting Supreme Court justice lost a retention vote, the first such loss ever. And now Professor Ledewitz who had articulated a series of charges based upon the scandal has become a target of public vilification not, of course from the public, but from some indignant of the bench and from some leaders of the organized bar. (Our wonderful Dean in a fit of good humor has furnished the colleagues of Ledewitz, campaign-style buttons with a strike through Ledewitz's image with the emblazoned motto, "I am not Bruce Ledewitz".) I have heard him called disrespectful of the office of Justice. While I do not agree with all the points in his proposals, I will note that the criticism that he is disrespectful is not a persuasive reason for concluding that he is wrong. But in these pages, I challenge the epithet that he has gone beyond the bounds of law professor, that in this very practical criticism of our courts or in his very spiritual *American Religious Democracy* he has horribly strayed from the right and just role of the law professor.

His activism, that is putting his thoughts into action, has pressed me to consider the profession of the law professor. The law professor is, in a real sense, of the first professors of our Western civilization. Their range of influence over real legal decisions was vast. Law professors provided a trellis for all law as we know it by lacing out principle from the tatters of the over-revered Justinian Code. Law professors were not just scholars, but also doubled as ambassadors, draftsmen of legislation, cultural stars, men of the court, the university, and the church. But these men were polymaths; we live under the burden of our great numbers in a world of specialties. Thus, our current academy (as I guess the Greek among us like to call it), the profession of law professors cannot agree itself on our proper role. In illustration, I offer a chat with a colleague from another institution, Older than I, an early boomer, nonetheless, he rued the younger generation of our ilk. We were devoted to law, case analysis, who shot John, so forth. Now, they (the others) want to be political scientists, poets, philosophers; they do not want to read cases. (In fairness, we agree: who does?) Here is one division in the academy—scholarship you can use or, well, something else. This struggle is as old as Erasmus.

The role of the law professor in our culture (outside of Germany) diminished as the education of the lawyer was conducted through an apprentice system. But for us, our model for practice is in the revival of the law school, its modern recreation in the scientific Nineteenth Century through the efforts and with vision of the re-Discoverer of Harvard Law School, Langdell. And it is clear that that vision was scientific, rational, systematic. I lack the patience of my editors to draw this theme fully out. But it is this perception of law professor as scientist, so ingrained, that leads to the charge that the activist professor is breaching the ethics and standards of his profession. The law professor is to be the neutral arbiter, balancing, teaching the art of doing, running a sort of lab. Scholarly writings are to be of the same cloth. And religion is by definition suspect, particularly Roman Catholicism.

That law or life or anything can be reduced to science, including science, is a hope that has long since passed. The rhetoric of faith in science by the giants of law schools was stirring, altruistic, and not fully misguided. Yet when you see the full measure of these men, you see the role the law professor of vigor and courage can have in this world.

I have a cracking one-hundred-year-old copy of *The Vocation of the Law Professor* by James Barr Ames, Langdell's follower, indeed, apostle, to the legal community for the religion of the Law School. This address was given at the dedication of a devoted law school facility for old Penn in 1901. While the scientific faith of the age percolates the talk, real activism is part of the role Ames had in mind for his ideal law professor. Indeed, one may note that Ames' view has Ledewitz's religious fervor; to be a law professor is to have vocation, that is classically to be called by the Voice of God. First we teach but then we write, to have a "wholesome influence" on real decisions. Scientific use of precedent is to prevail, but judges need help and occasionally err. And key to Ames was the communal role, friend to the legislator, a teacher whose wisdom and contemplative life could help practically shape positive law for the good of the community. This is what Ledewitz is trying to do in the best traditions of our profession.

And so too is his synthesis of law and religion in *American Religious Democracy*. I will still balk at whether history has a shape, shaped by God, that we can see. I am with Procopius, a nascent historian of circa 550, thoroughly Christian, believing God moved all but: "For man cannot, I think, apprehend ever human affairs with accuracy, much less those things which pertain to the nature of God." Yet traditional legal scholarship has always had the

breath of God, the eternal, the perfection of man, the process of civilization at its root. One of my personal favorite texts of legal scholarship is the magisterial *Superstition and Force* by Henry C. Lea, first published in 1870, a “scientific” exploration of torture and ordeals, wherein he found “the fervor of religious conviction thus made persecution a duty to God and man.” Yet, he saw, in the late Nineteenth Century, the dawn (as does Ledewitz a century later) of an age of luster:

For the first time in the history of man the universal love and charity which lie at the foundation of Christianity are recognized as the elements on which human society should be based. Weak and erring as we are, and still far distant from the ideal of the Saviour, yet are we approaching it, even if our steps are painful and hesitating.

Lea believed that we had grown beyond state-sponsored torture, obviously an error. While I have little faith in the prophecies of *American Religious Democracy*, I praise the faith of the prophet and the courage of his testimony. Thus, an encouragement: on, Ledewitz.

