

# **METAPHYSICAL UNIVOCITY AND THE IMMANENT FRAME: DEFENDING RELIGIOUS LIBERTY IN A SECULAR AGE?**

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*As the first of three installments, this article examines and appropriates concepts such as metaphysical univocity (a scheme initiated by John Duns Scotus and enriched by insights proffered by Muslim philosopher Ibn Sīnā) and then considers the immanent frame as part of my defense of religious liberty. The second installment applies my defense to current controversies in the United States. The third utilizes ideas and concepts from the first two articles as part of a comparative study of religious liberty in Turkey wherein I consider the status of religious minorities within Turkey's borders. This tripart study is sparked by the contention that:*

The freedom to practice one's chosen faith is of vital importance to the United States. It was a quest for religious freedom that motivated many of America's founders, and this remains fundamental to [the United States]. Recently President Obama said: "The principle that people of all faiths are welcome in [our] country, and will not be treated differently by their government, is essential to who we are." Today, throughout the world and indeed even here in the [Organization for Security & Cooperation in Europe] (OSCE), governments and societies are struggling with rising religious diversity even as they are called upon to protect the fundamental rights of individuals in all communities who seek to practice their own religious beliefs.

As [former] Secretary Clinton put it, "religious freedom provides a cornerstone for every healthy society." The right to believe or not to believe, and to practice one's convictions without fear of government interference or restriction, is a basic human right. Today, religious freedom is restricted

in ways both overt and subtle in too many countries, including participating States.<sup>1</sup>

*The first installment of this project shows there are, indeed, grounds for pessimism regarding the fate of religious liberty in both the Latin West and the United States.*

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1. Ian Kelly, U.S. Ambassador to Georg., United States Mission to the OSCE: Statement on the Situation in Belr. 1 (March 3, 2011), <http://www.osce.org/g/p/6579?download=true>.

## INTRODUCTION

*States that fail to protect religious freedom usually trample on other freedoms, too*<sup>2</sup>

Recently, President Obama said: “The principle that people of all faiths are welcome in [our] country, and will not be treated differently by their government, is essential to who we are.”<sup>3</sup> Consistent with this intuition, it is argued that “[t]he freedom to practice one’s chosen faith is of vital importance to the United States. It was a quest for religious freedom that motivated many of America’s founders, and this remains fundamental to [the nation].”<sup>4</sup> Still, many hierarchs within the Latin West respond to such sentiments with a shrug, believing that religion is simply a form of superstition representing the residue of an unwanted and intolerant meme that evolution was supposed to rid us of.<sup>5</sup> At the same time, the idea that religious zeal belongs to the primitive and uneducated while nonbelief or quiet private belief belongs to the more advanced and enlightened—a conceit underpinning Western modernity for at least two centuries—has been punctured by a global renaissance of religion fused with inspiring political movements.<sup>6</sup> Although such movements may have the propensity to spark persecution that defies persistent calls for peace and reconciliation, or to spur marginalization in the Mideast or anywhere else, it appears that the conceit of pure reason, ostensibly at the heart of the West, is under stress.<sup>7</sup> Whether or not reasoning justifiably retains normative currency, the growing tension between religious zeal and nonbelief, and between the “primitive” and the

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2. Rajeev Bhargava, *Rehabilitating Secularism*, in *RETHINKING SECULARISM* 99 (Craig Calhoun et al. eds., 2011).

3. Ian Kelly, U.S. Ambassador to Geor., United States Mission to the OSCE: Statement on Freedom of Religion in the OSCE 1 (March 3, 2011), [http://dushanbe.usembassy.gov/pr\\_3042012.html](http://dushanbe.usembassy.gov/pr_3042012.html).

4. *Id.*

5. See Harry G. Hutchison, *Shaming Kindergarteners? Channeling Dred Scott? Freedom of Expression Rights in Public Schools*, 56 *CATH. U. L. REV.*, 361, 362 (2007) [hereinafter Hutchison, *Shaming Kindergarteners?*] (suggesting that intolerance in the United States multiplies because many citizens have accepted the notion that their fellow citizens, if infected with a religious meme, are unlikely to live consistently with the tenets of liberalism and individual singularity).

6. Wendy Brown, *The Sacred, the Secular, and the Profane: Charles Taylor and Karl Marx*, in *VARIETIES OF SECULARISM IN A SECULAR AGE* 83-84 (Michael Warner et al. eds.).

7. *Id.* at 84.

“advanced,”<sup>8</sup> forms an essential backdrop for public policy and constitutional debate within the United States and elsewhere. Frequently, such debates ignore the growing body of scholarly work that explores how the category of “religion” has been developed and misused in the modern West and colonial contexts according to specific configurations of political power.<sup>9</sup>

Brooding beneath the surface of heated constitutional debates, it appears that Americans live in what has been called a “late modern, post-secular world.”<sup>10</sup> This dominion finds expression through an intensifying and unstable pluralism that signifies a dazed, confounding, and confused cultural milieu.<sup>11</sup> Any intelligible effort to define the proper relationship between government and religion or, alternatively, to erect a defensible framework from which to advance religious liberty is a fraught enterprise and one that has vexed jurists, governments, and clerics for thousands of years.<sup>12</sup> Within the Latin West, this enterprise has become progressively more difficult in what Charles Taylor calls our “secular age,”<sup>13</sup> and this struggle (contestability) becomes particularly prickly when the debate centers over whether religious exemptions from generally applicable law ought to be granted.<sup>14</sup> Professor Steven Smith’s examination of American religious freedom—a profoundly cogent contribution that echoes Tocqueville’s remarkable observations<sup>15</sup>—finds that there are

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8. *But see* PETER L. BERGER, *THE MANY ALTARS OF MODERNITY: TOWARD A PARADIGM FOR RELIGION IN A PLURALIST AGE* ix (2014) (arguing that this paradigm, one that suggests that modernity necessarily brings about the decline in religion can no longer be sustained, and proposing a new paradigm to deal with two pluralisms, which includes the co-existence of different religions and of religious and secular discourse).

9. *See* WILLIAM T. CAVANAUGH, *THE MYTH OF RELIGIOUS VIOLENCE* 3 (2009).

10. Harry G. Hutchison, *Lochner, Liberty of Contract, and Paternalism: Revising the Revisionists? Review Essay: David N. Mayer, Liberty of Contract: Rediscovering a Lost Constitutional Right*, 47 *IND. L. REV.* 421, 423 (2014) [hereinafter Hutchison, *Lochner, Liberty of Contract*] (citing James Davison Hunter, *Law, Religion, and the Common Good*, 39 *PEPP. L. REV.* 1065, 1069 (2013)).

11. *See* Hunter, *supra* note 10, at 1068-69.

12. BERGER, *supra* note 8, at xii.

13. *See generally* CHARLES TAYLOR, *A SECULAR AGE* (2007).

14. *See e.g.*, *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 496 U.S. 913 (1990) (disallowing religious accommodation for Native American peyote smokers).

15. *See e.g.*, Aristide Tessitore, *Alexis de Tocqueville on the Incommensurability of America’s Founding Principles*, in *DEMOCRACY AND ITS FRIENDLY CRITICS: TOCQUEVILLE AND POLITICAL LIFE TODAY* 59 (Peter Augustine Lawler ed., 2004) (describing Tocqueville’s initial impressions upon arriving in the United States and characterizing the nation as having two foundings: one rooted in biblical religion and the other in secular philosophy).

at least two stories of American religious freedom.<sup>16</sup> First, he explicates “[t]he *standard* story which tells us how, under the influence of the Enlightenment, the American founders broke away from intolerance and dogmatism of centuries of Christendom and courageously set out on a radical new experiment in religious liberty[.]”<sup>17</sup> a move that valorizes the presumptive appeal of progress and elevates one or more of the several explanations and descriptions of secularization.<sup>18</sup> “More specifically, the founders adopted a Constitution that committed the nation to the separation of religion from government and thus to secular governance that would be neutral toward religion,”<sup>19</sup> even though “these commitments were not immediately realized.”<sup>20</sup> More recently, so the narrative goes, the Supreme Court finally undertook to realize the promise of the First Amendment’s commitment to religious freedom and religious equality,<sup>21</sup> putatively embedded in the “enlightened” standard story.

Second, Smith offers a *revised story*, one that “begins in late antiquity with the emergence of a new religion—Christianity—with distinctive commitments to a separation of spiritual and temporal authorities and to an inner saving religiosity that was of necessity sincere and voluntary.”<sup>22</sup> Smith argues that “[t]hese themes, together with a commitment to openness and contestation between perennial providentialist and secularist interpretations of the nation, constituted the distinctive American settlement of the problem of religious pluralism.”<sup>23</sup> Over the centuries, Christians sometimes neglected and betrayed these commitments, but nonetheless “the American embrace of church-state separation is best understood not as radical innovation but rather as a retrieval and consolidation of these classical commitments (with a measure of easygoing pagan toleration mixed in).”<sup>24</sup> Both the standard and revised stories agree that religious freedom is presently embattled. The source of this struggle is, of

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16. See STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* (2014) [hereinafter SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM*].

17. *Id.* at 167 (emphasis added).

18. For an explanation of the term secular, see *infra*, Part IV.

19. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM*, *supra* note 16, at 167.

20. *Id.*

21. *Id.*

22. *Id.* (emphasis added).

23. *Id.* at 167-68.

24. *Id.* at 167.

course, in dispute. Adherents to the standard (enlightened) story fear primitive conservatives<sup>25</sup> whereas proponents of the revised story fear that religious freedom is being subverted by “religious freedom itself (as currently understood), which through its commitments to equality and neutrality and secular government has effectively deprived itself of its historical reasons for being.”<sup>26</sup> “Thus enfeebled and faced with being flattened by the juggernaut of ‘equality,’ religious freedom’s long-term chances do not look promising.”<sup>27</sup>

The revised story, one that inclines toward Professor Smith’s preferred understanding of the American settlement, highlights James Madison’s defense of religious freedom as a “right,” which of course was something more than we might mean today: “merely a privilege or immunity that governments may (or may not) choose to confer, or an ‘interest’ that should be assigned significant ‘weight’ in political or judicial ‘balancing.’”<sup>28</sup> Religion, in Madison’s view, was free in the sense that it was a domain “‘wholly exempt from [the government’s] cognizance.’”<sup>29</sup> Failure to respect this right in this jurisdictional sense means that all other rights will be likewise imperiled and that rights will be generally transmuted into nothing more than appeals to the benevolence and good grace of the government.<sup>30</sup>

Although Professor Smith’s analysis clarifies the shifting ground beneath religious freedom and cannot be dismissed by any thoughtful endeavor to understand this highly contested arena, this article’s point of departure pivots largely on historical developments in the Latin West that commenced during the thirteenth century. This move is, of course, associated with the emergence of a new religion (Christianity).<sup>31</sup> While proof of cause and effect remain difficult and while the risk of apophenia<sup>32</sup> may potentially afflict my analysis, I

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25. *Id.* at 168.

26. *Id.* To be sure, James Madison’s initial draft of the Free Exercise Clause referred to the “full and equal rights of conscience,” a move that supports the notion that equality is a major value underlying the Religion Clause. MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 28 (3d ed. 2011).

27. *Id.*

28. *Id.* at 169.

29. *Id.* (quoting Madison).

30. *See id.* at 170.

31. *See id.* at 167.

32. As used here, apophenia represents the “spontaneous perception of connections and meaningfulness in unrelated things.” *See, e.g.*, Noah Toly, *Terrible Simplifiers*, in BOOKS & CULTURE: A CHRISTIAN REVIEW 28, 30 (May/June 2015), <http://www.booksandculture.com/articles/2015/mayjun/terrible-simplifiers.html> (quoting William Gibson).

shall argue that it was thirteenth-century developments that diminished previously dominant hierarchical assumptions and led to (A) the appropriation of metaphysical univocity; (B) the more recent cultural adoption of the “immanent frame” as its preferred stance, an occurrence that simultaneously appeals to and bewilders modern man who is waiting but does not know what he is waiting for;<sup>33</sup> and (C) the instantiation and pervasive effects of the secular age. This article considers whether it is possible to define and defend religious liberty in our current era. Part I provides necessary background by situating religion in our current epoch as a prelude to placing religious liberty in the dock and providing analysis and tentative conclusions in subsequent sections.

## I. SITUATING RELIGIOUS BELIEF IN THE LATIN WEST

In order to advance this paper’s central claims and properly situate religious belief in the West, it is useful to define metaphysical univocity. Metaphysical univocity is a viewpoint that ultimately led to the exclusion of God from descriptions of the natural world. Scholar Brad Gregory shows that the metaphysical and epistemological assumptions of modern science and of antireligious, scientific ideologies are clearly indebted to the emergence of univocity identifiable in medieval scholasticism beginning with John Dun Scotus.<sup>34</sup> Whether or not these developments reflect a misreading, misappropriation, or misinterpretation of Scotus’ actual writings,<sup>35</sup> this move, in fits and starts, defies previously ascendant supercessionists’ rationalizations of secularism and its origins, which were grounded in the notion of inevitable historical progress.<sup>36</sup> Properly appreciated:

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33. See CHANTAL DELSOL, *ICARUS FALLEN: THE SEARCH FOR MEANING IN AN UNCERTAIN WORLD* xxvii (Robin Dick trans., 2003).

34. See BRAD S. GREGORY, *THE UNINTENDED REFORMATION: HOW A RELIGIOUS REVOLUTION SECULARIZED SOCIETY* 5 (2012).

35. See, e.g., DANIEL P. HORAN, O.F.M., *POSTMODERNITY AND UNIVOCITY: A CRITICAL ACCOUNT OF RADICAL ORTHODOXY AND JOHN DUN SCOTUS* 4 (2014) (contesting the claims that Scotus’s actual writing support the claims that proponents of Radical Orthodoxy and perhaps Gregory make); CYRIL L. SHIRCEL, *THE UNIVOCITY OF THE CONCEPT OF BEING IN THE PHILOSOPHY OF JOHN DUN SCOTUS* 7 (1942) (asserting that the doctrine of univocity has been misunderstood and misinterpreted).

36. GREGORY, *supra* note 34, at 10 (under the supercessionist approach, older ideas, values, and practices simply became untenable at certain points and were superseded by more adequate ones; this approach was originally linked to strongly positive evaluations of historical progress).

The strength of Gregory's thesis is his argument that supercessionist conceptions of history and the conventional historical periodizations—Antiquity, the Middle Ages, and modernity—rest on an ahistorical logic that was invented by late medieval secular reason and progressively instituted by the forces of Protestant confessionalization and the Enlightenment. In positing absolute historical breaks—which in reality were entirely avoidable, contingent, and arbitrary—this logic is unable to demonstrate its own presupposition that the passage from the Middle Ages to modernity was somehow inevitable, necessary, and normative.<sup>37</sup>

This highly contingent process is unmasked by Gregory. His analysis (A) leaves conventional historicism in tatters; (B) links apparently universal ideas and structures, such as the global system of national states and transnational markets that underpin modern international relations to particular periods such as the Protestant Reformation or the religious wars of the fifteenth and sixteenth centuries; and (C) shows that much of what emerged during the early fourteenth to the late seventeenth centuries reflects ideas and practices already nascent during the Middle Ages, ideas that achieved fuller maturity and developed into secular modernity.<sup>38</sup> Although Gregory provides persuasive analysis of Protestantism's role in shaping modernity and the contemporary era, Adrian Pabst argues that Gregory underplays the Catholic roots of secularization, which included Franciscan theology and Baroque scholasticism and ultimately led to Catholic liberalism.<sup>39</sup> Whether or not Gregory or Pabst are correct, on my reading of the evidence and, in particular, on my appreciation of Charles Taylor's scholarship, secularization ushered in a cultural stance that welcomed the immanent frame, a disposition bereft of space for the sacred.<sup>40</sup>

Although Gregory disputes much of Charles Taylor's analysis regarding the origins of the modern age,<sup>41</sup> on philosopher James Smith's reading of Taylor, secularity manifests itself in the contestability of belief.<sup>42</sup> This manifestation is accompanied by a celebration of wide-ranging skepticism and even disinterest in the

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37. Adrian Pabst, *Secular Supercessionism and Alternative modernity*, IMMANENT FRAME, SSRN, (Sept. 24, 2013, 12:26 PM).

38. *See id.* at 2.

39. *See id.*

40. *See* GREGORY, *supra* note 34, at 10 (referencing and disagreeing with Charles Taylor).

41. *See id.*

42. *See* JAMES K. A. SMITH, HOW (NOT) TO BE SECULAR: READING CHARLES TAYLOR 26-46 (2014) [hereinafter JAMES SMITH].



possibility of belief,<sup>43</sup> as well as disenchantment with the notion or need for transcendence (or significance) outside of ourselves.<sup>44</sup> This progression continues apace despite the growing sense of a haunting immanence.<sup>45</sup> The immanent frame is a metaphor that captures the world we now inhabit wherein this mental frame constitutes a natural order, one of exclusive humanism as against the possibility of living within a transcendent or supernatural world.<sup>46</sup>

In an epoch that fosters the contestability of all forms of belief, religious practice provokes opposition. Martha Nussbaum insists that Christianity, for example, “represents a repression of our humanness, a hubristic desire to transcend humanity by denying ‘natural’ drives, passions, etc.”<sup>47</sup> First, this thesis ignores that what counts as religious or secular in a given context is arguably a function of different configurations of power.<sup>48</sup> Second, it may be churlish to observe that Nussbaum’s claims can be deflated by an examination of records exhumed from the “age of social catastrophe” revealing that various secular twentieth-century ideologies sponsored “internal repression” during which millions of individuals lost their lives<sup>49</sup> in order to advance the hegemonic pursuit of human moral progress. This hubristic pursuit was a notable part of a revolutionary yet largely unsuccessful quest to transcend humanity, which both ignored Hume’s warnings<sup>50</sup> and confirmed Berlin’s interpretation of history.<sup>51</sup>

Still, if Charles Taylor’s intuition is spot on, “faith may endure in our secular age, but believing doesn’t come easy.”<sup>52</sup> Threats to belief appear to be escalating even if the origin of such dangers ascends from within religion itself, particularly sparked by the introduction of metaphysical univocity,<sup>53</sup> a largely Christian but partially Muslim

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43. *See id.*

44. *Id.* at 53-56.

45. *See id.* at 76 (suggesting that modern man creates an immanent space to satisfy a lost longing for transcendence).

46. *See id.* at 92.

47. *Id.* at 110.

48. *See* CAVANAUGH, *supra* note 9, at 4.

49. ROBERT GELLATELY, *LENIN, STALIN, AND HITLER: THE AGE OF SOCIAL CATASTROPHE* 583-84 (2007) (quoting Solzhenitsyn).

50. *See* JOHN GRAY, *ISAIAH BERLIN* 82 (1996) [hereinafter GRAY, *ISAIAH BERLIN*].

51. *See id.* at 82.

52. JAMES SMITH, *supra* note 42, at 4.

53. GREGORY, *supra* note 34, at 24-73 (showing that Thomas Aquinas, in his analogical metaphysics of creaturely participation in God, presupposed and sought to preserve a view of God as wholly “other” with no genus in common with creatures, consistent with the view that a God who

idea<sup>54</sup> that diminished the stature of God and ultimately the utility of hierarchical norms. Appropriation of this idea paved the way to analyze, tame, and ultimately exclude God, a process that was accelerated by the Reformation.<sup>55</sup> Similarly, Charles Taylor notes that nothing less than a zigzag religious path that arose from the innovative formation of nominalism—a metaphysical thesis that was profoundly theological<sup>56</sup>—diminished previously ascendant notions of God. This led first to the view that the notion of reality was largely a figment of the mind, thence to metaphysical libertarianism, then to the notion of

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by definition is radically distinct from the natural world could never be shown to be unreal via empirical inquiry or, alternatively, that God could not be shown to be unreal though philosophical inquiry because an incomprehensible God cannot be comprehended rationally nor can his extraordinary actions in history be inferred from philosophical principles. But then came John Dun Scotus, who endeavored to comprehend God strictly on the basis of reason, and he broke with the then traditional view by predicating God on something called metaphysical univocity, a theory signifying that all beings, both created and creator, are of one substance, thus implying that all beings are conceptually equivalent in terms of existence and hence understandable in human terms. This move led inexorably to God being an unnecessary and exogenous factor, a deeply influential move that prepared the way for the elimination of miracles, the elevation of science, and the liberation of human desires from constraints imposed by Christian morality. This move was followed by the exclusion of God and the resultant secular age that engendered greater hostility toward religious believers in the Latin West).

54. *See id.* at 37 (outlining Muslim philosopher, Ibn Sīnā's influence on John Dun Scotus).

55. *See id.* at 24-73.

56. *See* JAMES SMITH, *supra* note 42, at 41-42 (“Taylor notes that nominalism was not a proto-secularism precisely because the motives behind nominalism were fundamentally theological. In particular, nominalism arose as a way of metaphysically honoring a radical sense of God’s sovereignty and power. At issue, for nominalists like Scotus, was something like this: the Aristotelian notion of human ‘nature’ saw the good of the human being determined by the nature of the telos of the human being; so there was a defined way to be good. . . . [since God cannot be limited to conforming his will to the telos, we are then left with] a metaphysical picture called ‘nominalism’ where things are only what they are named . . . [and as this process evolves, it appears that the] purposes that things serve are extrinsic to them . . . as part of the loss of final causality.”) For our purposes, it is arguably sufficient to note that nominalism, led by William of Occam, radicalized Scotus’s view of God. GREGORY, *supra* note 34, at 38. Arguably this was accomplished through Occam’s denial of universals suggesting that universals were mere constructs of the mind, a maneuver that suggests implicitly that God is simply a figment of the mind though faith. *See also*, Sharon Kaye, *William of Ockham (Occam, c. 1280—c. 1349)*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY 2, [http://www/iep.utm.edu/ockham/print](http://www.iep.utm.edu/ockham/print) (last visited Sep. 10, 2015) (“In logic, Ockham presents a version of supposition theory to support his commitment to mental language. Supposition theory had various purposes in medieval logic, one of which was to explain how words bear meaning. Theologically, Ockham is a fideist, maintaining that belief in God is a matter of faith rather than knowledge. Against the mainstream, he insists that theology is not a science and rejects all the alleged proofs of the existence of God. Ockham’s ethics is a divine command theory. In the Euthyphro dialogue, Plato (437-347 B.C.E.) poses the following question: Is something good because God wills it, or does God will something because it is good? Although most philosophers affirm the latter, divine command theorists affirm the former. Ockham’s divine command theory can be seen as a consequence of his metaphysical libertarianism. In political theory, Ockham advances the notion of rights, separation of church and state, and freedom of speech.”).

the separation of church and state,<sup>57</sup> and finally to the idea of exclusive humanism with its corresponding dismissal of the need for either God or religion.<sup>58</sup> It appears that even though it rejects Christianity, “exclusive humanism” as a viable concept was only possible *having* come through Christianity.<sup>59</sup>

Notwithstanding this backdrop, one that stations the inherent value of religious freedom in the dock, it appears that, in our modern-day era, it has become decidedly fashionable to champion religious liberty by relying on ideas and currents that are embedded in the Universal Declaration of Human Rights (UDHR). Perhaps erected on seventeenth-century jurist Hugo Grotius’ proposal that international law should be developed as if God did not exist,<sup>60</sup> this instrument “protects rights of ‘thought, conscience, and belief’ and guarantees freedom from religious discrimination.”<sup>61</sup> A number of “subsequent international instruments have refined these [rights] and elaborated additional protections of religious rights and liberties.”<sup>62</sup> Grounded by these documents, one could insist in the abstract that freedom of religion or belief is an absolute right, even if the right to *manifest* one’s religion or belief is not.<sup>63</sup> Not all countries accept this United Nations-approved approach,<sup>64</sup> which has the potential to protect religious liberty across the globe. It is equally unlikely that this approach, erected largely on Western ideas, can be fully translated into all cultures. At the same time, it is difficult (if not impossible) to understand religious liberty as a human right in a world where the

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57. *See id.*

58. *See* JAMES SMITH, *supra* note 42, at 47-59 (explaining this move from deism to atheism).

59. *See id.* at 56.

60. BERGER, *supra* note 8, at x.

61. John Witte, Jr., *Religion*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 25 (Dinah Shelton ed., 2013), <http://ssrn.com/abstract=2517762>.

62. *Id.* at 26 (referencing the International Covenant on Civil and Political Rights (ICCPR), U.N., Dec. 19, 1966, 999 U.N.T.S. 171, United National Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion, U.N. GAOR, 44th Sess., 82nd plen. Mtg., U.N. Doc. A/44/131 (Dec. 15, 1989), <http://www.un.org/documents/ga/res/44/a44r131.htm>; Conference on Security and Cooperation in Europe (CSCE), *Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the CSCE* (1989); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135 U.N. Doc. A/RES/47/135 (Dec. 18, 1992), <http://www.un.org/documents/ga/res/47/a47r135.htm>).

63. *Id.* (referencing the ICCPR).

64. *Id.* (stating that this is a contested issue among some Muslim groups who recognize the right to enter Islam but not to exit it).

denial of the category of truth is accepted as true<sup>65</sup> or in a society where, in the face of the undeniable fact of pluralism, it is inferred that moral and cultural relativism is true, a move that may propel undifferentiated toleration and diversity.<sup>66</sup>

The resolution of this paper's central issues—the proper relationship between government and religion, and the possibility of defending religious liberty—implicates movements and ideas drawn from several streams, including Roman, Roman Catholic, German, Lutheran, Reformist, and Enlightenment traditions that have been remixed.<sup>67</sup> This process has catalyzed “rights talk” that has consumed the world<sup>68</sup> and led to the deconstruction of law, politics, and society.<sup>69</sup> It is likely that an exploratory examination of these myriad ideas, constructions, appropriations, and reformulations is useful in order to assess whether it is possible to defend religious liberty in a secular age. My defense is necessarily indirect. Rather than defend religious freedom through an assault on the forces of secularity, I shall argue that a proper defense of religious freedom entails a reexamination of the ideas and currents that vitiated the vitality of this important objective in the first place. Part II prepares a pathway toward understanding religious liberty by first contrasting the adoption of metaphysical univocity with Tocqueville's understanding of America's dual parentage in biblical religion and secular philosophy and then emphasizing the implications of this conceptually rich idea. Part III considers the emergence of the immanent frame, while Part IV examines the institution of secularism in its various versions. Building on the framework initiated by univocity, Part V examines how the appropriation of these ideas established a legal and cultural landscape that, largely erected on emotive construal, places religious liberty at risk. Part VI offers tentative answers to the question of whether

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65. See GREGORY, *supra* note 34, at 18.

66. *Id.* at 18-19; see also, PHILLIP E. JOHNSON, THE RIGHT QUESTIONS: TRUTH MEANING & PUBLIC DEBATE, 116-17 (2002) (showing, for instance, the proposal by one commentator to make the war on terrorism a war on “religious totalitarianism,” — a view asserting that only one religion (agnosticism) is true and that all others are false to the extent that they contradict the true religion—is only superficially a tolerant position because this view, in reality, absolutizes one religious position—nonbelief—in order to relativize all others, whereas the correct approach is to ask “what is the correct metaphysical viewpoint that correctly describes how things really are and against which all claims of religious truths or exclusiveness should be evaluated?”).

67. JOHN WITTE, JR., LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION 23 (2002).

68. Witte, Jr., *supra* note 61, at 23.

69. WITTE, JR., *supra* note 67, at 2.

religious liberty is possible in a secular age committed to the pursuit of human perfection and evolutionary progress.

Only tentative conclusions are reached within the parameters of this article. Firmer conclusions are deferred to the next installment of this study, where I will again advert to the emergence of the immanent frame and the reification of concepts such as equality and neutrality before situating my analysis within the contours of current controversies<sup>70</sup> exemplified by two cases: *Burwell v. Hobby Lobby*<sup>71</sup> and *Hosanna Tabor*.<sup>72</sup> Of necessity, the sections in this installment will overlap. Finally, any attempt to respond richly to our secular age calls for a deep understanding of how we got here; for such a response to be durable, it will likely require a collaborative, collective, and even communal effort. This paper offers a modest step in that direction. I hope my analysis avoids falling prey to the “idealism” that originates from a tradition deep in Western thought<sup>73</sup> and a view deep within the United States: a distinctly Protestant flavor that weaves in the elements of “individualism” and the notion that the autonomous and rational individual is the key to changing or, in our terms, to defending religious liberty.<sup>74</sup>

Taken together, however messy and incomplete this process may be, I shall argue that the complete recovery of prior understandings of religious liberty in our secular age is vanishingly slim, particularly in the absence of a return of St. Benedict<sup>75</sup> or of another reformation of religious institutions that transforms the background assumptions of our culture, an event that James Davison Hunter finds implausible.<sup>76</sup> Pessimism regarding a full-fledged recovery of religious liberty coheres with Ross Douthat’s remarkable claim that the United States has become the locus of heretics wherein we—all of us, religious or not—have birthed a nation of narcissists who are unable to control our

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70. In the next installment, I examine two recent Supreme Court cases—*Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) and *Hosanna-Tabor Evangelical Lutheran Church and Sch. V. EEOC*, 132 S. Ct. 694 (2012)—that have sparked a vigorous debate about whether an exemption from generally applicable law should be granted to religious believers.

71. *Burwell*, 134 S. Ct. 2751.

72. *Hosanna*, 132 S. Ct. 694.

73. JAMES DAVISON HUNTER, *TO CHANGE THE WORLD: THE IRONY, TRAGEDY, AND POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD* 24 (2010).

74. *Cf. id.* at 26.

75. See generally Robert Louis Wilken, *Christianity Face to Face with Islam*, *FIRST THINGS*, Jan. 2009, at 19, 23 (referencing Alasdair MacIntyre’s hope).

76. See HUNTER, *supra* note 73, at 17 (stating his thesis that transformation of culture though religious reform is implausible).

own impulses and desires, either individually or collectively.<sup>77</sup> Secularity, exhilarated by its presumption that human progress is inevitable, acts as the Latin West's faithful innamorata and is simply part of an ongoing, if heretical, process that is not necessarily inevitable.

## II. APPROPRIATING METAPHYSICAL UNIVOCITY IN THE LATIN WEST

### A. *Tocqueville in the Mirror of Metaphysical Univocity*

Shortly after reaching the New World, Tocqueville wrote about the flurry of conflicting impressions that greeted him.<sup>78</sup> Arriving well after Thomas Jefferson released his famous proclamation that the Religion Clauses created a wall of separation between church and state<sup>79</sup> but disembarking, perhaps contemporaneously with the positioning of the idea of separation between church and state less as a constitutional doctrine and more as an anti-Catholic ideology,<sup>80</sup> Tocqueville traces these conflicting currents to their root<sup>81</sup>—“a nation characterized not by one but by two foundings, each of which is drawn from a radically different source—biblical religion and secular philosophy.”<sup>82</sup> Professor Tessitore, prompted by Tocqueville's thesis, argues that the dual parentage of America ensures the persistence of conflict for future generations, a conflict that cannot end until one of the antagonists claims complete victory.<sup>83</sup> And yet, despite the unmistakable encroachment of the secular on the sacred in American life and culture during the past two centuries, this subsection will endeavor to show that it is unlikely that Tocqueville's perspective supplies a balanced representation of the conflict between religious institutions, individuals, and groups on one hand and the state on the other. This remains true even if American political culture is aptly explained as “incoherent, an unresolved argument—ordinarily implicit

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77. See ROSS DOUTHAT, *BAD RELIGION: HOW WE BECAME A NATION OF HERETICS* 235 (2012).

78. Tessitore, *supra* note 15, at 59.

79. Letter from Thomas Jefferson to the Danbury Baptist Ass'n (Jan. 1, 1802) (on file with the Thomas Jefferson Papers Manuscript Div., Library of Congress, Wash., D.C.).

80. JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* 231 (2000).

81. Tessitore, *supra* note 15, at 59.

82. *Id.*

83. *Id.* 59-60.

and more or less civil—between the ‘spirit of liberty’ and the ‘spirit of religion.’”<sup>84</sup> Skepticism ascends regarding the persuasiveness of Tocqueville’s paradigm, despite Wilson Carey McWilliams’ suspicion that “the ‘spirit of liberty,’ entrenched in the laws, has gained ground at the expense of its rival,”<sup>85</sup> and notwithstanding evidence that, today, the various languages of individualism, tolerance, progress, neo-Darwinian atheism, and antireligious scientism<sup>86</sup> “dominate moral discourse.”<sup>87</sup>

Doubt multiplies in light of the ascension and appropriation of metaphysical univocity and its corresponding rejection of a non-univocal or inherited view of God as a distinct entity or order of being, one that stands apart from the same order or type of existence as his creation.<sup>88</sup> This process led to the excludability and, thence, to the exclusion of God from intellectual discourse regarding natural phenomena.<sup>89</sup> The initiation of this scheme is identified in the scholasticism of John Duns Scotus—analysis that was enriched by insights proffered by Muslim philosopher Ibn Sīnā.<sup>90</sup> This combined move, which began in the late Middle Ages in the Latin West,<sup>91</sup> was predicated on the explanatory power of reason,<sup>92</sup> a perspective that initially comprehended God on reason alone then prepared the way for the elimination of miracles and the liberation of human desires from constraints imposed by Christian morality.<sup>93</sup> Built primarily on reason alone, the appropriation of metaphysical univocity supplied an ever-ramifying platform<sup>94</sup> from which one could dispute the notion of a

84. WILSON CAREY MCWILLIAMS, *REDEEMING DEMOCRACY IN AMERICA* 55 (Patrick J. Deneen & Susan J. McWilliams, eds., 2011).

85. *Id.*

86. *See generally* GREGORY, *supra* note 34, at 5 (outlining a different way of thinking about the last five or six hundred years of Western History, an outline that is indebted to scholars from philosophy, economics, and the history of science, and showing how seemingly minor innovations in the medieval or early modern past had lasting consequences because they became embedded in subsequent changes, assumptions, and practices).

87. MCWILLIAMS, *supra* note 84, at 55 (“in contemporary society, the prevailing norms seem to be almost universal tolerance and a respect for private liberty, while the biblical voice in American culture is increasingly marginalized or inarticulate.”).

88. *See* GREGORY, *supra* note 34, at 33-34.

89. *See generally id.* at 25-27.

90. *See id.* at 37.

91. *See id.* at 5.

92. *See id.* at 47-50.

93. *Id.* at 60.

94. *See id.* at 38, 181 (describing the appropriation and transformation of metaphysical univocity by nominalist thinkers like Scotus’s younger confrere William of Occam, who radicalized

natural human good.<sup>95</sup> Although contemporary society frequently attempts to resolve howling disputes by reference to the ethics of emotivism (feeling-based preferences),<sup>96</sup> it appears that earlier time frames, including the Middle Ages, were reinforced by another default perspective: reason alone. This is so despite the fact that reason alone, in either its antique or contemporary iteration, likely requires more faith than anything found in religion.<sup>97</sup>

Reason as an interpretive principle and normative guide, in order to be sustained collectively and communally, requires agreement on foundations and principles.<sup>98</sup> Given the current absence of such agreement, coherence may be at risk. Philosopher Alasdair MacIntyre demonstrates the difficulty (if not the impossibility) of solving moral disputes on the basis of reason alone by adroitly showing that the “key episodes in the history of philosophy were what fragmented and largely transformed morality.”<sup>99</sup> Evidently, fragmentation sparked Immanuel Kant and John Stuart Mill’s “attempt to develop accounts of morality in the name of some impersonal standard,” which was an “understandable response to the loss of shared practices necessary for the discovery of goods in common.”<sup>100</sup> Kant and Mill’s project is “doomed to failure, however, exactly because no such standards can be sustained when they are abstracted from the practices and descriptions that render our lives intelligible.”<sup>101</sup> Stanley Hauerwas explains that modern moral philosophy becomes part of the problem as a result of its stress on autonomy, like its corresponding attempt to free ethics from history because it “produces people incapable of living lives that have narrative coherence.”<sup>102</sup> And metaphysical univocity was at the center of this fracturing process that echoes what has been lost—the value of shared traditions and the importance of communal

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Scotus’s views on univocity while more thoroughly rejecting Aquinas’s way of speaking about God).

95. *See id.* at 180-81.

96. *Id.* at 182 (quoting MacIntyre).

97. JOHN GRAY, *THE SILENCE OF ANIMALS: ON PROGRESS AND OTHER MODERN MYTHS* 75 (2013) [hereinafter GRAY, *SILENCE OF ANIMALS*].

98. Harry G. Hutchison, *Affirmative Action: Between the Oikos and the Cosmos Review Essay: Richard Sander & Stuart Taylor, Jr., Mismatch: How Affirmative Action Hurts Students It’s Intended to Help, and Why Universities Won’t Admit It*, 66 S.C. L. REV. 119, 122 (2014) [hereinafter Hutchison, *Affirmative Action: Between the Oikos and the Cosmos*].

99. Stanley Hauerwas, *The Virtues of Alasdair MacIntyre*, *FIRST THINGS*, Oct. 2007, at 35, 36.

100. *Id.*

101. *Id.*

102. *Id.*



coherence—and replaced by autonomous life without any collective sense of the common good, a move that characterizes the onset of the immanent frame.<sup>103</sup> Still, this analysis implies that Tocqueville’s observations about American individualism—an outgrowth of the Protestant Reformation that reaches into its more contemporary secular manifestations,<sup>104</sup> and a part of the fracturing of America’s normative foundation—are at least partially accurate<sup>105</sup> (if, of course, we concede that metaphysical univocity got there first).

The appropriation of metaphysical univocity from its antiquarian origins in reason—a move that was accelerated by nominalism<sup>106</sup>—led to emotivism in a complex series of moves initiated by domesticating God’s transcendence and quickened with the seventeenth-century revolutions in philosophy and science, which were unexpectedly transformed by doctrinal disagreements among Christians in the Reformation era.<sup>107</sup> This development, as we have already seen in the prior paragraph, was bolstered by the fragmentation of philosophy and the fracturing of morality, which were consequences of the loss of shared practices.<sup>108</sup> A quintessential component of this ever-subdividing plinth—the contention that all beings, including God, are conceptually equivalent and univocal<sup>109</sup>—is an acknowledgment that some (most?) contemporary Westerners (including believers) have been drawn to Isaiah Berlin’s claim that “the capacity for choice, and for a self-chosen form of life . . . [is] itself constitutive of human beings.”<sup>110</sup> Westerners appear to be captivated by the opportunity to invent through the “exercise of the powers of choice a diversity of natures, embodied in irreducibly distinct forms of life containing goods

103. For a fuller description of the emergence and consequences of the immanent frame, see *infra* Part III.

104. HUNTER, *supra* note 73, at 26.

105. Cf. Greg Sisk, *Harry Hutchison: Responding to “How Not to Do Social Justice”*, MIRROR OF JUSTICE (Nov. 6, 2013), <http://mirrorofjustice.blogs.com/mirrorofjustice/2013/11/harry-hutchison-responding-to-how-not-to-do-social-justice.html> (describing Patrick Deneen’s analysis of Tocqueville and the individualist roots of Progressivism, and linking the advance of individualism to classical liberalism and its supreme emphasis on the cultivation of the individual as persons who were liberated from membership in something larger and from embedded ties to mediating groups and how, accordingly, individuals sought shelter in the government, and arguing that unmediated individualism reinforces the state).

106. GREGORY, *supra* note 34, at 38 (showing that William of Occam further radicalized Scotus’s view of God).

107. *Id.* at 37-38.

108. See, e.g., Hauerwas, *supra* note 99, at 36.

109. GREGORY, *supra* note 34, at 37.

110. GRAY, ISAIAH BERLIN, *supra* note 50, at 14.

(and evils) that are sometimes incommensurable and . . . rationally incomparable.”<sup>111</sup> Emerging under the banner of official government neutrality among competing moral/religious positions,<sup>112</sup> and proceeding to the adoption of secular neutrality as the prevailing orthodoxy,<sup>113</sup> this distinctly humanist process thus fashions the conditions necessary for increasingly rivalrous values to surface as each of us celebrate our autonomous selves on platforms that stoutly preempt the possibility of any adverse judgments of virtually any human behavior. Perhaps such values were discovered in *Griswold v. Connecticut*<sup>114</sup> (deploying substantive process analysis and finding a fundamental right to privacy in the shadow of penumbras of the Bill of Rights),<sup>115</sup> and acclaimed by the United States Supreme Court in *Planned Parenthood v. Casey*<sup>116</sup> (finding that the concept of liberty arising from a radical conception of human autonomy discovered in the Due Process Clause gave rise to the right of women to choose to have an abortion before viability).<sup>117</sup> This process of valorizing new values was reified in *Lawrence v. Texas*<sup>118</sup> (finding that the state law at issue furthers no legitimate state interest justifying its intrusions into the personal and private life of the individual),<sup>119</sup> and promoted by the Court in *Christian Legal Society v. Martinez*<sup>120</sup> (holding that Christian student groups at public universities do not have a First Amendment right to maintain a distinctive Christian identity if such identity can be seen as inconsistent with the ambitious egalitarianism that protects

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111. *Id.* at 14-15.

112. *See, e.g.*, STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 75 (1995) [hereinafter SMITH, FOREORDAINED FAILURE] (contesting the possibility of establishing a “neutral theory”).

113. *See* STEVEN SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM, *supra* note 16, at 136-38 (exposing the Latin West’s progression as evolving from strategies of coercively maintained religious orthodoxies to policies of religious toleration and, thence, to the dominant modern position of secular neutrality).

114. *Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1965).

115. *Id.* at 484.

116. *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (stating: “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”).

117. *Id.* at 846.

118. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

119. *Id.*

120. *Hastings Christian Fellowship v. Martinez*, 561 U.S. 661, 689 (2010).

individual dissenters).<sup>121</sup> Advanced as part of an insistent quest for secular principles,<sup>122</sup> these cases further a particular (*non-neutral*) conception of the “good” and the good life.<sup>123</sup> Doubtlessly, such cases, fused perhaps with “grandiose narcissism,”<sup>124</sup> imply that human life preoccupied by the mind inheres solely in its imaginative capacity unmoored to any teleology. The widespread cultural preoccupation with this idea summons Jean-Paul Sartre’s memorable claim that we are all “condemned to be free.”<sup>125</sup> Against this existential foreground, the nation’s pursuit of unrestrained and detached individualism spurs conflict and permits many individuals and groups to reply in the negative to a particularly salient anthropological question: Can we know the nature of human persons?<sup>126</sup> Univocity contributed to this process and fueled the rejection of Aristotelian architecture, leaving the moral virtues marooned, perhaps, as little more than annoyances that objectionably constrained human desires.<sup>127</sup>

Since many Americans, on one hand, are waiting but do not know what they are waiting for, and since, on the other, there are few principles that we all share, this joint move fashions an inchoate intersection that produces a deeply incoherent political culture extending beyond the conflict between the spirit of liberty and the spirit of religion.<sup>128</sup> This clash of undeveloped feelings and ineffably imprecise beliefs, as McWilliams shows, is exemplified by the fact that “Americans are unquestioning in their belief in equality yet apparently inclined to accept inequalities greater than those in any industrial

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121. See e.g., Michael Stokes Paulsen, *Disaster: The Worst Religious Freedom Case in Fifty Years*, 24 REGENT U. L. REV. 283, 284-86 (2012) (describing the holding and its implications).

122. See generally SMITH, FOREORDAINED FAILURE, *supra* note 112, at 78 (describing the judicial opinions as proclaiming neutrality).

123. See e.g., Helen M. Alvaré, *Same-Sex Marriage and the “Reconceiving” of Children*, 64 CASE W. RES. L. REV. 829, 829-30 (2014) (showing how the focus on the good life for adults has been facilitated within the domain of marriage by a judicial reversal of 120 years of constitutional family law decisions issuing from the Supreme Court, which previously focused on the future of children within both society and family law (the common good) in favor of individuals’ interest in state marriage recognition).

124. Richard W. Garnett, *Righting Wrongs and Wronging Rights*, FIRST THINGS, Oct. 2008, at 48, 48 (reviewing Nicholas Wolterstorff, *Justice: Rights and Wrongs* (2008)).

125. *Jean-Paul Sartre: Freedom Fighter*, ECONOMIST, Feb. 21 2015 at 82, 82-83 (reviewing Thomas R. Flynn, *Sartre: A Philosophical Biography* (2015)).

126. Benedict M. Ashley, O.P., *A Philosophical Anthropology of the Human Person: Can We Know the Nature of Human Persons?*, in RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW 52, 52 (Michael A. Scaperlanda & Teresa Stanton Collett eds., 2007).

127. GREGORY, *supra* note 34, at 181.

128. MCWILLIAMS, *supra* note 84, at 55.

country.”<sup>129</sup> Further drift toward incoherence and paradox is expressed in a mounting number of inconvenient truths,<sup>130</sup> including signs disclosing that “although talk of equality . . . and rights permeates the West, evidence surface[s] showing ‘inequality in America at the start of the twenty-first century is greater than in the slave-based economy of imperial Rome in the second century,’”<sup>131</sup> and “[i]f belief in human rationality was a scientific theory [,] it would long since have been abandoned.”<sup>132</sup>

Equally apparent is the reality that political culture, as currently manifest, “is lacking in rigor and loaded with rancor,”<sup>133</sup> an outcome that has been conceivably provoked by recent Supreme Court decision-making.<sup>134</sup> This outcome (a society lacking in rigor and loaded with rancor) is inspired by the disavowal by commentators of commonly held and formerly dominant premises such as the teleological view of human nature, virtue-centered morality,<sup>135</sup> and the conviction that God is radically and irreducibly distinct from creation.<sup>136</sup> Although these

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129. *Id.*

130. Hutchison, *Affirmative Action: Between the Oikos and the Cosmos*, *supra* note 98, at 122-23. Inconvenient truths include the following: (1) although the pursuit of diversity has been lauded by universities and by the Supreme Court as a compelling interest that can withstand an Equal Protection Clause challenge, the nation’s public schools are increasingly characterized by de facto segregation; and (2) “while human rights are all the rage within the hallowed halls of academia, the forces of xenophobia are on the march throughout much of the Western world.” *See id.*

131. Hutchison, *Affirmative Action: Between the Oikos and the Cosmos*, *supra* note 98, at 122-23

132. GRAY, *SILENCE OF THE ANIMALS*, *supra* note 97, at 72.

133. GREGORY, *supra* note 34, at 15-16.

134. *See, e.g.*, Marci A. Hamilton, “*Hobby Lobby*” Yields More Rancor as Wheaton College Queues up to Deny Contraceptive Coverage to Its Female Employees, VERDICT (July 10, 2014), <http://verdict.justia.com/2014/07/10/hobby-lobby-yields-rancor-wheaton-college-queues-deny-contraceptive-coverage-female-employees> (decrying the fact that after the male Catholic members of the Supreme Court declared that closely held corporations have souls and therefore can use their faith to deprive their female employees of reproductive health coverage, other organizations would seek an exemption, and stating that the *Hobby Lobby* majority actually played games with accommodation).

135. *See* GREGORY, *supra* note 34, at 181 (suggesting that in seventeenth and eighteenth-century natural philosophy, Aristotelian final causes were rejected and replaced by a conception of nature as a universal mechanism of efficient causes that encompassed human beings and thus subsumed morality, but the elimination of any natural teleology from human life rendered incoherent the notion of moral virtues and vitiated the possibility of reaching a consensus of the constitutive ingredients of the human (common?) good).

136. *Id.* at 30 (referencing the Christian view that goes far beyond a distinction between monotheism and polytheism wherein God is radically distinct from the universe as a whole, which he did not fashion by ordering anything already existent but rather created entirely *ex nihilo* as an act of deliberate love, a viewpoint that sees God as incomprehensible in all things and above all things).

disowned premises were largely connected with medieval Christianity, and whilst scholar Brad Gregory lists a plethora of contemporary scientists and others who have succeeded in reconciling science and religion in ways that Max Weber found incompatible in the early part of the twentieth century,<sup>137</sup> this anaphora of formerly vibrant foundations has crumbled in the face of history. Despite various attempts to privilege or adopt new orthodoxies,<sup>138</sup> this outcome—the implosion of normative foundations—is compounded because contemporary commentators, by and large, have proved unable or unwilling to settle or even begin to converge on any framework to take the place of the previously ascendant Aristotelian moral tradition embedded in the medieval age.<sup>139</sup> Further, this extensive progression spawned an enormously wide range of incompatible truth claims pertaining to human values, aspirations, norms, morality, and meaning as a hyper-pluralism of religious and secular commitments marks the early twenty-first century.<sup>140</sup> This is so despite the large probability that our current civilization is road mapped by two things: (A) individualist consumerism,<sup>141</sup> which depends “on a widely embraced Romantic and Post-Romantic conception of the individual—not an embodied soul called by God to flourish in a family within a community through the exercise of virtues, but an emotive ‘self’ that constructs itself as it pleases in the self-chosen relationships it makes and breaks by exercising its right to do so through the desire for and acquisition of material things and their contribution to its self-construction of identity,”<sup>142</sup> and (B) ironically enough an “unslaked craving for transcendence.”<sup>143</sup> This latter possibility has generated faiths as distinctive as “Sheilaism”<sup>144</sup> and the adoption of a personal

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137. *Id.* at 26-28 (listing a number of scientists and others who agree with Gregory’s proposition).

138. *See, e.g.,* SMITH, *FOREORDAINED FAILURE*, *supra* note 112, at 74-75 (explaining how Kathleen Sullivan privileges the secular establishment under which religious freedom, for example, encompasses only “the exercise of religious liberty insofar as compatible with the establishment of the [religious] public order.”). In truth, of course, any privileging of orthodoxy is an inescapable fact of any theory of religious freedom. *Id.* at 74.

139. GREGORY, *supra* note 34, at 11 (referencing Alastair MacIntyre).

140. *Id.*

141. *Id.* at 10.

142. *Id.* at 292.

143. *Id.* at 10.

144. ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 97 (2010) (quoting Robert Bellah’s description of one example of a self-created faith in oneself, defined by trying to love oneself and be gentle to oneself while taking care of each other).

religious creed premised on the irresistible perception that “Kozy Kitten” cat food contributes to one’s energy<sup>145</sup> as part of an effusive paean of self-discovery nurtured by society’s capitulation to the “immanent frame.” Cultivated by a climate of opinion emphasizing personal truths,<sup>146</sup> religious and other types of certainty may erode and, as a consequence, a certain degree of religious and other kinds of relativism appears to be inevitable.<sup>147</sup> This dystopian repercussion corresponds with Joseph Cardinal Ratzinger’s insistence that relativism has become the religion of modern man,<sup>148</sup> but even if true, this development will nonetheless require the United States Supreme Court to take sides and perhaps rely on unarticulated and hidden background assumptions that depend less on normative principles (particularly ones we can agree to) and more on construal.<sup>149</sup>

As a consequence of these ramifications, three deductions occupy center stage. First, as Alasdair MacIntyre observes, the widespread moral default in contemporary Western societies, including the United States, is emotivism: an ethic of subjective, feelings-based, personal preference, which only intensifies society’s irresolvable disagreements.<sup>150</sup> Although this default (emotivism) was preceded and sustained by an asserted allegiance to another—reason—the oscillating traffic between reasoning and a fundamentally emotive viewpoint is perhaps illustrated by Justice Kennedy’s opinion in *United States v. Windsor*, which appears to translate an emotion into a legal principle.<sup>151</sup> Second, it is likely that both the spirit of liberty and the move toward tolerance<sup>152</sup> gained much of their currency through

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145. *Brown v. Pena*, 441 F. Supp. 1382, 1384 (1977).

146. PUTNAM & CAMPBELL, *supra* note 144, at 97.

147. *Id.*

148. See Marcello Pera, *Relativism, Christianity and the West*, in WITHOUT ROOTS: THE WEST, RELATIVISM, CHRISTIANITY, ISLAM 22-23 (Michael F. Moore trans., 2006) (citing Cardinal Ratzinger).

149. See *infra* Part III.C.

150. GREGORY, *supra* note 34, at 182.

151. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (finding that DOMA reflected little more than a “bare . . . desire to harm” same-sex couples and was thus an invalid legislative purpose given the Constitution’s guarantee of equality); see also, Helen M. Alvaré, *A “Bare Purpose to Harm”? Marriage and Catholic Conscience Post-Windsor*, SSRN, <http://ssrn.com/abstract=2433741>.

152. The move toward tolerance can be seen in James Madison’s argument in his *Memorial and Remonstrance Against Religious Assessment* (1785) (wherein he argued that torrents of blood have been spilt in the old world by vain attempts of the secular arm to extinguish religious discord by proscribing all difference in religious opinion) (quoted in MCCONNELL, GARVEY & BERG, *supra* note 26, at 2); see also, MCCONNELL, GARVEY & BERG, *supra* 26, at 2 (suggesting that increased

changes and reform efforts that commenced during the medieval age and saw the emergence of metaphysical univocity<sup>153</sup> within the religious as opposed to the secular realm. Third, as a consequence of the second, it is doubtful that commentators can necessarily define the place of religious liberty in a pluralized setting by depending on Tocqueville's thesis that the nation's dual parentage in biblical religion and secular philosophy explains the nation's current conflicts. This is so both because Tocquevillian analysis, arguably, has insufficient explanatory reach and because it sees secularism as a distinct occurrence standing apart from its origins in developments that are derived from religion itself.

In fairness, it is debatable whether contemporary observers responding to our secular age fare much better. For example, the efforts of serious commentators like Michael Gerson and Peter Wehner<sup>154</sup> to fashion a new model of political theology emphasizing public engagement by believers in the face of growing skepticism—doubtlessly reacting to the politically arbitrary and theologically inept efforts of members of believing communities to respond to secularization—is likely to provide a feeble platform (for believers) to reclaim an influential place in society. Or consider the admirable efforts of Michael Scaperlanda & Teresa Collett, who offer in the spirit of strong pluralism a reintroduction to the “two-thousand-year-old Catholic intellectual tradition, which produced the ‘first modern Western Legal system’ [and as such] has retained its spiritual and intellectual vibrancy and can therefore offer compelling insights into the most serious issues facing the United States today.”<sup>155</sup> Asserting that their approach transcends current ideological battles, their solution is apparently “[r]ooted in faith and reason, revelation, and natural law.”<sup>156</sup> It is doubtful, however authentic their pluralism and inclusive their approach may be, that faith, reason, revelation, and natural law—a process linked ultimately to Thomas Aquinas and Aristotelian

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tolerance has been fueled by increasing religious diversity, by the notion that coerced faith is not valid, and by increased secularization).

153. GREGORY, *supra* note 34, at 5-6.

154. See generally MICHAEL GERSON & PETER WEHNER, *CITY OF MAN: RELIGION AND POLITICS IN A NEW ERA* (2010). For a critique of Gerson and Wehner's book, see generally Harry G. Hutchison, *Book Review*, 52 *J. CHURCH & ST.*, 1, 128 (2011) [hereinafter Hutchison, *Book Review*].

155. Michael A. Scaperlanda & Teresa Stanton Collett, *Introduction*, in *RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW* 1, 8 (Michael A. Scaperlanda & Teresa Stanton Collett, eds., 2007).

156. *Id.*

teleology—can be seen as persuasive in a world that disbelieves the possibility or the value of transcendence.

In part, the inability of believers, even if informed by Tocqueville, Gerson & Wehner, or Scaperlanda & Collett, to recapture influence is a consequence of many things, including the inverse relationship between the ballooning size and scope of government<sup>157</sup> and the reduction in the scope and credibility of religion in the public square. This latter occurrence, part of the multiplication of skepticism, likely represents the ongoing adoption of the immanent frame, a topic explored in the next section. Although I have earlier alluded to some of these trends and themes, this overall process correlates with the forging of a society wherein human selfishness and solipsism<sup>158</sup> have waxed and self-control, community, and self-reliance have waned,<sup>159</sup> thus fostering a nation of narcissists who are unable to control their own impulses and desires.<sup>160</sup> This nation of narcissists turns out to be one of Ponzi schemers, gamblers, and speculators, one wherein household debt rises alongside public debt as bankers, pensioners, automakers, and unions all compete to empty the public trough.<sup>161</sup> This “yields a nation wherein limitless appetites spur unlimited government.”<sup>162</sup> Since this rise in the size and scope of government<sup>163</sup> reflects the fact that the “State has permeated civil society to such an extent that the two are mostly indistinguishable,”<sup>164</sup> the odds of escaping conflicts between religious groups and individuals on one hand and the state on the other are terribly low. As the state grows in size, the odds shift further in favor of the state and against religious institutions and individuals in areas of conflict. This trend intensifies when individuals liberated from membership in mediating groups seek

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157. Hutchison, *Book Review*, *supra* note 154, at 128.

158. Solipsism, or the view that “I alone exist,” is apparently an epistemological position holding that knowledge of anything outside of one's own mind is unsure; this move leads to the conclusion that the external world and other minds cannot be known and might not exist outside of one's mind. *See, e.g.*, J. P. MORELAND & WILLIAM LANE CRAIG, *PHILOSOPHICAL FOUNDATIONS FOR A CHRISTIAN WORLDVIEW* 388 (2003).

159. DOUTHAT, *supra* note 77, at 235.

160. *Id.* (providing a comprehensive demonstration that within the culture, the prevailing view is that only what we do here and now matters).

161. *Id.*

162. Hutchison, *Lochner*, *Liberty of Contract*, *supra* note 10, at 424.

163. *See generally* Brian M. Riedl, *FEDERAL SPENDING BY THE NUMBERS 2010* (Heritage Special Report, SR-78, 2010), [http://thf\\_media.s3.amazonaws.com/2010/pdf/sr0078.pdf](http://thf_media.s3.amazonaws.com/2010/pdf/sr0078.pdf) (providing some perspective on the rise in government spending during the period from 1990-2010).

164. HUNTER, *supra* note 73, at 154.



forms of state-sponsored protection from the uncertainty that arises from the vagaries of life in our globalized world,<sup>165</sup> a process that spurs renewed conflict between the state and mediating institutions like churches, church schools, and hospitals. Thus, the acclaimed conflict between individualism and the collective represents a false dichotomy because, in reality, unmediated individualism contributes to loneliness<sup>166</sup> and reinforces the state.<sup>167</sup> This claim is reinforced by noting Robert Nisbet's intuition:

[T]he great tension of modernity—the concurrent rise of individualism and collectivism, and the struggle between the two for mastery—is really no tension at all. It seemed contradictory that the heroic age of nineteenth-century *laissez faire*, in which free men, free minds, and free markets were supposedly liberated from the chains imposed by throne and altar, had given way so easily to the tyrannies of Mussolini, Hitler, Stalin, and Mao. But it was only a contradiction . . . if you ignored the human impulse toward community that made totalitarianism seem desirable—the yearning for a feeling of participation, for a sense of belonging, for a cause larger than one's own individual purposes and a group to call one's own.<sup>168</sup>

Risking repetition, the inception of this process commenced before Tocqueville's visit to the New World.<sup>169</sup> Indeed, this ongoing progression reflects ramifications from events originating well before the founding of America, currents that have been transmuted into new forms of consumerism,<sup>170</sup> individualism, and self-celebration in contemporary times. The next two subsections consider religious freedom in the context of the Latin West's fateful turn to the market and reflect the appropriation of univocity within Western universities as part of the pursuit of secularized knowledge. Both developments fortify the above-referenced factors that may make it difficult to attain religious freedom in our secular age.

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165. Sisk, *supra* note 105, at 1.

166. Rebecca Harris, *The Loneliness Epidemic: We're More Connected Than Ever - but Are We Feeling More Alone?* INDEPENDENT (Mar. 31, 2015), <http://www.independent.co.uk/life-style/health-and-families/features/the-loneliness-epidemic-more-connected-than-ever-but-feeling-more-alone-10143206.html?printService=print>.

167. Sisk, *supra* note 105, at 1.

168. Ross Douthat, *The Quest for Community in the Age of Obama*, IMAGINATIVE CONSERVATIVE (Apr. 11, 2015), <http://www.theimaginativeconservative.org/2015/04/the-quest-for-community-in-the-age-of-obama.html> [hereinafter Douthat, *Quest for Community*] (reviewing Nisbet).

169. See Tessitore, *supra* note 15 at 66-67 (describing this process).

170. See *infra* Part II.B.

*B. The Latin West Capitulates to the Market*

It is commonplace that human selfishness has been a permanent feature of human life. During the Middle Ages, the devout constantly created new strategies to deal with material things and money in order that human behavior would serve the pursuit of salvation and the common good.<sup>171</sup> One of the intellectual achievements of scholastic theologians was “in seeing how money, despite its dangers, fit within Christianity’s theology of creation and teleological ethics.”<sup>172</sup> Among the seven biblically-based “corporal acts of mercy so emphasized in the late Middle Ages, at least four—feeding the hungry, giving drink to the thirsty, clothing the naked, and burying the dead—ordinarily involved some financial expenditure.”<sup>173</sup> Spending money could be virtuous and could also be seen as such, both communally and individually. Then came the Reformation, but reformers like Luther, Calvin, and others preached restraint when it came to acquisitiveness<sup>174</sup> and the “strict subordination of material things” to that end which God himself intended.<sup>175</sup> Today, “[c]apitalism and consumerism have deeply shaped and continue to transform the Western world. Markets make them symbiotic and mutually reinforcing.”<sup>176</sup> The direct and even indirect influence of Protestantism on the emergence of modern capitalism and consumption was probably not nearly as consequential as the “concrete, religio-political violence between magisterial Protestant and Catholic regimes, from the conflicts between Swiss cantons in the late 1520s through the Thirty Years War and England’s civil wars during the 1640s.”<sup>177</sup> Although this history continues to draw fire from Justices of the United States Supreme Court as a basis for questionable religious liberty contentions,<sup>178</sup> Gregory agrees that the Reformation,

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171. GREGORY, *supra* note 34, at 251.

172. *Id.* at 249.

173. *Id.* at 248.

174. *Id.* at 266-67.

175. *Id.*

176. *Id.* at 235.

177. *Id.* at 272.

178. *See, e.g.,* *Zelman v. Simmons-Harris*, 536 U.S. 639, 686 (2000) (Stevens, J., dissenting) (contending that his opposition to an Ohio state school Pilot Project involving religious schools is animated by his “understanding of the impact of religious strife on the decisions of our forebears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another.”). Of course, these claims raise two questions regarding

standing alone, did not cause a cultural capitulation to market capitalism.<sup>179</sup> Still, Reformation-era ideas and religious groupings linked to the onset of univocity precipitated and participated in this process.

Consumerist capitalism can be placed “at the center of the decline in the American culture of care, and the deleterious impact of this slide on women, families, and human intimacy.”<sup>180</sup> Reflecting the fact that consumption, no less than production, was brought under scientific management—the management of desire<sup>181</sup> became a correlate of the poisonous separation of “thinking from doing,” and the degradation of work and humanity that was previously grounded in tradition, craft and experience.<sup>182</sup> “Thus, there came to be marketers who called themselves ‘consumption engineers’ in the early decades of the twentieth century.”<sup>183</sup> Representing the transmutation of the old Puritan moralism, the early twentieth century saw the moral legitimization of spending and the reversal of the moral valence of debt and spending wherein the multiplication of wants (and accompanying debt) becomes not a sign of corruption but part of the civilizing process.<sup>184</sup> The adverse effects of this consumerist conquest fuels a greater appetite for government and government programs designed to alleviate corresponding economic disadvantage. This inevitably creates space for more and more collisions between the state and religion, an outcome, which reflects the liberal penchant for centralizing authority and forecast the potential abuse of power.<sup>185</sup> “[M]odern capitalism and consumerism cannot be understood apart from the formal ethics of rights and individual freedom that are politically protected by modern liberal states. Modern liberalism,

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Justice Stevens’ analysis: (A) “Does his evolving worldview, social analysis, and moral vision enable us to understand and endure this ‘first century of world wars’ . . . in which nearly 200 million fellow human beings have been murdered in the name of some pernicious ideology?” and (B) since those deaths were unattached to religious disputes, does Justice Stevens subordinate those deaths to his worldview? Harry G. Hutchison, *Liberal Hegemony? School Vouchers and the Future of the Race*, 68 MO. L. REV. 559, 612 (2003) [hereinafter Hutchison, *Liberal Hegemony*].

179. GREGORY, *supra* note 34, at 272-73.

180. *Id.* at 237.

181. MATTHEW B. CRAWFORD, *SHOP CLASS AS SOULCRAFT: AN INQUIRY INTO THE VALUE OF WORK* 43 (2009).

182. *See, e.g., id.* at 37-53.

183. *Id.* at 43.

184. *Id.* at 44.

185. *Id.* at 45.

individualism, and capitalism are profoundly intertwined,”<sup>186</sup> a process that, as Muhammad anticipated more than a millennium ago, undermines the communal life and needs of the vulnerable.<sup>187</sup> Consumerism, or what Gregory calls the “goods life,” “has been manufactured in a double sense: it has been concocted ideologically, and stuff has been fabricated in ever-expanding ways in tandem with the extraordinary malleability and manipulability of human desires.”<sup>188</sup> As a consequence, “[p]ractices once regarded as dangerous and immoral because detrimental to human flourishing and to the common good have in a dramatic reversal been redubbed the very means to human happiness and the best sort of society.”<sup>189</sup> “This is the Western world’s fundamental shift from the distant past with respect to capitalism and consumerism”<sup>190</sup> as the pursuit of today’s happiness has replaced either the prospect of eternal rewards or the value of interest earned on deferred gratification as the very foundation of life. This roiling tide “affects politics, morality, religion, education, marriage, families, and every other domain of human life in what Joyce Appleby has aptly called a ‘relentless revolution’ characterized by ceaseless change.”<sup>191</sup> This shift appears to reify John Stuart Mill’s pursuit of continual experimentation as a way to nurture varieties of individual flourishing.<sup>192</sup> Most of these currents are traceable to the initial appropriation of metaphysical univocity, the continued appropriation of this idea during the Reformation, and the emergence of a truce between warring denominations that ended decades of conflict and was premised on an agreement emphasizing that “religious beliefs no longer mattered at all in the pursuit of the goods life.”<sup>193</sup> Congruent with this contention, Gregory shows that:

Seventeenth- and eighteenth-century ideologies of acquisitiveness were not based on discoveries of previously unrecognized, timeless truths about human nature. Rather they relied on particular, historically emergent,

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186. GREGORY, *supra* note 34, at 242.

187. KAREN ARMSTRONG, A HISTORY OF GOD: THE 4000-YEAR QUEST OF JUDAISM, CHRISTIANITY AND ISLAM 160 (1993) (describing Muhammad’s belief that the cult of self-sufficiency leads to the disintegration of the community or tribe).

188. GREGORY, *supra* note 34, at 242.

189. *Id.*

190. *Id.*

191. *Id.*

192. GRAY, ISAAH BERLIN, *supra* note 50, at 59.

193. GREGORY, *supra* note 34, at 243.

tendentious claims about human beings and the natural world. Their protagonist rejected competing claims by Reformation-era Catholics *and* Protestants about the ways in which Christians ought to relate to material things, money and God's creation. Yet ironically, Christians supra-confessional adoption of practices *consistent* with the new ideology of acquisitiveness was a sine qua non for the transformation of late medieval capitalist practices into modern capitalist societies . . . [as] religious persecution understandably led most Catholics and Protestants alike eventually to welcome the free exercise of individual conscience with respect to religious belief and worship. By privatizing religion and separating it *from* society, individual religious freedom unintentionally precipitated the secularization of religion *and* society.<sup>194</sup>

While the privatization of religion and its separation from society contributed to the conditions necessary for religious freedom to be eventually subverted by itself,<sup>195</sup> in fairness to the seventeenth and eighteenth centuries, notions of profit, capitalism, and the monetization of life afflicted the Latin West much earlier: during the eleventh and twelfth centuries.<sup>196</sup> Some of the most committed Christians of this era fled from the moral effects of money, thus giving impetus to an effort to establish monasteries far from cities.<sup>197</sup> As a general matter, the trends that Gregory identified coincided with the way in which the individualization of religious and other preferences, and the partitioning of religion from the rest of life,<sup>198</sup> paved the way for secularization to become the idiosyncratic fruit of religious innovation. The market eventually “displaced confessional churches as the junior partner alongside states in the public exercise of power.”<sup>199</sup> Today, the terms of this partnership have been dramatically reversed, placing markets in the senior position in response to the thoroughly globalized markets that are super-charged with computer algorithms and credit default swaps, a development that has the potential to bring government leaders, governments, and the world down.<sup>200</sup> This move is complemented by the insights of “Scottish Enlightenment thinkers

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194. *Id.* at 242-43.

195. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM, *supra* note 16, at 168 (arguing that religious freedom, as currently understood, is subverting itself perhaps through commitments to equality and neutrality etc.).

196. GREGORY, *supra* note 34, at 250.

197. *Id.*

198. *Id.* at 275.

199. *Id.* at 283.

200. *Id.* at 284.

such as David Hume, James Steuart, John Millar, and Adam Smith, [who] observed that the behavioral constancy of political subjects devoted to material acquisitiveness made them more predictable and less prone to being moved by other disruptive passions, which in turn made the state internally more stable.”<sup>201</sup> Hence, the state has every incentive to stake its claim as an engine of material (as opposed to moral and spiritual) advancement. Consistent with this intuition, “Western European Christians, whose leaders in the Reformation era condemned avarice across confessional lines, *themselves created modern capitalism and consumption practices antithetical to biblical teaching even as confessionalization was creating better informed [and] more self-conscious Reformed Protestants, Lutherans and Catholics.*”<sup>202</sup> This progression leaves everyone free to choose a self-absorbed, consumerist, self-constructed life fortified by the knowledge that government stands ready to protect our right to do so.<sup>203</sup> These observations must be balanced by noting that the market model of culture is not, in fact, a free market at all, for human desire is rooted in a normative framework; the structures of human desires are framed and shaped by historical and sociological forces exogenous to the market, even if it is equally true that things created are not culturally, morally, or religiously neutral.<sup>204</sup> If this intuition is valid, the demand for contraceptive coverage—a claim stoutly defended by the federal government in *Hobby Lobby*<sup>205</sup> as a form of market choice—can be understood as nothing more or less than a consumer good with moral and religious consequences. Thus, when and if these various goods that are part of the “goods life” are analyzed by jurists and other observers who proclaim their commitment to neutrality, it becomes equally possible that such observers are (perhaps unintentionally) proclaiming their commitment to incoherence.

These maneuvers are linked to a pronounced commitment within the political arena to programs and policies that advance human choice predicated on the notions of human progress, personal autonomy, and freedom in such arenas as abortion and civil rights.<sup>206</sup> Systematically

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201. *Id.* at 283.

202. *Id.* at 288.

203. *Id.* at 296.

204. HUNTER, *supra* note 73, at 30.

205. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

206. See, e.g., Harry G. Hutchison, *Choice, Progressive Values, and Corporate Law: A Reply to Greenfield*, 35 DEL. J. CORP. L. 437, 454-55 (2010) [hereinafter Hutchison, *Choice, Progressive Values*] (critiquing Progressivism).

appreciated, consumerism and its consequent elevation of choice corresponds with the pursuit of equality and the uncritical acceptance of theories that posit the primacy of the individual and the neutral as the locus of certainty,<sup>207</sup> even if the naturalness and neutrality of this approach can be called into question by impartial observers.<sup>208</sup> The formation and thence the appropriation of metaphysical univocity in the Latin West provides a basis for contesting the notion that scientific materialism presumptively represents the unveiling and discovery of modernity<sup>209</sup> as part of a supercessionist narrative that leads inevitably to progress. Rather, such stories mask the fundamental *invention* of modernity and the plausible appeal of exclusive humanism that undermines the importance of religion in the West.<sup>210</sup> And yet this invention arguably had its origin in protean, liquid, and variegated currents located within, not outside of, religion.<sup>211</sup> Consistent with this intuition, the framework of America's initial constitutional commitments "reflected a recovery [and] adaptation . . . under the fresh circumstances of the New World, of themes that went back centuries—of the medieval theme of *libertas ecclesiae* (freedom of the church) and the more recently evolved corollary theme of freedom of the 'inner church' of conscience."<sup>212</sup> "And the Enlightenment, far from repudiating Christianity wholesale, actually served as a conduit by which these [freedoms of the church and conscience] were imported in the creation of the new Republic."<sup>213</sup> This overall process represents the culture's capitulation to the market, a move that is complemented by corresponding moves within the domain of epistemology. This is the issue to which I now turn.

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207. JAMES SMITH, *supra* note 42, at 98-99 (explaining, from Charles Taylor's perspective, how modern, foundationalist epistemology operates as a closed world structure that, in the end, depreciates inferences toward the transcendent, illustrated by the claim that if knowledge is knowing something outside of my mind, then the transcendent would seem to be as far away as one could get, a process that, when completed, undermines the pursuit of transcendence).

208. *Id.* at 99.

209. *Id.*

210. *Id.* at 101.

211. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM*, *supra* note 16, at 142-52.

212. *Id.* at 7.

213. *Id.*

C. *Univocity: Propelling the Pursuit of Secularized Knowledge?*

In the Latin West “today, research universities are the only institutions dedicated to making and transmitting knowledge across the full range of human inquiry.”<sup>214</sup> “[R]esearch universities have been the centrally important Western institution in the definition, pursuit, and transmission of knowledge since the later nineteenth century.”<sup>215</sup> On Gregory’s account, “[t]he two most influential expressions of modern Western rationality have been foundationalist philosophy and the natural sciences. . . .”<sup>216</sup> “Regardless of the academic discipline, knowledge in the West is considered secular by definition.”<sup>217</sup> “Its assumptions, methods, content, and truth claims are and can only be secular, framed not only by the logical demand of rational coherence, but also by the methodological postulate of naturalism, and its epistemological correlate, evidentiary empiricism.”<sup>218</sup> And yet, within this highly specialized domain of the pursuit and discovery of new knowledge, “there is almost no attempt by anyone to see how the kinds of knowledge thereby gained in different disciplines might fit together, or whether the disciplines’ respective, contrary claims and incompatible assumptions might be resolved.”<sup>219</sup> By contrast, knowledge within the Middle Ages and within monasticism emerging out of the Christian tradition “was not anti-intellectual, but it was resolutely teleological and therefore deliberately selective.”<sup>220</sup> On this view, “knowledge of the natural world was good, just as literacy and knowledge of rhetoric, grammar, and logic were good if they served the common good of virtuous, shared life and participatory knowledge . . . orientated toward the final good of eternal salvation.”<sup>221</sup> Just “[l]ike politics and economic behavior, knowledge was embedded within a teleological ethics that had a supernatural end.”<sup>222</sup> The potential for the different sorts of knowledge acquired to fit together during the early fourteenth to early sixteenth centuries, for example, “would depend on

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214. GREGORY, *supra* note 34, at 298.

215. *Id.*

216. *Id.* at 377.

217. *Id.* at 299.

218. *Id.*

219. *Id.* at 300.

220. *Id.* at 311.

221. *Id.*

222. *Id.*



intellectual give-and-take within a shared framework – just as it had in the thirteenth century, when medieval Christianity’s institutionalized worldview had enabled [an] enormous expansion of knowledge with the scholastic absorption of the Aristotelian corpus.”<sup>223</sup> Spurred by rejection of the authority of the Roman church, the Reformation eliminated any shared framework for the integration of knowledge and set the stage during the midst of nineteenth-century positivism and naturalism in the sciences to deliberately exile theology from research universities, replacing it with an increasingly marginal discipline: the study of religion among all the rest that constituted secular knowledge-making.<sup>224</sup> “Christian doctrinal pluralism set the Western world on an unintended trajectory in which knowledge was secularized as faith was subjectivized.”<sup>225</sup> God’s truth could no longer be taken for granted.

The secularization of knowledge proceeded during the sixteenth and seventeenth centuries, roughly the same time as when religious-political conflicts proliferated during the Reformation era.<sup>226</sup> They “had proven hugely expensive, massively destructive, and conspicuously inconclusive.”<sup>227</sup> Gregory shows that “[t]he sixteenth century would be different.”<sup>228</sup> Reacting to the conflicted state of affairs and seeking something less controversial than the possession of God’s truth sparked an interest in knowledge that might prove less troublesome than religion, and accordingly, new institutions for knowledge-making were spawned that presupposed a self-conscious distinction between theology and scientific knowledge.<sup>229</sup> As theology’s importance declined, universities began to minimize theology and maximize their service to the state by concentrating their efforts on law and philosophy.<sup>230</sup> Utility, usefulness, efficiency, and empirical observation assumed prominence, preparing an ever-widening pathway for the Enlightenment to assume center stage.<sup>231</sup> This primed faculty and students to emphasize the full self-development of the individual and the subjective realization of unfettered freedom and autonomy; thus, the modern university during

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223. *Id.* at 325-26.

224. *Id.* at 326-27.

225. *Id.* at 327.

226. *Id.* at 340-41.

227. *Id.* at 341.

228. *Id.* at 326.

229. *Id.* at 341.

230. *Id.* at 342-43.

231. *Id.* at 347.

the eighteenth and early nineteenth centuries, originally hatched from a Romantic vision of research, now became an adjunct to student and faculty self-realization.<sup>232</sup>

What, if anything, does this have to do with the pursuit of religious liberty? Virtually everything. “In sum, the hegemonic features of modern, liberal Western states—the political protection of the individual rights of autonomous consumers to construct themselves as they please amid wall-to-Walmart, post-Fordist capitalism—contribute powerfully albeit indirectly to the secularization of knowledge by sapping the taproot of Catholic theology: the shared practice of virtues that constitutes communities of faith and is the source of its experiential knowledge.”<sup>233</sup> The secularization of knowledge, unleashed by the relentless pursuit of personal autonomy, destabilized the idea that knowledge and its pursuit reflect shared normative assumptions and contributed to the dismissal of theology and tradition as a source of knowledge, thus setting the stage for the belief that religion was little more than the pursuit of a private hobby. This process has reached its apotheosis in the Latin West today and thus undermines the contemporary pursuit of religious liberty, particularly when built on individuated religious practice; further, it threatens religious liberty contentions built upon a communally shared practice. But if Brad Gregory’s analysis is correct, then this epistemological wound to religious liberty was largely self-inflicted and set the stage for the emergence of the immanent frame.

### III. THE EMERGENCE OF THE IMMANENT FRAME

The absence of agreed-upon background principles and beliefs, coupled with reliably seismic (if unintentional) changes that supported freedom within the “church” (broadly understood to include established churches) produced deists and providentialists rather than individuals who were opposed to or who sought freedom from religion. This move, generated the conditions necessary to furnish Westerners with the materials required to create “a kind of intellectual Pelagianism” that says: “We can figure this out without assistance.”<sup>234</sup> Furthering the onset of secularism, these currents posited that God

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232. *Id.* at 348-49.

233. *Id.* at 364.

234. JAMES SMITH, *supra* note 42, at 50.

plays no discernible role or function in the lives of his creatures.<sup>235</sup> After largely jettisoning the notion of God as an incomprehensible actor who intervenes in history, many have accepted the notion of God as the architect of an impersonal order, suggesting that many of us are now Masons.<sup>236</sup> This development led Charles Taylor to intuit that “providential deism” opened the door to exclusive humanism featuring immanentization and the relocation of significance within the individual.<sup>237</sup> This move presumably heralds the death of God and “the abolition of the distinction” between the world of being and the world of becoming accompanied by the “loss of any recourse to a transcendent ground that [c]ould provide [a] foundation for this temporal world” to become anything beyond what it is.<sup>238</sup> This process enabled the individual to see her life as an almost ontologically separate entity that is distinct and set apart from the communal.<sup>239</sup> Advanced by the German Enlightenment, this progression led to idealism and then to “individualism” and the Protestantized notion that the autonomous and rational individual is key.<sup>240</sup> From such currents, many of which were directly advanced by believers,<sup>241</sup> secularity has been cultivated as part of the Latin West’s contested past and future, but significantly, if Charles Taylor’s account is correct, secularism has simply become, more or less, construal rather than substance, a process that establishes the immanent frame.<sup>242</sup> This is the subject to which I now turn.

How did the Latin West, in a relatively short period of time, “go from a world where belief in God was the default assumption to our

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235. *Id.* at 57.

236. *Id.*

237. *Id.* at 48-50 (describing the process of immanentization, or the relocation of significance within the individual, as one involving four steps).

238. PHILLIP TONNER, HEIDEGGER, METAPHYSICS AND THE UNIVOCITY OF BEING 6 (2010).

239. JAMES SMITH, *supra* note 42, at 23.

240. HUNTER, *supra* note 73, at 25-26.

241. *See* JAMES SMITH, *supra* note 42, at 51-53 (showing that Christian responses to emerging humanism and the eclipse of grace and God as the source of transcendence “have already conceded the game” and refrained from invoking the saving action of Christ, nor do Christian apologetics dwell on a life of devotion and prayer but instead turns “exclusively on demonstrating God as Creator, and showing his Providence,” a maneuver that signifies that apologetics supply an impoverished, theologically elaborate faith that “ironically paves the way for exclusive humanism [wherein] God is reduced to creator and religion is reduced to morality,” a process that ties contemporary apologetics first to theism and then to providential deism, which sparked the accelerating move toward exclusive humanism in the first place).

242. *Id.* at 92.

secular age in which belief in God seems, to many, unbelievable?”<sup>243</sup> Through a process of discovering a replacement imaginary: exclusive humanism, which ostensibly “enables us to imagine a meaningful life within this now self-sufficient universe of gas and fire.”<sup>244</sup> On Charles Taylor’s account, this move was sparked by “a theological shift in the understanding of Providence in early modernity that, in turn, leads to an anthropological (or even anthropocentric) shift in four movements.”<sup>245</sup> This paradigm culminated in the inauguration of immanentization, which is constitutive of the relocation of significance in the individual as opposed to the search for transcendence in a world that was upheld by supernatural forces.<sup>246</sup> Formulated in Heideggerian terms, this paradigmatic move rules out appeals to transcendence as illegitimate.<sup>247</sup> Immanentization involves the following steps: (1) the “eclipse of what [Taylor] calls a ‘further purpose’ or a good that ‘transcends human flourishing’”; (2) an anthropocentric shift, which is what Taylor calls the “eclipse of grace,” grounded in the perception that “God’s providential concern for order is reduced to an ‘economic’ ordering of creation to our mutual benefit” (or what Gregory might call the cultural penetration of market imaginaries); (3) “[s]ince what matters is immanent [inheres in us] and since we can figure it out” for ourselves, then “‘the sense of mystery fades’” and God’s providence is no longer seen as inscrutable, thus enabling us to reach a point where mystery is neither tolerated nor desired; and (4) finally, “we lose any ‘idea that God was planning a transformation of human beings that would take [us] beyond the limitations that inhere in our present condition.’”<sup>248</sup> Taylor’s immanent frame orientation, as much threnodic as it is analytic, is a metaphor that “boxes in and boxes out,” wherein the secular age that Westerners inhabit “constitutes a ‘natural’ order” rather than “a ‘supernatural one.’”<sup>249</sup> So we—all of us—“now inhabit this self-sufficient immanent order, *even if we believe in transcendence*,” and the pertinent question becomes whether this is a closed box with “a brass ceiling” or, alternatively, an open frame with a skylight exposed to transcendence or to the existence of transcendent,

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243. *Id.* at 47.

244. *Id.*

245. *Id.* at 48.

246. *See id.*

247. TONNER, *supra* note 238, at 6.

248. JAMES SMITH, *supra* note 42, at 48-50.

249. *Id.* at 92.

perhaps supernatural, forces outside of ourselves.<sup>250</sup> And where we are in this order—which box (open or closed) we occupy—is often less of a reasoned picture than would be the fruit of deductive and conscious analysis; rather, where we are is simply our *background* that functions by supplying a nonconscious picture of the world.<sup>251</sup>

The immanent frame mirrors James Davison Hunter’s analysis<sup>252</sup> that refrains from focusing on the “explicit, visible, tangible” aspects of culture that are embedded in consumerism. Instead, coherent with Hunter’s understanding of contemporary American culture, the immanent frame creates an opposite focus that maximizes the implicit, intangible, preconscious, inherited nature of culture.<sup>253</sup> This move appears to correlate with the observation that “[p]ublic discourse today is characterized by a ‘new species of anti-rationalism, feeding on and fed by an ignorant popular culture,’”<sup>254</sup> an infection that ensnares even leading jurists and commentators.<sup>255</sup> Still, the relevant question for purposes of pursuing religious liberty, then, is whether decision-makers inhabit an open frame wherein they recognize the contestability of their “*take*” (whether rational or not) on things and even consider alternatives, or whether they settle for “an overconfident picture within” this largely construed order and “can’t imagine [their world-view] being otherwise.”<sup>256</sup> While proof of cause and effect remains doubtful, impartial observers may ask whether commentators and jurists have accepted a closed version of the immanent frame, a bullish picture within which they cannot imagine otherwise and thus self-assuredly dismiss those with whom they disagree.<sup>257</sup> Have members of the judiciary, responding to the cultural imperatives associated with the emergence of the immanent frame, been influenced

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250. *Id.* at 93.

251. *Id.* at 94.

252. HUNTER, *supra* note 73, at 30.

253. JAMES SMITH, *supra* note 42, at 94.

254. STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE 3* (2010) [hereinafter SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE*] (quoting Susan Jacoby).

255. *See id.* at 3-4 (noting Ronald Dworkin’s claim in his new book that “our political discourse is in an ‘appalling state’” and also noting that an impartial review of Dworkin’s book shows that it “is almost entirely lacking in . . . [a] serious argument”; rather, Dworkin’s book “purports to promote public debate ‘not so much to engage in serious discussion for the [purpose] of discovering the truth’” but in order to provide a “stage upon which he [can] explain” why his political opponents are wrong).

256. JAMES SMITH, *supra* note 42, at 94-95.

257. *Id.* at 95.

to establish jurisprudence that, upon careful reflection, answers this question in the affirmative?

#### IV. FROM CONTESTED BELIEF TO SECULARITY?

Over the past several years, the United States Supreme Court has issued a number of salient decisions involving the place of religion in American life.<sup>258</sup> At the same time, secularity has continued its rise in cultural prominence, albeit, at times, with an effusion of civil religion.<sup>259</sup> This section underlines the dense complexity associated with any examination of the rise of secularism.

##### A. *Three Types of Secularity?*

On Taylor's account, there are three types of secularity,<sup>260</sup> which for ease of description can be denoted through the use of subscripts as secular<sub>1</sub>, secular<sub>2</sub>, and secular<sub>3</sub>. (1) Briefly stated, secularity<sub>1</sub> conforms to a so-called traditional "definition of the secular, as distinguished from the sacred—the earthly plane of domestic life."<sup>261</sup> (2) Secularity<sub>2</sub> offers a "more 'modern' definition of the secular as areligious—neutral, unbiased, 'objective'—as in a 'secular'—public square."<sup>262</sup> This version is consistent with a formerly typical view, one now rejected by Peter Berger<sup>263</sup> and Brad Gregory and deemphasized by Taylor, wherein secularization is simply seen as an outgrowth of the process of modernization and technological advancement that results, so the story goes, in greater sophistication that discounts religious beliefs as simply superstition.<sup>264</sup> (3) Charles Taylor defines the third (and most important) version of secularity as secular<sub>3</sub>, which is simply

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258. See, e.g., *Emp't Div. Dep't of Human Res. of Or. v. Smith*, 496 U.S. 913 (1990); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Gonzales v. O Centro Espirata Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694 (2012); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

259. See generally Joseph Blankholm, *American Civil Religion in the Age of Obama: An Interview with Philip S. Gorski*, IMMANENT FRAME, SSRN (Blog) (June 28, 2012, 12:32 PM), <http://blogs.ssrn.org/tif/2012/06/28/american-civil-religion-in-the-age-of-obama-an-interview> (referencing ideas regarding civil religion that he picked up from President Obama's campaign rhetoric, and suggesting that civil religion may be able to mediate the differences between the Left and the Right).

260. JAMES SMITH, *supra* note 42, at 20.

261. *Id.* at 142.

262. *Id.*

263. BERGER, *supra* note 8, at ix (finding secularization theory empirically untenable).

264. JAMES SMITH, *supra* note 42, at 21.

identified as an age “of contested belief, where religious belief is no longer axiomatic.”<sup>265</sup> It is possible to imagine not believing in God,” a process that leads to a world view that accounts “for meaning and significance without any appeal to the divine or transcendence.”<sup>266</sup>

*B. The First Version of Secularity*

First, as part of the purported secular/sacred divide, in classical or medieval accounts, the “secular” amounted to something like the “temporal” or the realm of “earthly” politics or mundane vocation<sup>267</sup> rather than the domain of the spiritual, a realm largely occupied by priests and other religious workers. For more than a millennium “after Constantine, from the papacy to the parishes into which Christendom was parceled, the church remained institutionally and jurisdictionally distinct from secular political entities. . . .”<sup>268</sup> Univocity and its subsequent appropriations were alive and well in many of the chronological periods that accepted this classical and largely uncontroversial distinction between the secular and the sacred.<sup>269</sup> Perhaps consistent with this observation, “[a]s an institutionalized worldview in the Middle Ages, Western Christianity included politics,”<sup>270</sup> which was composed of both the temporal and the spiritual. Correlating with this observation, “Christian morality was irreducibly communal and social . . . [since] a shared social life of faith, hope, love, humility, patience, self-sacrifice, forgiveness, compassion, service, and generosity simply *was* Christianity.”<sup>271</sup> Life within both the temporal and spiritual realms yielded to the presumption that “[s]elf-fulfillment lay . . . in self-denial [and] genuine freedom in binding oneself to God.”<sup>272</sup> Nonetheless, the division between the political and the sacred retained some descriptive force.

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265. *Id.* at 142.

266. *Id.* at 141.

267. *Id.* at 20.

268. GREGORY, *supra* note 34, at 137.

269. *Id.* at 36-55 (showing that metaphysical univocity and its implications continued to thrive during the seventeenth century and until our current age, a chronological period that included epochs in which the distinction between the sacred and secular persisted).

270. GREGORY, *supra* note 34, at 133.

271. *Id.* at 134.

272. *Id.*

C. *The Second Version of Secularity*

Second, insofar as modernity proceeded in the wake of the Enlightenment in the supercessionist language that Gregory rejects, the term “‘secular’ begins to refer to a nonsectarian, neutral, and areligious space” wherein the public square is seen as “‘secular’ insofar as it is . . . nonreligious.”<sup>273</sup> Taylor refers to this absence of religious affiliation as part of a definitional process that gave rise to the standard secularization thesis that, “as cultures experience modernization and technological advancement, the (divisive) forces of religious belief and participation” are pushed to the margin and society is governed not by irrational religious belief but by neutral rationality.<sup>274</sup> The “standard” secularization story is either a variant of the subtraction story<sup>275</sup> or a diffusion story wherein secularization trickled down from elite pluralism then made its way to the masses; alternatively, this story refers to secularization as a modern outgrowth of urbanization, industrialization, or disenchantment. Yet neither narrative adequately explains the decline of religious practice in the West, the decoupling of religion and society,<sup>276</sup> or the fact that “the decline of religious practice in Europe” has not been “matched in the United States or elsewhere.”<sup>277</sup> It turns out as an empirical matter that these phenomena—urbanization, industrialization, privatization, and disenchantment—did not necessarily entail a decline in religious practice; rather they often sparked their own kind of religious response and indeed revival.<sup>278</sup> But even the existence of evidence suggesting a decline of religion and religious practice provokes the question of what is meant by religion. If one’s net is cast wide enough, evidence surfaces that all sorts of religious and semi-religious beliefs are flourishing in

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273. JAMES SMITH, *supra* note 42, at 21.

274. *Id.*

275. Subtraction stories “are accounts in which authors trace the decline or compartmentalization of religion without seriously considering the transformations this entails—not just in religion but in everything else as well. Taylor touches on the familiar topoi of secularization theory: urbanization, the rise of science, industrialization, and so forth. He notes that these can’t be quite so autonomously and uniformly effective as has sometimes been asserted or the decline of religious practice in Europe would be matched in the United States and elsewhere.” See Michael Warner, Jonathan VanAnterpen & Craig Calhoun, *Editors’ Introduction*, in *VARIETIES OF SECULARISM IN A SECULAR AGE* 8-9 (Michael Warner, Jonathan Vanantwerpen & Craig Calhoun eds., 2010) [hereinafter *VARIETIES OF SECULARISM*].

276. See JAMES SMITH, *supra* note 42, at 79-91.

277. *VARIETIES OF SECULARISM*, *supra* note 275, at 9.

278. JAMES SMITH, *supra* note 42, at 80.



our contemporary age.<sup>279</sup> This can be seen in the fact that Oprah Winfrey, Elizabeth Gilbert, J. R. R. Tolkien, and Wayne Dyer “still captivate[] wide audiences.”<sup>280</sup> Irrespective of the appeal of these authors, it appears that for purposes of defending religious liberty, secularity<sub>2</sub> assumes an adverse normative dimension implying that constitutions ought to carve out a realm purified of the contingency, particularity, and irrationality of religious belief and instead be governed by universal neutral rationality (if possible) as individuals increasingly self-identify as secular and areligious.<sup>281</sup> Regardless of whether this description of the second version of secularity is accurate or if reason reigns in the Latin West, what really matters is whether or not opinion-forming elites and their intellectual offspring subscribe to this view in spite of the emerging sociological consensus that discounts the viability of the secularization thesis<sup>282</sup> embedded in secularity<sub>2</sub>.

*D. Transitioning from the Second to the Third Version of Secularity*

Taylor’s analysis allows for overlap between secularization<sub>2</sub> and secularization<sub>3</sub>. He disputes the myth of neutrality and finds satisfying terrain in the notion that secularization arises, perhaps organically, from the collision and interrogation of a number of “unthoughts,” preferences, or background assumptions.<sup>283</sup> Thus any account of secularization is informed by some pretheoretical perspective that comes with a certain sensibility and orientation, suggesting that religion must decline either (1) “because it is false and science shows this to be the case,” (2) because it has become increasingly irrelevant now that humans can solve all sorts of problems with research and investigation, or (3) because it is “based on authority, and modern societies give an increasingly important place to individual autonomy. . . .”<sup>284</sup> Nonetheless, such “tempers,” feelings, or whatever give rise to “an inevitably reductionist account of religion” that renders many observers unable to imagine that religion could be a true, genuine, and irreducible motivator for human action.<sup>285</sup> This less-than-neutral viewpoint shrinks “religion to merely epiphenomenal beliefs about

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279. *Id.*

280. *Id.* at 13.

281. *Id.* at 21.

282. *See, e.g.,* BERGER, *supra* note 8, at x.

283. JAMES SMITH, *supra* note 42, at 80.

284. *Id.* at 81.

285. *Id.* at 81-82.

supernatural entities,” and if such beliefs disappear or are pushed to the margins in the conditions of modernity, then religious folk are inevitably seen as “poor, benighted, misguided, but sincere soul[s].”<sup>286</sup> Failing to see religion as more than mere belief in supernatural entities, secular observers are unable to comprehend religion as a source of the transformation perspective that transports humans beyond what is “normally understood as human flourishing.”<sup>287</sup> Religion, with its transformation perspective, impinges on the moral order and is not simply about certain kinds of supernatural entities (although that is clearly possible). It isn’t merely an epistemology and a metaphysics; more fundamentally, it is about a way of life that calls humans to more than the mere worldly perception of human flourishing.<sup>288</sup> Given this analysis and the explanatory deficiencies associated with secularization<sup>2</sup>, Taylor offers a third story of secularization, simply called *secularization*<sup>3</sup>.

#### E. *The Third Version*

In its third iteration, Taylor understands society to be secular insofar as religious belief or belief in God is seen as one option among others and thus entirely doubtful.<sup>289</sup> This approach retains strong explanatory power that helps analysts comprehend the force of secularism, even in nations like the United States and much of the world where religious practice and belief remains strong, at least in comparison with Europe.<sup>290</sup> Within this third framework, what is essential is that the conditions for belief have been altered, even if there are still believers around, because what has emerged is a stasis known as exclusive humanism. On this view, exclusive humanism is a radically new option in the market place of beliefs: a vision of life in which anything beyond the immanent frame is eclipsed.<sup>291</sup> Placing Taylor’s analysis in Heideggerian terms, the individual can be seen as a practically engaged agent confined by death and finitude who lives in a world without transcendence and has come to terms with her inherent finitude and the inevitability of death.<sup>292</sup> As a consequence,

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286. *Id.* at 82.

287. *Id.*

288. *Id.* at 82-83.

289. *Id.* at 21-22.

290. BERGER, *supra* note 8, at x.

291. JAMES SMITH, *supra* note 42, at 22-23.

292. TONNER, *supra* note 238, at 8 (describing Heidegger’s thought).

“[f]or the first time in history [,] a purely self-sufficient humanism came to be a widely available option.”<sup>293</sup> Taylor means “by this a humanism accepting no final goals beyond human flourishing.”<sup>294</sup> Or, placing Taylor’s understanding in Dworkian terms, the late Ronald Dworkin insisted that whereas a theist may have a God who throws the last stone and thus in Jamesian language supplies a sense of fundamentality,<sup>295</sup> the atheist replies that “living well throws the last stone,” and there is nothing more basic on which this fundamentality rests or needs to rest.<sup>296</sup> Apparently, the Supreme Court concurs in this possibility and has recognized some variant of this perspective, simply called “secular humanism.”<sup>297</sup>

However much the Supreme Court may agree with Heidegger or Dworkin, secularity in its third version is much more than the retreat of religion from public spaces. Nor is it simply the decline of religious belief and practice thought to be an inevitable consequence of modernity. Religious belief and practice may or may not decline. Rather, in connection with this version, secularity<sub>3</sub>, it is possible to concede that there has been a decline in religious identification in much of the West while *still* contesting the secularization thesis tied to modernization, technological advance, and urbanization, nominally referred to as secularization<sub>2</sub>. Instead of accepting the hypothesis that religious belief and practice will recede in the face of modernization—a view tied to secularization theory<sup>298</sup>—secularity<sub>3</sub> signifies “a move from a society where belief in God is unchallenged and, indeed, unproblematic to one in which it is understood to be one option among others and frequently not the easiest to embrace.”<sup>299</sup> The core of secularization is not the onset of modernization but *the decline in the transformation perspective that leads to a new placement of the sacred or spiritual* in relation to individual and social life,<sup>300</sup> even if religious practice retains cultural purchase. “It is this new placement of religion

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293. JAMES SMITH, *supra* note 42, at 23.

294. *Id.*

295. RONALD DWORKIN, RELIGION WITHOUT GOD 4 (2013) [hereinafter DWORKIN, RELIGION WITHOUT GOD].

296. *Id.*

297. *Id.* at 4-5 (quoting *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961)).

298. JAMES SMITH, *supra* note 42, at 21 (showing that secularization theory is usually the confident expectation that societies will become secular because of the Enlightenment, modernity, urbanization, and progress and will therefore be characterized by decreasing religious belief and participation).

299. VARIETIES OF SECULARISM, *supra* note 275, at 9.

300. JAMES SMITH, *supra* note 42, at 83 (emphasis added).

that is constitutive of our ‘secular age.’ It’s not just that belief in supernatural entities becomes implausible; it’s that pursuing a way of life that values something beyond human flourishing becomes unimaginable.”<sup>301</sup> Since this view pervades culture, it shapes the normative conditions in which the pursuit of religious liberty surfaces; hence, it is possible that jurists and commentators, perhaps driven by the welter of presumptions associated with exclusive humanism, will find the pursuit of anything beyond human flourishing morally insufficient because it is simply inconceivable.

## V. RELIGIOUS LIBERTY AT RISK?

### A. *How Did We Get Here?*

In answering the question of how we got here it is useful both to observe that secularism can be read backwards (figuratively) to metaphysical univocity and to recognize that it is possible to “live in a ‘secular age’ even if religious participation might be visible and fervent . . . [or alternatively, this current or some future age] could undergo religious revival.”<sup>302</sup> Secularity<sub>3</sub> is constitutive of a framework wherein “people would still believe and indeed conversion would not only be possible but would arise as ‘a response to secularity, not an escape from it.’”<sup>303</sup> Consistent with the ongoing privatization of belief, Taylor forecasts that religiosity within the secular age “is more and more considered a question of personal belief than collective ritual or practice,”<sup>304</sup> an approach that may have much in common with “idealism” and is supplemented by the cultural focus on individualism that both markets and research universities reinforce. Secularity<sub>3</sub>, or what Taylor means in its current modern Western sense, is the culmination of “the long history of reform movements within Western Christianity.”<sup>305</sup> Heartened by the Enlightenment and other moves,<sup>306</sup> this drive by reformers to police what was seen as the spiritual arena gave rise to an unanticipated result: the possibility of a fully secular

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301. *Id.*

302. *Id.* at 22-23.

303. *Id.* at 23.

304. VARIETIES OF SECULARISM, *supra* note 275, at 9-10.

305. *Id.* at 15.

306. *Id.* at 16 (noting that Charles Taylor takes the view that reform did not derive from modernity, nor was it contrived by Enlightenment rationalists).

society.<sup>307</sup> Offering views that intersect, at least in part, with Brad Gregory, Taylor contends that reform did not derive from modernity, nor was it contrived by Enlightenment rationalists, nor did it appear willy-nilly as the result of capitalism; rather, the secular was not a force that assaulted religion from outside that realm of the church but instead was partly, if not mostly, a history of spiritual motives tied to late medieval reforms.<sup>308</sup> The perception that secularism<sub>3</sub> emerged from *within* religion is consistent with additional claims that this ongoing process commenced well before the Reformation and continued afterwards among Catholics as well as Protestants.<sup>309</sup> Evidently, it was a project of producing purer religion and demanding more widespread lay adherence to high standards of purity,<sup>310</sup> an approach that was reinforced by the impact of metaphysical univocity's early tendency to encourage participants in theological debates to avoid confessional controversy and instead to substitute the human mind and reason alone as part of this new Pelagianism.<sup>311</sup> In addition to "cleansing" Christianity of folk beliefs and practices and emphasizing the salvific power of human efforts unaided by the Augustinian notion of total human depravity,<sup>312</sup> reformers labored to produce a new morality governed by the prospect of self-discipline and self-effort.<sup>313</sup> Reform "also helped shape the rise of an understanding of an impersonal natural order in which God intervened less frequently (if ever) and

307. *Id.*

308. *Id.*

309. *Id.* at 15.

310. *Id.*

311. GREGORY, *supra* note 34, at 48-49 (describing the process of sidelining theology, scripture, tradition, and religious experience as sources of knowledge about God, and showing how reason now assumed a univocal focus that left reason alone as the arbiter). Evidently, Pelagianism arose in response to and as a rejection of the teaching of Augustine:

Augustine taught that human beings, because they are born in original sin, are incapable of saving themselves. Apart from God's grace, it is impossible for a person to obey or even to seek God. Representing the entire race, Adam sinned against God. This resulted in the total corruption of every human being since, so that our very wills are in bondage to our sinful condition. Only God's grace, which he bestows freely as he pleases upon his elect, is credited with the salvation of human beings. In sharp contrast, Pelagius was driven by moral concerns and his theology was calculated to provide the most fuel for moral and social improvement. Augustine's emphasis on human helplessness and divine grace would surely paralyze the pursuit of moral improvement, since people could sin with impunity, fatalistically concluding, "I couldn't help it; I'm a sinner." So Pelagius countered by rejecting original sin.

Michael S. Horton, *Pelagianism*, MODERN REFORMATION, (Jan./Feb. 1994), <http://www.modernreformation.org/default.php?page=articledisplay&var1=ArtRead&var2=448&var3=searchresults&var4=Search&var5=pelagianism>.

312. *See* Horton, *supra* note 311.

313. VARIETIES OF SECULARISM, *supra* note 275, at 15.

which could be the object of a purely natural science.”<sup>314</sup> At the same time, this progression shaped “a transformation of the self to create individual subjects . . . able to take a distanced view of everything outside the mind.”<sup>315</sup> A distanced, detached view potentially coheres with the United Nations’ perspective on religion wherein freedom of belief is an absolute right in the abstract<sup>316</sup> but, nonetheless, may place actual religious practices at risk because it embodies the view that one’s belief (even if protectable) ought to be seen as independent of (religiously motivated) conduct. This approach, if enforced, suggests that conduct is ripe for constraint, particularly when it collides with two values that have assumed preeminence in our secular age: equality and neutrality. This paradigm provides us with a framework within which we can assess the validity and viability of the standard (yet disputed) story of religious freedom in the United States.<sup>317</sup>

*B. Reviving the Standard (Enlightened) Story of Religious Freedom?*

Understood as a whole, a complex, multipart tsunami through fits and starts, including religious revivals,<sup>318</sup> both preceded and then affected contrasting conceptions of religious liberty within the West that are connected to themes surfacing during the medieval period.<sup>319</sup> This process drove the establishment of a culture that culminated in the rise of exclusive humanism and its corresponding focus on individual human flourishing as the defining default good.<sup>320</sup> This contemporary viewpoint is advanced by both Justice Ginsburg’s dissent in *Hobby Lobby*, emphasizing the connection between the ability of women to control their reproductive lives and their ability to participate equally

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314. *Id.*

315. *Id.*

316. Witte, Jr., *supra* note 61, at 25.

317. *See, e.g.*, SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM, *supra* note 16, at 167 (establishing “[t]he *standard* story which tells us how, under the influence of the Enlightenment, the American founders broke away from intolerance and dogmatism of centuries of Christendom and courageously set out on a radical new experiment in religious liberty,” a claim that Smith persuasively disputes).

318. SMITH, FOREORDAINED FAILURE, *supra* note 112, at 53 (showing that prevalent notions about the relationship between government and religion changed significantly between 1790 and 1865 and not necessarily in a liberal or secular direction but rather in a direction favoring greater intersections between religion and government as a wave of religious revivalism sparked a Christianization that advanced a new and sometimes ugly demand for Christian hegemony).

319. *See, e.g.*, SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM, *supra* note 16, at 7.

320. VARIETIES OF SECULARISM, *supra* note 275, at 18.

in the economic and social life of the Nation,<sup>321</sup> and the Obama administration's calculation that ISIS-inspired violence can be foiled by giving young Muslim men expanded employment options.<sup>322</sup> Complementing Gregory's scholarship, Taylor shows that "secular culture grew with thinking about society in terms of new social imaginaries like the market, democracy and the public sphere. Each was shaped by humanism but also by notions such as the equality of human individuals aggregated in one way or another in an impersonal order,"<sup>323</sup> which is coherent with the presumption that we are radically alone within our individual selves, more or less, as neutral, detached molecules spinning in the cosmos. Within such a *zeitgeist*, the question becomes what is the actual or imagined place of the sacred?<sup>324</sup>

Despite this question, and in spite of the possibility that religion has been pushed to the margins as part of the insistent advance of humanism, it appears that "[m]any Americans are horrified by the prospect of a new dark age imposed by militant superstition; they fear a black, know-nothing night of ignorance in which America becomes an intellectually backward and stagnant theocracy,"<sup>325</sup> one that obdurately refuses to embrace what Marcel Gauchet calls an unmistakable trend toward a post-religious future.<sup>326</sup> Similarly incensed observers contend that religious phenomena can be explained in terms of neurology as nothing more than a twitching in some part of the human brain.<sup>327</sup> If the later approach, fashioned largely by strident atheists, merits attention, then the question becomes whether religion, however twitchy, can find shelter within a domain that appears increasingly hostile to the success of religious liberty. As Parts II, III, and IV combine to show, such hostility is linked to the second

321. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2788 (Ginsburg, J. dissenting).

322. R.R. Reno, *While We're at It*, *FIRST THINGS*, April 2015, at 65, 65.

323. *VARIETIES OF SECULARISM*, *supra* note 275, at 18.

324. JAMES SMITH, *supra* note 42, at 87.

325. RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE* 79 (2006) [hereinafter *DWORKIN, IS DEMOCRACY POSSIBLE HERE?*]. Avoiding militant superstition in his view apparently means avoiding God as he quotes William James, who said that religion is a sense of fundamentality or, alternatively put, something that throws the last stone. *See* DWORKIN, *RELIGION WITHOUT GOD*, *supra* note 295, at 4.

326. *VARIETIES OF SECULARISM*, *supra* note 275, at 18.

327. BERGER, *supra* note 8, at 74. Psychophysical reductionism of this sort may collapse in terms of the current state of analysis within a materialist neo-Darwinian conception of nature. *See* THOMAS NAGEL, *MIND AND COSMOS: WHY THE MATERIALIST NEO-DARWINIAN CONCEPTION OF NATURE IS ALMOST CERTAINLY FALSE* 4 (2012) (explaining why psychophysical reductionism, an approach that was motivated by the hope of showing how the physical sciences could in principle produce a theory of everything, failed).

(reductionist) version of secularity, often referred to as the standard secularization thesis, which presumed that the divisive forms of religious belief and practice will wither away so that society is no longer governed by irrational belief as it yields naturally to neutral rationality. Despite the threatening nature of this presumption, it is not clear that the hostility exemplified by Dworkin or others—hostility that can be shown to be unfounded<sup>328</sup>—is not nearly as threatening as the presumptive appeal of exclusive humanism.

The preliminary question is whether there is any need for religious liberty at all, so long as we possess personal autonomy and the state is prepared to defend this, our most prized possession. This question coincides with the highly preferred standard story of American religious freedom, one that Steven Smith has so richly critiqued. Recall how the preferred story, a redoubt of cultural elites, asserts that the founders were committing themselves to a novel, even radical, experiment that privileged an enlightened pathway that (1) prevented government from intruding on or sponsoring religion, (2) ensured that citizens of all faiths or none would be treated equally, and (3) kept government religiously neutral and perhaps defiantly secular.<sup>329</sup> What is crucial for advocates of religious liberty, even if this preferred story of religious freedom is fictitious, is that it may nonetheless survive as a narrative that resonates in our secular age among individuals and commentators who have surrendered to exclusive humanism. If so, this story, however false, could prevail as a preferred construal, a preferred “take,” and finally as preferred spin. If this paradigm is operational, it follows that unless courts and jurists are immune from this template, religious liberty adjudication may be set adrift because this alluring “take” is not so much reasoned *to* as it is reasoned *from*.<sup>330</sup> Since this largely emotive viewpoint is necessarily independent of reason, it follows that there is no need to engage one’s opponents in a real debate (if one were possible) or to reveal the real basis for one’s positions.<sup>331</sup> Instead, it appears that those who are held captive by this emotive view may be content to merely dress up their pre-established conclusions in verbiage.<sup>332</sup>

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328. See, e.g., GREGORY, *supra* note 34, at 26-28 (showing how contemporary scientists have succeeded in reconciling science and religion).

329. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM, *supra* note 15, at 26-28.

330. JAMES SMITH, *supra* note 42, at 96.

331. SMITH, THE DISENCHANTMENT OF SECULAR DISCOURSE, *supra* note 254, at 5.

332. *Id.*



Although it is doubtful that religion will necessarily wither away despite contemporary society's position within the domain of secularization<sub>3</sub>, there is, of course, more of Taylor's analysis to consider. Taylor concentrates his fire on how and why the plausibility structures of secularized societies make and will continue to make religion contestable and heavily contested.<sup>333</sup> What matters is the *shift* in the conditions of belief and the corresponding emergence of exclusive humanism, a radically new option that diminishes the transformation perspective, which was tied closely to religion.<sup>334</sup> Exclusive humanism surfaces within the immanent frame in a box that is either open or closed and that rejects the medieval imaginary,<sup>335</sup> which functioned as an obstacle to unbelief.<sup>336</sup> Disabused of the influence of the medieval imaginary, the realm of secularism<sub>3</sub> issues forth in the conviction that no longer would the natural world be seen as a constituted cosmos that functioned semiotically as a sign that pointed beyond itself to God; no longer would society be understood as something grounded in a higher reality wherein earthly kingdoms were instantiated in a heavenly kingdom; no longer would people live in an enchanted world: a world "charged with supernatural presences that was open and vulnerable as opposed to being closed and self-sufficient."<sup>337</sup> The world and our lives in this new imaginary were simply what we would make of them in a culture that allowed itself to be drawn closer and closer to perfection, diminishing all forms of "inequality" through the anthropomorphized force of progress as part of a Hegelian pattern that energizes civilization to move forward from period to period as if it were an organism passing from one stage of development to the next in its life-cycle.<sup>338</sup> If human flourishing, as the climax of this pattern, is our final end, then religion and religious belief can be seen as its enervating enemy, one that has little appeal once the culture accepts what Taylor calls a closed version of the immanent frame. If this analysis is plausible, then the question becomes whether religious liberty can nonetheless find its bearings and, if so, how this

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333. JAMES SMITH, *supra* note 42, at 22.

334. *Id.* at 22-23.

335. *Id.* at 2 (within the medieval imaginary, the natural world would be seen as a constituted cosmos that pointed beyond itself to God and society was understood as something grounded in a higher, even heavenly, reality that was charged with supernatural presences, a process that, taken together, made atheism inconceivable).

336. *Id.* at 27.

337. *Id.*

338. ROGER SCRUTON, *THE USES OF PESSIMISM AND THE DANGER OF FALSE HOPE* 131 (2010).

will occur in an epoch committed to human perfectibility and the pursuit of progress. Perhaps a partial answer can be found by once again revisiting secularization theory (secularity<sub>2</sub>) as part of the reification of progress before returning to the superior explanatory force associated with secularity<sub>3</sub> as emphasized by Charles Taylor.

## VI. PURSUING RELIGIOUS LIBERTY AS THE NATION PURSUES PROGRESS?

### A. *Implications Arising from the Nation's Pursuit of Progress and Perfection*

Consistent with the second version of secularization—what Taylor calls *secularization*<sub>2</sub>, an approach he declines to embrace—and fulfilling the implications of metaphysical univocity, modern elites from before and after the French Revolution,<sup>339</sup>—and apparently the world over,<sup>340</sup>—insist on the perfectibility of man, nature, and society.<sup>341</sup> This progressive process is galvanized by the direct repudiation of the faith of the ancients and the affirmation of modern secular belief in human, ability, and power.<sup>342</sup> Such insistence, as a form of faith, signifies “a belief in amelioration without limit, of mutability without *telos*, of progress without boundary and of faith without grounding.”<sup>343</sup> Antifoundational and resolutely modern believers in democracy (Westerners?) and human improvement “are concomitantly hostile to forms of philosophy and ‘faith’—particularly ancient philosophy and traditional religious faith—that seek to chasten . . . human visions of perfectibility with warnings against hubris, invocations of human nature and human teleology, and reminders of

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339. PATRICK J. DENEEN, *DEMOCRATIC FAITH* xii-xiv (2005) (describing the decision of the French Assembly, after the success of the French Revolution, to desacralize the Cathedral of Saint Genevieve and rededicate the basilica as the Panthéon, the final resting place for France's revolutionary heroes, and the subsequent decision to remove the coffin of Jean-Jacques Rousseau to the Panthéon completing the process of converting a Christian church into a secular cathedral and thus declaring the city's preeminence over God).

340. *Id.* at xv (discussing Chinese students who assembled a Styrofoam sculpture called the Goddess of Democracy, the apparent desacralized descendant of St. Genevieve of St. Genevieve Cathedral in France, as their only hope of salvation).

341. *Id.* at 4.

342. *Id.* at xiv.

343. *Id.* at 5.

inescapable human shortcoming.”<sup>344</sup> On this understanding of moderns and modernity, elites, are prepared to flee “[t]raditional” teachings—especially religious and in particular the Judeo-Christian belief of fundamental human depravity.”<sup>345</sup> This viewpoint, supplemented by philosophical univocity as presented by Heidegger, implies that “historical human beings are entitled to . . . their limited finite interpretations of things and [that] any appeal to principles of order which, in one way or another, make a claim to atemporal universality, should be treated with a degree of suspicion and skepticism,”<sup>346</sup> at least to the degree that such claims are independent of the universalizing ambition associated with neutrality and equality.<sup>347</sup> Elites pursuing democratic perfection during the Twentieth Century often expressed their defiant rejection of traditional faith, their strong insistence upon secularized forms of faith in the political domain, and their strident belief that they themselves were free of religious fanaticism, all while ignoring the fact that they continued to propagate a democratic faith that often obfuscated the religious lineage of such beliefs.<sup>348</sup>

In the United States, the standard story of religious freedom—the one preferred by elites and disputed by Steven Smith—appears strongly tied to the notion of progress and the perfectibility of man, which was exhibited within the political and public policy arena during the aftermath of the Gilded Age and extended during the Progressive Era. It perhaps attained its apotheosis during the New Deal, followed of course by more contemporary versions that seek to sustain what some view as an inevitability.<sup>349</sup> While proof of cause and effect remains inconclusive, building on anti-creedal trends emerging during the latter half of the nineteenth century and surfacing during the twentieth, “Progress” on this emotive view was “not an accident, but a necessity. Surely must evil and immorality disappear; surely must men become perfect.”<sup>350</sup> As I have shown in another context, given the

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344. *Id.*

345. *Id.*

346. TONNER, *supra* note 238, at 5.

347. *See supra* Part V.A.

348. DENEEN, *supra* note 339, at 96. The secularization thesis finds some confirmation in leading social theorist John Dewey’s secular faith in progress, which rested largely upon rationality and science as the formerly “irrational” elements of old faith (traditional faith) would drop away. *Id.* at 175-76.

349. *See, e.g.*, Hutchison, *Lochner, Liberty of Contract*, *supra* note 10, at 422-23.

350. PHILIP RIEFF, *THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD 5* (40th Anniversary ed. 2006) (quoting Herbert Spencer).

precommitment of cultural hierarchs to human perfection and progress, and built upon the fact that they foresaw the future as inevitably governed by the laws of evolutionary progress, they nonetheless worried whether the inevitable outcome of history they foresaw could come about without their intervention.<sup>351</sup> Accepting the presumption that no restriction on the state or citizens who were committed to the premises of the liberal state could be derived validly from an external source,<sup>352</sup> religious belief tied to external authority appears highly suspect. But as an empirical matter, phenomena such as urbanization, technological progress, and industrialization, which on the surface seemed to foster the conditions of the liberal state, often sparked their own kind of religious response and revival, meaning that the secularization thesis embedded in this syllogism, while attractive for some commentators, is incomplete and lacks deep explanatory power, a conclusion that Peter Berger confirms.<sup>353</sup> A fuller understanding of the possibility of defending religious freedom in an age committed to secular progress emerges by refracting this defense in the lenses supplied by secularity<sup>3</sup>, the immanent frame, and the notion of exclusive humanism. Refraction implies that proponents of religious liberty will have to confront the prevailing secular orthodoxy and its looming faith in the potency of progress, which have combined to breach the foundations of religious freedom in America.

As an initial matter, it might be argued that religious liberty can be grounded on the observation and the fact that a large proportion of its early settlers came to the United States (1) to escape the bondage of laws that compelled them to support and attend government-favored churches and (2) to flee the turmoil, civil strife, and persecutions generated by established sects determined to sustain their political and religious supremacy.<sup>354</sup> Cognizant of the deduction that “an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems,”<sup>355</sup> it is worth noticing that two leading founders supported religious liberty by offering the claim that “Almighty God had created men free [and] that all attempts to influence it by temporal punishments . . . are a departure from the plan

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351. Hutchison, *Lochner, Liberty of Contract*, *supra* note 10, at 423.

352. *Id.* at 422.

353. BERGER, *supra* note 8, at ix-xii.

354. GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 525 (2d ed. 2003) (quoting *Everson v. Board of Educ.*, 330 U.S. 1 (1947)).

355. *Sch. Dist. of Abington Twp. Pa. v. Schempp*, 374 U.S. 203, 235-36 (1963) (Brennan, concurring).

of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions . . . .”<sup>356</sup> On its face, this statement appears to subsume a deist, providentialist, or perhaps even orthodox Christian view. This possibility recalls the revised story of religious liberty, one that accepts and indeed seems compatible with distinctively Christian notions of separation of church and state and refrains from embracing grand and novel principles.<sup>357</sup> On this view of the American settlement, religious liberty could be defended by grounding it in the jurisdictional authority of the states without any commitment to equality, secular government, or adjudicatory neutrality in matters of religion.<sup>358</sup> On such a reading, one could argue that these above-referenced statements tied to two of the framers (Jefferson and Madison) strongly imply that they were inclined to the religious liberty camp.

On the other hand, a careful reading of metaphysical univocity “equally implies that the preamble that Jefferson penned to the document James Madison authored,” can be seen as credible documentary evidence of the rise of secularism and the immanent frame. This is so because, as Charles Taylor shows, deism and providentialism, to which Jefferson and Madison owed some allegiance,<sup>359</sup> led inescapably not to contestation within the domain of church and state but rather to exclusive humanism, a move that finds religious practice and belief incredible as society progresses toward the closed version of the immanent frame within the boundaries of secularization<sup>3</sup>. It is possible that the move to terminate contestation, first as a cultural matter and then as a form of consensus, has now migrated to the Supreme Court.

The possibility and desirability of religious freedom can be sharpened by asking whether or not Americans understood the

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356. STONE ET AL., *supra* note 354, at 525 (quoting the preamble to *Madison’s Memorial Remonstrance against Religious Assessment*, originally written by Thomas Jefferson). There are at least two views of Madison’s *Memorial and Remonstrance*. See, e.g., *id.* (discussing the contrasting views of Justice Thomas’s reading of Madison’s *Memorial and Remonstrance* to allow aid to religious groups and Justice Souter reaching the opposite conclusion in *Rosenberger v. Rector*, 515 U.S. 819 (1995)).

357. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM*, *supra* note 16, at 7-8.

358. *Id.* at 8.

359. See, e.g., MCCONNELL, GARVEY & BERG, *supra* note 26, at 46 (describing Jefferson’s hostility to religion and his religious views as a deist); see also *id.* at 55-56 (suggesting but not proving Madison’s providentialism).

Constitution—and later the Religious Freedom Restoration Act<sup>360</sup> (RFRA)—to provide individuals or institutions a right of exemption from civil law to which they had religion-based objections.<sup>361</sup> Although this question will not be answered here, the debate generated by this question remains contentious despite the assertion that everyone has “intuitions about exempting religious objectors from legal duties with which others must comply[]”<sup>362</sup> and almost no one thinks that “American law can be truly and adequately respectful of religious freedom [] if the law offere[d no] avenue[] to accommodate deeply held, conscientious religious commitments.”<sup>363</sup> This latter assertion remains vibrant despite evidence from early American history supporting the inference that exemptions and accommodation were not widespread.<sup>364</sup> But difficulties still proliferate because of the contemporary absence of agreed-upon background principles and beliefs coupled with reliably seismic (if unintentional) changes that supported freedom within the “church,” broadly understood. This combination, as we have already seen, first produced deists and providentialists rather than individuals who were necessarily opposed to or who sought freedom from religion and, second, generated the conditions necessary to equip Westerners with the materials necessary to create a kind of Pelagianism that says we can sort out our life on our own.<sup>365</sup> These currents posited that “God plays no discernible role or function” in the lives of his creatures.<sup>366</sup> These maneuvers opened the door to exclusive humanism featuring immanentization and the

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360. Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4.

361. For contrasting perspective regarding the historical understanding of exemptions, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (suggesting that America’s historical record supports religion-based exemptions); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: A Historical Perspective*, 60 GEO WASH. L. REV. 915 (1992) (suggesting that late eighteenth-century Americans assumed that the Free Exercise Clause did not provide a constitutional right of religious exemption from civil laws).

362. Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 1, 36 (forthcoming 2015), <http://ssrn.com/abstract=2466571>.

363. *Id.*

364. McConnell, *supra* note 361, at 1512.

365. JAMES SMITH, *supra* note 42, at 50.

366. *Id.*

relocation of significance within the individual<sup>367</sup> whose life could be seen as ontologically separate from the communal.<sup>368</sup>

How did we get here? From widely disparate currents, some of which were directly advanced by believers<sup>369</sup> who responded to religious persecution<sup>370</sup> by eventually welcoming the free exercise of individual conscience with respect to religious belief and worship and the privatization of religion<sup>371</sup> before separating religion from society (markets and universities).<sup>372</sup> These circumstances spawned the further secularization of religion and society<sup>373</sup> and spurred the creation of the immanent frame.<sup>374</sup> It remains possible (if speculative) that the construct of progress, one that took on added urgency in a post-Darwinian age, catalyzed this move. The continuation of this process may place religious liberty in a pickle because it is possible that jurists and commentators, as a cultural matter, reside within an immanent frame. If so, the box they occupy may be less of a reasoned picture that is the fruit of deductive and conscious analysis grounded in principle than it is an expression of feelings. Culturally, where we and they are may simply reflect a construed *background*, one that functions by supplying a nonconscious but preferred picture of the world.<sup>375</sup> If judges capitulate to this approach, then religious liberty advocates must appeal to the nonconscious picture of the world possessed by adjudicators while simultaneously noting Alastair MacIntyre's magisterial assertion that emotivism has now become the Western World's default in a world already stripped of narrative coherence, a

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367. *Id.* (describing the process of immanentization, or the relocation of significance in the individual as one involving four steps).

368. *Id.* at 23.

369. *See, e.g., id.* at 51-53 (showing that Christian responses to emerging humanism and the eclipse of grace and God as the source of transcendence have already conceded the game and refrained from invoking the saving action of Christ; nor do Christian apologetics dwell on a life of devotion and prayer but instead turned exclusively to demonstrating God as Creator and showing his Providence, a maneuver that signifies that apologetics supply an impoverished, theologically elaborate faith that ironically paves the way for exclusive humanism wherein God is reduced to creator and religion is reduced to morality, a process that ties contemporary apologetics first to theism and then to providential deism, which sparked the accelerating move toward exclusive humanism in the first place).

370. GREGORY, *supra* note 34, at 150-63.

371. *Id.* at 163-76.

372. *Id.* at 173 (referencing the Western symbiosis of capitalism and consumerism); *id.* at 299-364 (discussing the secularization of knowledge).

373. GREGORY, *supra* note 34, at 242-43.

374. JAMES SMITH, *supra* note 42, at 23.

375. GREGORY, *supra* note 34, at 94.

perspective that (ironically enough) undermines the persuasiveness of reason, rationality, and the ability of empirical evidence to settle debates. The relevant question, then, for purposes of pursuing religious liberty, is whether decision-makers inhabit an open immanent frame wherein they recognize the contestability of their *take* on things and even consider alternatives, or whether they settle for an overconfident (noncontestable) picture within a largely construed order, meaning that they cannot imagine their world-view being otherwise. This process gives rise to a thorny question: how, if at all, religious liberty defenders can disarm this potentially prevailing construal. This paradigm raises the question of whether the view tied to a closed box (the inconceivability of something beyond human flourishing or, alternatively stated, modern secular neutrality) commands a majority of the Supreme Court.<sup>376</sup>

Though cause and effect remain debatable, my take—or, alternatively put, my construal (which is admittedly speculative)—suggests that many commentators and jurists have accepted a closed version of the immanent frame, within which they cannot imagine otherwise and thus dismiss those with whom they disagree.<sup>377</sup> Although this process may cohere with the willingness of proponents of modern professions of secular neutrality to typically deny that they are held captive to an orthodoxy,<sup>378</sup> one that differs in content but not in kind from religious orthodoxy, it is possible that members of the judiciary have been influenced to shift toward a jurisprudence that reifies this cultural maneuver by becoming masters of illusion.<sup>379</sup> This self-deceptive process may be fueled by the invention of what John Gray—an avowed atheist—calls evangelical atheism, which insists on

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376. This question may already have been asked and answered. See SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM, *supra* note 16, at 136-38 (exposing the Latin West's progression as evolving from strategies of coercively maintained religious orthodoxies to policies of religious toleration and thence to the dominant modern position of secular neutrality premised on the view that the this third phase is more enlightened and inclusive, and further showing that earlier orthodoxies could be candid about their character as orthodoxies whereas, under the constraint of professed commitments to neutrality, "modern secular orthodoxies typically refuse to acknowledge their character as orthodoxy."). This refusal to acknowledge that modern secular neutrality is an orthodoxy signifies denial, but denial may no longer work after being exposed by intensifying culture wars; accordingly, we may come to appreciate the former settlement, which was simply "open contestation within a framework committed to church-state separation and freedom of conscience." See *id.*

377. GREGORY, *supra* note 34, at 95.

378. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM, *supra* note 16, at 137.

379. *Id.*



a reliable connection between science, atheism, and secular liberal values.<sup>380</sup> This new evangelicalism, a missionary enterprise aimed at converting humankind to a particular vision of unbelief,<sup>381</sup> may facilitate intolerance premised on the allegation that citizens “infected with a religious meme are unlikely to live consistently with the tenets of liberalism and individual singularity.”<sup>382</sup> Equally clear, this approach reveals the absence of any truly satisfactory way to reconcile modern hyperpluralism with an ambitious egalitarianism.<sup>383</sup> This dilemma has been richly described by Yale law professor Paul Kahn: “[W]hen we put the modern state on the couch, we find a social organism that is simultaneously deeply in fear of its own death . . . and in deep denial of the fact that it is willing to do anything at all to put off that death (liberal theory).”<sup>384</sup> Rather than accept a “less pretentious American settlement [regarding religious liberty] with its central principle not of neutrality or secularism, but rather of open contestation within a framework committed to church-state separation and freedom of conscience,”<sup>385</sup> jurists are increasingly committed to a pretense that seems to be premised on the imagined *neutrality* of secular neutrality despite the hopelessness of attaining this goal through reason. The implications of this analysis deeply mimic Taylor’s, which posits that contemporary individuals are held captive to the immanent frame and that if this frame is indeed closed and opposed to remaining open to transcendence, then this outcome produces what he calls a closed blindedness, one that holds or rather *feels* that the “Enlightened” position or view of the world is better. To repeat, this “take” on ourselves and the world around us is not something reasoned *to* so much as reasoned *from*.<sup>386</sup> “So secularist spin is in fact the denial of contestability and thus the refusal to recognize secularity.”<sup>387</sup> That is to say that we—and they, whether judges or not—may be held captive to secularity in its third sense despite our claims to openness, neutrality, and ambitious egalitarianism.

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380. John Gray, *What Scares the New Atheists*, GUARDIAN (Mar. 3, 2015, 1:00 PM), <http://www.theguardian.com/world/2015/mar/03/what-scares-the-new-atheists>.

381. *Id.*

382. Hutchison, *Shaming Kindergarteners?*, *supra* note 5, at 362.

383. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM, *supra* note 16, at 138 (quoting Kahn).

384. *Id.* at 138.

385. *Id.*

386. JAMES SMITH, *supra* note 42, at 96.

387. *Id.*

To the extent that the Supreme Court has surrendered to this prevailing *weltanschauung*, it is possible that traditional religion will be seen as a constitutional scandal: an offense against the whole ethos of contemporary liberal egalitarianism,<sup>388</sup> making compromise difficult<sup>389</sup> as the political and legal culture demands that the Court get off the fence and rule against what is seen as part of a former but now discredited orthodoxy. This demand is facilitated by three revolutions in premises: (1) that secular egalitarianism views equality as the foundation of our legal and political order; (2) that, just as proponents of Christian orthodoxies often were inordinately certain of their views, proponents of secular equalities seem untroubled by doubt; and (3) that secular egalitarianism is like Christianity in that it is not merely content to regulate outward conduct but instead seeks to penetrate into hearts and minds, perhaps best illustrated by the movement deeming a private act of violence performed with an inegalitarian motive more reprehensible than the same violent act done intentionally but with a different, less reprehensible motive.<sup>390</sup> The culmination of this stratagem corresponds with the claim that not just discriminatory actions or even words but also beliefs are harmful.<sup>391</sup> This outlook permits judges to decide that “a set of religious beliefs in itself constitutes a harm to other citizens and a violation of their equality.”<sup>392</sup> For purposes of constitutional analysis, this presumption invokes the specter of 1984<sup>393</sup> and leads to Steven Smith’s observation that, once such views are entrenched and conceded as our prevailing adjudicatory orthodoxy (even if claims to orthodoxy are denied), the Court, as our dominant, puritanical egalitarian secular master, is unlikely to evince much sympathy or toleration for traditional religion.<sup>394</sup> While compromise and negotiation may be possible, this analysis forms the backdrop for any assessment of the possibility of religious liberty in our contemporary epoch.

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388. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM, *supra* note 16, at 153.

389. *Id.*

390. *Id.* at 154-55.

391. *Id.* at 155.

392. *Id.* at 156.

393. GEORGE ORWELL, 1984 (1949).

394. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM, *supra* note 16, at 156.

*B. Tentative Analysis, Recommendations, and Conclusions*

Given this backdrop, proponents of religious liberty and the individuals and institutions they represent must concede that much of what passes for constitutional adjudication is likely a presumptive construal tied to feelings that may be unsupported by actual rational analysis. Although judicial construal embodied in increasingly formalistic opinions lacks intellectual value, it may be calculated “to wear the reader into submission as much as actually persuade.”<sup>395</sup> Much of this jurisprudential “take” defies individual choice as being constitutive of human beings.<sup>396</sup> This progression locks in the contentious appeal of rivalrous values ostensibly resolvable by “neutral” principles that perpetuate the nation’s drift toward cultural, political, and finally adjudicatory incoherence, an outcome that is skillfully unmasked by Winnifred Fallers Sullivan’s intuition that you cannot celebrate religious freedom while denying it to those whose religion you don’t like.<sup>397</sup> This deeply incoherent state of affairs is augmented by the quest for explanatory monism. Steven Smith shows that “judges and legal scholars have been misled because they have insisted on discovering something in the nature of a ‘principle’ where there is no likelihood of finding one, and the principles that they have purported to discover amount to ‘[i]llusion born of oversimplification.’”<sup>398</sup> By contrast, Christianity itself was the source of the separation of spiritual and temporal authorities and led to an

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395. STEVEN D. SMITH, *LAW’S QUANDARY* 7 (2004) (quoting Dan Farber).

396. GRAY, ISAIAH BERLIN, *supra* note 50, at 14.

397. Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom*, IMMANENT FRAME, SSRIC (blog) (July 8, 2014, 12:33 PM), <http://blogs.ssrc.org/tif/2014/07/08/impossibility-of-religious-freedom/?disp=print>.

398. SMITH, *FOREORDAINED FAILURE*, *supra* note 112, at 119-20 (explaining that failure was not surprising because (a) an originalist approach to the Religion Clauses could not succeed because the framers thought that religion was a matter for the states, not the national government; hence, express constitutional protection for religious freedom was unnecessary, and it is clear that discussion in ratifying legislatures was sparse and apathetic, and (b) with regard to a theoretical approach to the Religion Clause, it can be asked whether it was ever realistic to suppose that the complex and fluctuating relations among the often incommensurable concerns of governments, churches, and the individual conscience (“inner church”) could sensibly be regulated by developing and applying a uniform principle); *see also id.* at 48 (showing that, in addition, scholars inclining toward original meaning have prescinded from the Religion Clauses’ apparent jurisdictional focus because their focus has been elsewhere: “What principle, or right or theory, of religious freedom did the clauses adopt? That question assumes in advance that the religion clauses were designed to provide a substantive answer to the religion question . . . [that is] they were designed to prescribe the proper relationship between government and religion.”).

inner, saving religiosity that was of necessity sincere and voluntary; thus appreciated the American embrace of church-state separation and freedom of conscience can be understood as a retrieval and consolidation of these classic, even theological commitments.<sup>399</sup> Today's Supreme Court has rendered these theological rationales inadmissible and, accordingly, modern constitutional doctrine and political philosophy leave religious freedom weakly defended and vulnerable.<sup>400</sup>

Given the above-referenced claims and contentions, and given that even conscience as a right may be insufficiently robust to preserve the freedom to live faithfully or the right to be wrong,<sup>401</sup> defenders of religious liberty ought to accept a few unhappy conclusions. First, the vitiation of religious liberty—reflects events that happened within and not outside of Christianity. Rather than being spawned by some superseding force that materialized *ex nihilo*, such as technological progress or modernity itself, the demise of religious liberty can be linked to the appropriation of metaphysical univocity, an endogenous rather than exogenous concatenation that tamed and then excluded God from analyses of the natural world.

Second, univocity's appropriation was advanced by events that preceded the Reformation, were accelerated by the Reformation itself, and were further driven forward by the religious wars and a consequent consensus deemphasizing theology within a culture that surrendered to the market and within the university setting that secularized the acquisition of knowledge. As formerly ascendant medieval imaginaries were lost—ones that inevitably affirmed that both nature and man's teleology surely pointed toward God and a heavenly and transformational realm—this inverted process primed the Latin West to succumb to the notion of exclusive humanism. Such developments were internal to Christianity and led to an erosion of the rationales for religious freedom through a secularizing process that can be seen as an offshoot of religious freedom itself.<sup>402</sup>

Third, risking repetition, the Latin West got there through deism and providentialism in a process that remains inconsistent with

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399. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM, *supra* note 16, at 167-68.

400. *Id.* at 168.

401. Stanley W. Carlson-Thies, *Keynote Address: Beyond Right to Conscience to Freedom to Live Faithfully*, 24 REGENT U. L. REV. 351, 352 (2011-2012).

402. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM, *supra* note 16, at 142.

previously dominant supercessionist rationalizations of the origin of secularism that were grounded in the mythical claim that historical progress was inevitable.<sup>403</sup> Building on this highly contingent, unnecessary, and less than normative secularizing process,<sup>404</sup> our current epoch yields more and more to emotion and less and less to reason defined within a community that corresponds with narrative coherence. As a consequence, society's position on the validity of religion represents the fracturing of previously ascendant ideas about the need for transcendence or significance outside of ourselves. Hence, the pursuit of significance without the need for transformation has soared, bringing elites and jurists along for the ride despite the fact that many people, particularly within the United States, still believe and practice religion.

Fourth, issuing forth from the immanent frame, a process with undeniable cultural appeal, both the nation and the courts' position on religious liberty reflect the absence of *agreed-upon* principles from which we might reason to a defensible conclusion, setting the stage for advocates of principles such as secular neutrality to deny their own orthodoxy. Reflecting this dual construal toward orthodoxy—both culturally and judicially—religious belief has been condensed to a shadow of its former self. This move is compounded within the jurisprudential domain by Jeremy Waldron's analysis showing that the "alleged reason-giving advantage associated with courts is a sham."<sup>405</sup> Taken together, these circumstances render religious liberty, if not unnecessary, largely undefended so long as personal autonomy is secure. As a consequence, Professor Douglas Laycock, "a vigorous proponent of religious liberty[,] worries that '[f]or the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle'—suggesting that free exercise of religion may be a bad idea, or at least, a right to minimized. Once again, though, the argument usually is not that religion or religious freedom should be suppressed . . . but only that there is no justification for singling out freedom of religion for special recognition."<sup>406</sup> Or, alternatively framed, this "enlightened" approach chooses to simply leave "religious people and groups to fend for themselves on grounds

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403. GREGORY, *supra* note 34, at 10.

404. Pabst, *supra* note 37, at 1.

405. Jeremy Waldron, *Public Reason and "Justification" in the Courtroom* 1 J. L., PHIL. & CULTURE 107, 131 (2007).

406. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM*, *supra* note 16, at 140.

of freedom of speech, freedom of association, and the like.”<sup>407</sup> Comprehended as a whole, this represents the crucible within which religious liberty defenders must work.

Given this quandary, I offer the following highly speculative final observations. First, any attempt to respond richly to our secular age calls forth a deep understanding of how we got here, and for such a response to be durable, it will likely require a collaborative, collective, and even communal effort that extends beyond the bounds of the practice of law. This collaborative effort must implicate communities and the houses of worship that populate them. Second, although it is likely that the fate of religious liberty is at least partially tied to the fate of the church, this is a double-edged sword. Religious vitality and revival may reinvigorate the appeal of religious liberty. On the other hand, the cause of religious liberty has been destabilized through a constellation of appropriations that were internal to the church itself. That contention remains tenable despite the possibility that successive generations of philosophers and commentators have misread or misappropriated John Dun Scotus’s scholarship.<sup>408</sup> Given this stony terrain, lawyers and other defenders of religious liberty can best advance this cause by adopting a stance of stalwart humility toward their opponents and analytical modesty in court, secure in the knowledge that in the absence of the return of St. Benedict, or a revival in intellectual discourse sparked by proponents of Radical Orthodoxy,<sup>409</sup> or the retrieval of theological commitments that established the separation of church and state within a framework that perceives religion as possessing inherent value, the prospect of advancing religious freedom remains bleak. Responding to the prevailing temper of the times, religious liberty advocates must appeal to more than the reasoning, rational views of judges, as the judiciary’s feelings are often hidden within the lexicon of originalism, theory, equality, or some other monism. Just like the failure of originalism and constitutional theory to provide America with a dependable beacon to protect religious freedom, similar failures attend to efforts to utilize words derived from neutrality and equality, such as nonendorsement, formal neutrality, substantive neutrality, noncoercion, or nondisparagement within a Free Exercise Clause or Establishment

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407. *Id.* at 143.

408. HORAN, *supra* note 35, at 1-13 (asserting this possibility).

409. For a description of Radical Orthodoxy, *see id.* at 1-2 (showing that Radical Orthodoxy is rooted in an idiosyncratic form of Thomism that seeks the reinstatement of theology as the “queen of sciences”).

Clause framework. This is so because such words and concepts not only defy Oliver Wendell Holmes's forecast that law was destined to become more rational and scientific with the passage of time,<sup>410</sup> but frequently depend less on hard and fast definitions and more on appeals to feelings and emotions that, in their most extreme form, seem barely distinguishable from Sheilaism.

Finally, the standard (enlightened) story of religious freedom, however contestable, and how we got there coheres with the loss of a transformation perspective within society and likely within the judiciary. This loss of the transformational perspective—one that posits redemption and salvation and the possibility of divine punishment<sup>411</sup>—has given way to a plausibility structure indicating that the only universal goal is endless human flourishing<sup>412</sup> and that, apparently, there are endless ways to define and perhaps demand that society facilitate the attainment of this goal. Charles Taylor rightly opines that most people, including believers, are inclined to grasp human flourishing as their final good, a practice that leaves little room for transcendence<sup>413</sup> as the Latin West submits to anthropocentrism, which implies that humans are the final end of the universe.<sup>414</sup> This viewpoint generates a dense foundation first for contesting belief, particularly belief in God; second for flattening religious liberty; and third for enforcing this combined move through a narrative that does not depend on reasoning about principles but rather on the development of procedures imposed through majoritarian authoritarianism.<sup>415</sup> The pursuit of human flourishing disconnected from Aristotelian teleology and medieval imaginaries is constitutive of adjudications that represent just as much a leap of faith as anything found in religion. In reality, this pursuit and these leaps signify “leaps ahead of reasons.”<sup>416</sup> These leaps of faith are constitutive of an overall sense of things that manifest itself as “anticipatory confidence,”<sup>417</sup> leading to the insistence that our opponents are wrong even if we cannot offer persuasive or even rational reasons to identify

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410. *The Path of Law*, 10 HARV. L. REV. 457, 468 (1897).

411. JAMES SMITH, *supra* note 42, at 114.

412. *Id.* at 115.

413. *Id.* at 93-94.

414. *Id.* at 113 (disagreeing with Taylor's acceptance of this view).

415. Richard H. Pildes, *The Inherent Authoritarianism in Democratic Regimes*, in *OUT OF AND INTO AUTHORITARIANISM* 125-51 (Andras Sajó ed., 2002).

416. JAMES SMITH, *supra* note 42, at 96.

417. *Id.* at 96.

why they are wrong. Rather than identify inapt legal analysis, the courts have yielded to the postmodern contention that language is “the opening through which the law discloses itself to us,”<sup>418</sup> meaning that within the domain of religious liberty, judicial language constitutes a self-preoccupied falsifying veil that conceals the reality of construed adjudication. Such adjudication gives substance to Charles Taylor’s contention that the penchant to settle things judicially effectively precludes compromise.<sup>419</sup> At the same time, this move (1) ignores Jeremy Waldron’s instructive contention that liberalism in its prescriptive form, ungrounded in faith, is not politically neutral, and his corresponding allegation that secular political culture, purged of the sacred, inevitably deadens concern for the marginalized and impoverishes the nation’s discourse on social justice;<sup>420</sup> and (2) denies N. T. Wright’s commanding claim that “there is no neutral ground, no island in the middle of the epistemological ocean as yet uncolonized by any of the warring continents.”<sup>421</sup>

## VII. CONCLUSION

Given the instantiation and pervasive effects of the secular age and its corrosive consequences on constitutional analysis, the future pursuit by believers of religious liberty in the form of an accommodation from generally applicable laws is likely to suffer the same fate as peyote smokers in *Employment Division v. Smith* within the meaning of the Free Exercise Clause and the federal’s government’s preferred fate for corporations seeking exemptions under RFRA from the Affordable Health Care Act’s contraceptive mandate.<sup>422</sup> Such outcomes are advanced as the nation increasingly capitulates to the tyranny of the good, perhaps reinvigorated by the puzzlingly contestable claim that the arc of history inevitably bends toward justice. No longer the

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418. LINDA L. BERGER, METAPHOR IN LAW AS POETIC AND PROPOSITIONAL LANGUAGE, ISSEI, <https://lekythos.library.ucy.ac.cy/bitstream/handle/10797/6172/ISSEIproceedings-Linda%20Berger.pdf?sequence=1>.

419. CHARLES TAYLOR, THE MALAISE OF MODERNITY 116 (1991).

420. JEREMY WALDRON, SECULARISM AND THE LIMITS OF COMMUNITY, N.Y.U. Sch. L. (2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1722780](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722780).

421. N. T. WRIGHT, SURPRISED BY HOPE: RETHINKING HEAVEN, THE RESURRECTION, AND THE MISSION OF THE CHURCH 64 (2008).

422. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).



beneficiary of *Sherbert's* compelling interest test,<sup>423</sup> religious liberty—rather than remaining a Madisonian right wherein duties to God are precedent, “both in order of time and degree . . . to claims of [c]ivil [s]ociety[.]”<sup>424</sup>—has been transmuted into little more than an appeal to the generosity and good grace of the government.<sup>425</sup> And human history unerringly implies that it is dangerous “to trust government to be benevolent and gracious.”<sup>426</sup> This claim is particularly true in a nation that has made progress toward the realization of a therapeutic culture wherein modern mankind appears indifferent to the ancient question of legitimate authority so long as the powers that be preserve social order and manage an economy of abundance.<sup>427</sup> Hence, this article affirms Steven Smith’s pessimism regarding the arc of religious liberty;<sup>428</sup> indeed, his doubts, amplified by Gregory and Taylor’s contentions, can regrettably be seen as a guarantee. The intersection of metaphysical univocity, the immanent frame and secularity<sub>3</sub> represents something more than “the spontaneous perception of connections and meaningfulness in unrelated things.”<sup>429</sup> Increasingly, this conjunction represents the ongoing decline of religious liberty.

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423. See, e.g., *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) (rejecting the compelling interest test for free exercise accommodation purposes); see also, MCCONNELL, GARVEY & BERG, *supra* note 26, at 173-82.

424. James Madison, *Memorial and Remonstrance against Religious Assessments*, reprinted in MCCONNELL, GARVEY & BERG, *supra* note 26, at 51.

425. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM*, *supra* note 16, at 169-70.

426. *Id.* at 170.

427. RIEFF, *supra* note 350, at 20.

428. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM*, *supra* note 16, at 168 (suggesting that it is impossible to be optimistic about religious-freedom’s long-term chances).

429. Toly, *supra* note 32, at 30.