

# IS RELIGION A NON-NEGOTIABLE ASPECT OF LIBERAL CONSTITUTIONALISM?

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## INTRODUCTION

The question that was addressed on January 4, 2017, by the Section panel on Law and Religion at the AALS Annual Meeting, and is now addressed in these papers, is whether Secularism is a Non-Negotiable Aspect of Liberal Constitutionalism? That question elicited a variety of important responses at the panel discussion. Of course there were definitional issues: What is meant by secularism? What is the nature of liberal constitutionalism? The panelists also explored the relationship among religion, secularism, and constitutionalism. Some panelists pointed to historical experiences in which dominant religions oppressed minority religious believers and non-believers. The panel pointed out how a secularly oriented government can oppress religious believers. Importantly, the deep religious roots of constitutionalism were acknowledged. The question put was not answered, of course. It is not the kind of

question that has one simple answer. But the discussion greatly enriched the question concerning religion in a constitutional order.

The discussion was not entirely open, however, but was subtly shaped by the way the question as put: privileged secularism. The question implicitly assumes that secularism will normally occupy an important place in a liberal constitutional order and then asks whether there are special circumstances that might justify a departure from this norm. These are the same assumptions that many, perhaps most, American law professors would bring to consideration of the role of religion in a constitutional order. Phrases like the “separation of church and state” or the “ban on establishment of religion” sound familiar to the ears of American constitutionalism. By and large, American law professors assume a secular constitution.

In this privileging of secularism, the question is reminiscent of the similar assumptions behind Brian Leiter’s well-known 2013 book challenging religion, *Why Tolerate Religion?*<sup>1</sup> Like the panel question, Leiter presents secular constitutionalism as the desired ideal, from which to greater and lesser extents, national constitutional regimes depart.<sup>2</sup> Indeed, so much is the question in the Leiter tradition, that the question put to the panel would not have been greatly altered if the phrasing had been: Should Secular, Liberal Constitutionalism Tolerate Religion?

Despite this conventional privileging of secularism, one important way that the consideration of religion was expanded beyond the usual arguments that are made in this field in American constitutional thought was in the makeup of the panel itself. By inviting participants with rich backgrounds in international constitutional systems to the panel, the organizers plainly intended to upset these easy American assumptions, even while formally restating them. The experiences of the panelists raised issues of popular resistance against a secular political and legal order, as well as the opposite issue of government interwoven with religious institutions. The assumption by American law professors that secular government having little or nothing to do with religion is one of the necessary goals of constitutionalism was undermined by these

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1. See BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013).

2. For a general discussion of Leiter’s book, see Bruce Ledewitz, *The Vietnam Draft Cases and the Pro-Religion Equality Project*, 43 U. BALT. L. REV. 1, 3, 30-38 (2014) [hereinafter *Vietnam Draft Cases*].

presentations. In other countries, religion occupies a more vital public role than it is thought to occupy in America.

In contrast to this important attribute of the panel, in this essay I aim to challenge the question's implicit privileging of secularism as a constitutional norm by returning to the American experience. Recent events, in particular the Presidential campaign of 2016, demonstrate two seemingly inconsistent propositions about American constitutional government: First, the American political and constitutional system is in important respects not secular, but religious, yet it remains fully liberal. Second, the increasingly secular nature of American government and society—and the parallel increasing marginalization of religion—are leading to the demoralization and breakdown of American public life. America is succumbing to nihilism. In these two different ways—one political and the other ontological—the answer to Brian Leiter's question turns out to be that we tolerate religion because we have to do so. To the extent that we do not tolerate religion, sustainable constitutionalism is impossible. So the answer to the question put to the panel is that it is not secularism, but religion, that is a non-negotiable aspect of liberal constitutionalism.

## I. AMERICA'S DEMOCRACY IS RELIGIOUS, BUT ITS CONSTITUTION IS STILL LIBERAL

### A. The Liberal American Constitution Is Not Neutral About the Good Life

The panelists agreed that one characteristic of liberal constitutionalism is the protection of fundamental human rights, at least against government interference. Furthermore, in the context of the discussion of the role of secularism, it was assumed by all of the panelists that protection of the exercise of religion is a fundamental human right, though the panelists disagreed over the extent and nature of this required government protection.

By this measure, the American Constitution would certainly be considered liberal. Freedom of conscience is generally respected in the American setting, and despite *Employment Division v. Smith's* limitation on the Free Exercise Clause,<sup>3</sup> there are ample other

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3. *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 885 (1990) (holding the Free Exercise Clause basically inapplicable to the obligations imposed by generally applicable laws).

protections for religious practice that render such practice as free in America as anywhere in the world.<sup>4</sup> Despite recent tensions in the healthcare realm, and now with regard to same-sex marriage, the freedom of institutionalized religion, and the freedom of religious believers generally, have flourished in America.

But Professor Jaclyn Neo's presentation on the panel raised a different understanding of the requirements of liberal constitutionalism, one that goes beyond the protection of religious conscience and practice—that a liberal State must be neutral with regard to visions of the good life. Pursuant to this understanding of liberal constitutionalism, secularism would not only be a necessary aspect of a liberal constitution, it would practically be coextensive with liberal constitutionalism, since religions generally teach a substantive vision of the good life.<sup>5</sup>

One basic strand of liberalism, which unites classical liberals, such as libertarians, with many modern liberals who do not share the commitment to government protection of property rights, is this neutrality principle—that government must be neutral on the question of the good life.<sup>6</sup> This position, associated with, among many others, John Rawls and Ronald Dworkin, holds that government must make its decisions, and thus use its coercive power, without regard to particular conceptions of the good life or what gives value to life.<sup>7</sup> The ground of the neutrality principle differs from theorist to theorist, but Dworkin is representative in grounding the idea in the notion of equal treatment of the citizen by government.<sup>8</sup> By no means do all those who identify as liberals or

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4. See generally Bruce Ledewitz, *Experimenting with Religious Liberty: The Quasi-Constitutional Status of Religious Exemptions*, 6 ELON L. REV. 37 (2014) (discussing some of the available protections for people to freely practice their religion in America).

5. See EMILE LESTER, TEACHING ABOUT RELIGIONS: A DEMOCRATIC APPROACH FOR PUBLIC SCHOOLS 231-32 (2011) (attributing to Reinhold Niebuhr the view that “[r]eligions are the source of ultimate moral and social commitments”).

6. See *id.* at 232 (“For liberals like John Rawls, . . . [p]luralism means we cannot hope to convince others of our religious vision of the good life.”); see also Steven Shiffirin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103, 1129 (1983) (explaining the neutrality principle).

7. See Henry Mather, *Natural Law and Liberalism*, 52 S.C. L. REV. 331, 357 (2001) (highlighting the assertion, exemplified in Rawls and Dworkin, that “lawmakers should be neutral on all moral issues, or at least all questions of what is good for humans”).

8. Dworkin writes of conceptions of the good life: “Since the citizens of a society differ in their conceptions, the government does not treat them as equals if it

occupy the left side of the political spectrum promote the neutrality principle,<sup>9</sup> but it is a predominant position, even if thinkers arrive at the position from different directions.<sup>10</sup>

The neutrality principle achieved a kind of formal acceptance in constitutional law in *Lawrence v. Texas*,<sup>11</sup> in which a closely divided Supreme Court adopted the view that Justice Stevens had set forth in dissent in *Bowers v. Hardwick*, that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”<sup>12</sup> Thus, Texas had “no legitimate state interest”—the lowest test the Court applies in evaluating the constitutionality of legislation—in criminalizing consensual homosexual relations.<sup>13</sup> In a different context, Chief Justice Roberts accused the majority of adopting John Stuart Mill’s harm principle as the test of constitutional legislation, and thus requiring government neutrality, in striking down all bans on same sex marriage in *Obergefell v. Hodges*.<sup>14</sup> The implication of the majority, according to the Chief Justice, was that the State may not declare homosexual life to be immoral per se, thus endorsing one vision—a heterosexual one—of a good life, when same sex marriage would “pose no risk of harm to themselves or third parties.”<sup>15</sup>

But while the neutrality principle is quite influential, there is a sense in which it is an unattainable ideal, and thus not a practical measure of liberal constitutionalism.<sup>16</sup> No political community can really be neutral about better and worse ways of living. Certainly,

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prefers one conception to another.” RONALD DWORKIN, *A MATTER OF PRINCIPLE* 191 (1985).

9. Steven Shiffrin, *Liberal Theory and the Need for Politics*, 89 MICH. L. REV. 1281, 1282 (1991) (“Ten of the eleven essays collected . . . proceed from the assumption that the state need not be neutral about the good life.”).

10. See Kenneth L. Townsend, *Education and the Constitution: Three Threats to Public Schools and the Theories that Inspire Them*, 85 MISS. L.J. 327, 340-43 (2016) (explaining that both neutralist and pluralist liberals, for different reasons, would oppose state inculcation of virtues in the citizenry).

11. 539 U.S. 558 (2003).

12. *Id.* at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

13. *Id.* at 578.

14. 135 S. Ct. 2584, 2622 (2015) (Roberts, C.J., dissenting) (criticizing the majority for philosophizing from the bench, relying on social policies rather than law to strike down the same-sex marriage ban).

15. *Id.*

16. Townsend, *supra* note 10, at 348, n.95 (“It is reasonable to ask whether neutrality is even achievable in any true sense of the term.”).

American society is not silent about what it views as a good life. In America, a relentless barrage of advertising promotes capitalist consumption. Materialism is plainly the American good life.

Here is how James Hillman describes that way of life and its power:

We can't get away from the Economy. To set aside the profit motive, the desire to possess, the ideals of fair wage and economic justice, the bitterness over taxation, the fantasies of inflation and depression, the appeal of saving, to ignore the psychopathologies of dealing, collecting, consuming, selling and working, and yet pretend to grasp the interior life of persons in our society would be like analyzing the peasants, craftsman, ladies and nobles of medieval society all the while ignoring Christian theology, as if it were merely an inconsequential occurrence. Economics is our contemporary theology, regardless of how we spend Sunday.<sup>17</sup>

Government plays an important role in promoting this consumption—not least by excessively tracking the numbers reflecting economic activity. As an illustration of this government promotion, two weeks after the 9/11 terrorist attacks, President George W. Bush told the nation to get back to consumption—to go down to Disney World.<sup>18</sup> And the message was taken. By relaxed regulation and easy credit, the nation binged on consumption in the ensuing years, leading to the Recession of 2008.<sup>19</sup>

Behind the emphasis on consumption, there is the positive American vision of the work ethic that sustains it. There is a deeply Protestant strand in the American approach to work.<sup>20</sup> Americans work longer hours than do most workers in the world,<sup>21</sup> and we seem to prefer it that way. There was even a 2012 advertising campaign to

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17. JAMES HILLMAN, *KINDS OF POWER: A GUIDE TO ITS INTELLIGENT USES* 5 (1995).

18. See Justin Fox, *Telling Us to Go Shopping*, TIME (Jan. 19, 2009), [http://content.time.com/time/specials/packages/article/0,28804,1872229\\_1872230\\_1872236,00.html](http://content.time.com/time/specials/packages/article/0,28804,1872229_1872230_1872236,00.html) [<https://perma.cc/K5M4-MKNB>] (showing that President Bush suggested people visit Disney World after 9/11).

19. See *id.* (showing that easy credit caused people to binge by spending money they did not have and suggesting that citizens are now “paying the bill” in 2009—seemingly referencing the 2008 Recession).

20. For an account of the religious and cultural implications of Max Weber's thesis of the Protestant work ethic, see Audrey Pumariega, Note, *Mañana, Mañana: Trans-Cultural Perceptions of Time and the Role of Polychronism in Latin American Legal Systems*, 41 U. MIAMI INTER-AM. L. REV. 105 (2009).

21. Dean Schabner, *Americans Work More Than Anyone*, ABC NEWS (May 1, 2017), <http://abcnews.go.com/US/story?id=93364&page=1> [<https://perma.cc/DG2V-TEVP>].

try to get Americans to use the vacation time off that they earn but do not take.<sup>22</sup>

Again here, government policy plays an important role through punishing policies that target the poor as lazy shirkers.<sup>23</sup> Everything about the American approach to poverty is built around the goal of forcing the poor and unemployed to work.<sup>24</sup> The continuing low labor force participation rate under President Barack Obama is widely regarded as one of the policy failures of his Administration.<sup>25</sup> The American attitude that people should work for their income is deeply held. As Archie Bunker and his wife, Edith, used to sing about a mythic past, in the theme song of *All in the Family*, “Didn’t need no welfare state. Everybody pulled his weight.”<sup>26</sup>

Foundational to these commitments to consumption and work is the prevalent American cult of the individual.<sup>27</sup> Americans, to a greater extent than others, reject the view that outside forces

22. See Teresa Iezzi, *Orbitz Wants You to Take Your Vacation Back*, FAST COMPANY (May 8, 2012, 2:40 PM), <https://www.fastcocreate.com/1680758/orbitz-wants-you-to-take-your-vacation-back> [<https://perma.cc/6XT5-S4RP>] (discussing an advertising campaign by Orbitz).

23. See Ezra Rosser, *Obligations of Privilege*, 32 N.Y.U. REV. L. & SOC. CHANGE 1, 51 (2007) (referring to the “paternalism and punishment in America’s welfare programs”).

24. See, e.g., Bryce Covert, *Paul Ryan Wants to Preserve His Work/Family Balance While Making It Harder for Poor Parents*, THINKPROGRESS (Oct. 21, 2015), <https://thinkprogress.org/paul-ryan-wants-to-preserve-his-work-family-balance-while-making-it-harder-for-poor-parents-6003fde3f146#.g7ut82nj5> [<https://perma.cc/K7BT-VR8F>] (criticizing the argument that the poor suffer from a “‘culture problem’ where they don’t value work”).

25. See, e.g., Ali Meyer, *Record 93,626,000 Americans Not in Labor Force; Participation Rate Hits 38-Year Low*, CNSNEWS.COM (July 2, 2015, 8:42 AM), <http://www.cnsnews.com/news/article/ali-meyer/record-93626000-americans-not-labor-force-participation-rate-declines-626> [<https://perma.cc/PMC2-2LHU>] (stating that in June 2015 the labor participation rate hit a 38-year low under President Obama’s administration).

26. *All in the Family Theme Song “Those Were the Days” Lyrics*, GENIUS, <https://genius.com/Carrroll-oconnor-and-jean-stapleton-all-in-the-family-theme-song-those-were-the-days-annotated> [<https://perma.cc/X7BN-49YG>] (last visited Apr. 10, 2017).

27. Cf. Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights over Children’s Interests*, 46 U. BALT. L. REV. 57, 67 (2016) (“[T]he ideology of homeschooling is compatible with and complementary to some excessive current expressions of American individualism and of our specifically negative-rights-based legal culture, which reflects a preference for liberty over equality.”).

determine a person's success or failure in life.<sup>28</sup> “‘The cult of the individual’ may be the closest thing American culture has to a common ideal.”<sup>29</sup>

American individualism manifests in various ways. The traditional American disdain for government is one example.<sup>30</sup> Relative to the rest of the world, America has one of the least regulated economies in the world,<sup>31</sup> and yet politicians from Ronald Reagan to President Donald Trump make very popular appeals by promising to reduce regulation even more.

While individualism manifests in these economic patterns on the American political right, the same individualism inheres in the American left—the ACLU, for example, is just as anti-government as is the Tea Party. The manifestation of this anti-government attitude just takes different forms, depending on a person's political alignment.

American individualism is also represented in constitutional law. Consider *Eisenstadt v. Baird*, in which the Supreme Court extended the right of contraception to individuals.<sup>32</sup> The precedent that *Eisenstadt* built on was *Griswold v. Connecticut*, which held that a state law prohibiting the use of contraception by a married couple was a violation of privacy.<sup>33</sup>

28. See George Gao, *How Do Americans Stand Out from the Rest of the World?*, PEW RES. CTR. (Mar. 12, 2015), <http://www.pewresearch.org/fact-tank/2015/03/12/how-do-americans-stand-out-from-the-rest-of-the-world/> [<https://perma.cc/7QUD-6QJF>] (supporting the proposition that a majority of Americans reject the view that success is determined by forces outside an individual's capacity).

29. See Nathan Heller, *The Disconnect: Why Are So Many Americans Living by Themselves?*, THE NEW YORKER (Apr. 16, 2012), <http://www.newyorker.com/magazine/2012/04/16/the-disconnect> [<https://perma.cc/F2QD-T6DL>] (reviewing ERIC KLINENBERG, *GOING SOLO: THE EXTRAORDINARY RISE AND SURPRISING APPEAL OF LIVING ALONE* (2012)).

30. Samantha Smith, *6 Key Takeaways About How Americans View Their Government*, PEW RES. CTR. (Nov. 23, 2015), <http://www.pewresearch.org/fact-tank/2015/11/23/6-key-takeaways-about-how-americans-view-their-government/> [<https://perma.cc/UEL3-HTQY>] (“[J]ust 19% [of Americans] say they trust the federal government to do what is right always or most of the time.”).

31. See JAMES GWARTNEY, ROBERT LAWSON & JOSHUA HALL, *ECONOMIC FREEDOM OF THE WORLD: 2015 ANNUAL REPORT* (2015), <https://www.fraserinstitute.org/sites/default/files/economic-freedom-of-the-world-2015.pdf> [<https://perma.cc/H33D-AQRU>] (rating the United States as the sixteenth most economically free country in the world).

32. 405 U.S. 438, 455 (1972).

33. 381 U.S. 479, 485-86 (1965).

The holding in *Griswold* had been based in large part on the concept of marital privacy that the state had always fostered and protected.<sup>34</sup> How then could this right be extended to unmarried sexual relations? Justice Brennan's majority opinion accomplished the extension by reinterpreting the nature of marriage:

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>35</sup>

I have always told my students that this observation by Justice Brennan—not rigorously argued, of course, but an easily assumed truth of liberal individualism—is destructive of marriage, or indeed of any long-term relationship of mutual concern and benefit. Such a relationship would indeed need to be an independent entity with its own mind and heart, if it were to last. Justice Scalia wrote more wisely in his *Obergefell* dissent when he suggested that marriage may be many things, but it is not an expansion of individual liberty.<sup>36</sup> Justice Brennan surely knew this—he married at 21 and enjoyed 55 years of marriage to his first wife until her death from cancer. But despite this secret knowledge, Brennan could only look at marriage in his public role through the lens of individualism.

This individualism also inheres in the abortion decisions. Of course, *Roe v. Wade* looks at abortion as a medical matter pertaining only to the pregnant woman and her doctor.<sup>37</sup> Her body is her property, to be free in large part from government interference, as is the case with property in general in a capitalist state. But precisely in line with the individualist view of marriage upheld in *Eisenstadt*, the Court held in *Planned Parenthood v. Casey* that a husband notification provision before an abortion was performed was

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34. *Id.* at 499 (Goldberg, J., concurring) (quoting Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 553 (1961)).

35. *Baird*, 405 U.S. at 453.

36. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 (2015) (Scalia, J., dissenting).

37. 410 U.S. 113, 153 (1973) ("All these are factors the woman and her responsible physician necessarily will consider in consultation.").

unconstitutional.<sup>38</sup> Since the statute contained an exception for fear of bodily injury resulting from the notification—a fear that could not be second guessed under the statute<sup>39</sup>—the predominant reason for the invalidation was the same “basic nature of marriage”<sup>740</sup> as that expressed in *Eisenstadt*—that abortion was not a decision to be made by the independent entity of the married couple, but by the individual.<sup>41</sup> The plurality opinion went so far at one point as to refuse to refer to the male party in the marriage as a father, or to the unborn child as his.<sup>42</sup> As far as the opinion’s language is concerned, someone else might be the father of this child:

The husband’s interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law.<sup>43</sup>

The point here is not what one thinks about these decisions, but simply to see starkly the American commitment to individualism as a necessary aspect of the good life. The Constitution endorses this individualism. The good life is the one in which a person stands on her own two feet, making her own way. This is the powerful American myth of the self-made man.<sup>44</sup>

The goal in this section is not to examine American non-neutrality in any detail,<sup>45</sup> but only to show that, while American

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38. 505 U.S. 833, 901 (1992).

39. *Id.* at 887.

40. *Id.* at 896.

41. *Id.* The passage from *Eisenstadt* is even quoted. It is true that the opinion marshalled facts about physical abuse, emotional abuse, child abuse and financial support, but in my view none of those statistics would have availed the invalidation of the husband notification provision if the husband had been viewed as having an equal right to his child. The opinion expressly observes that husband notification might be valid with respect to a “living child raised by both.” *Id.* at 895-96.

42. *See id.* at 898.

43. *Id.*

44. That mythological understanding reacts strongly when challenged. That is what happened when President Obama, during the 2012 campaign, said, “If you’ve got a business—you didn’t build that. Somebody else made that happen.” There was an enormous backlash to this statement. *See, e.g.,* Eugene Kiely, ‘*You Didn’t Build That, Uncut and Unedited*,’ *THE WIRE* (July 23, 2012), <http://www.factcheck.org/2012/07/you-didnt-build-that-uncut-and-unedited/> [<https://perma.cc/TH4P-88W7>].

45. The American commitment to progressive taxation, for example, is another, and different, aspect of non-neutrality. The better off are simply obligated

constitutionalism is plainly liberal in the sense of protecting fundamental rights, it is not neutral with regard to judgments about the good life. The next section looks at one aspect of this non-neutrality: American public life is most assuredly not neutral with regard to religion.<sup>46</sup> Surprisingly, it turns out that secularism is only in a certain and limited sense an aspect of American constitutionalism. Actually, America is a religious democracy.

## B. American Constitutional Democracy Is Not Neutral with Regard to Religion

I published a book in 2007 that tried to show that America was not a secular democracy, but a religious one.<sup>47</sup> The book argued that whether one looked at the role of religion politically—the 2004 Presidential election swung to President Bush largely on the strength of self-identified religious voters—or legally—in the judicial retreat in many ways from the *Lemon* religious neutrality test,<sup>48</sup>—a positive role of religion was very much a part of American public life.

But of course, the question put to the panel—whether secularism is a non-negotiable aspect of liberal constitutionalism—suggests the opposite—as did Brian Leiter’s book title.<sup>49</sup> The question suggests that liberal constitutionalism must, in some way, limit the role of religion in favor of a secular order and assumes, as background, that this must already be the case with regard to any country with a well-developed constitutional tradition, such as the United States. These suggestions and assumptions, however, are largely false.

If we first look at the political role of religion through the lens of neutrality, it is plain that political life in America is not neutral with respect to religion. Politically, voting in America remains

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to help those who are less fortunate. This is a simple moral position. See Rosser, *supra* note 23, at 28.

46. See *infra* Section I.B.

47. BRUCE LEDEWITZ, *AMERICAN RELIGIOUS DEMOCRACY: COMING TO TERMS WITH THE END OF SECULAR POLITICS* (2007).

48. *Tilton v. Richardson*, 403 U.S. 672, 678 (1971). Chief Justice Burger’s plurality opinion asked four questions to judge constitutionality, which, in later formulations, were condensed to three: “First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion? Fourth, does the implementation of the Act inhibit the free exercise of religion?” *Id.*

49. See LEITER, *supra* note 1.

highly demarcated by religious commitment and non-commitment.<sup>50</sup> Here is the PEW Trust exit poll summary for the Presidential election of 2016:

The 2016 presidential exit polling reveals little change in the political alignments of U.S. religious groups. Those who supported Republican candidates in recent elections, such as white born-again or evangelical Christians and white Catholics, strongly supported Donald Trump as well. Groups that traditionally backed Democratic candidates, including religious “nones,” Hispanic Catholics and Jews, were firmly in Hillary Clinton’s corner.<sup>51</sup>

Thus, America votes along religious lines in much the same way as do countries like Iraq, with its divisions among Sunni, Shiite, and Kurdish communities.<sup>52</sup> We do not generally think of those systems as religiously neutral, and indeed they are not. Neither is American democracy.

If, instead, we look at the matter of religious neutrality legally, the Free Exercise Clause itself obviously demonstrates a pro-religious practice position as a matter of constitutional right and public policy. It is equally revealing that every state constitution has some type of religious freedom provision.<sup>53</sup>

Admittedly, the Free Exercise Clause has now been interpreted to include a protection for what might be considered non-religious belief and practice,<sup>54</sup> and the presence of the no-religious-test Clause

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50. Gregory A. Smith & Jessica Martinez, *How the Faithful Voted: A Preliminary 2016 Analysis*, (Nov. 9, 2016), <http://www.pewresearch.org/fact-tank/2016/11/09/how-the-faithful-voted-a-preliminary-2016-analysis/> [https://perma.cc/5CJV-KT8N].

51. *See id.*

52. Nuimgeography, *The Geography of Voter Turnout in the 2010 Iraqi Parliamentary Elections*, EYE ON THE WORLD (Mar. 19, 2010), <https://maynoothgeography.wordpress.com/2010/03/19/the-geography-of-voter-turnout-in-the-2010-iraqi-parliamentary-elections/> [https://perma.cc/N92T-T7GB] (stating that Sunni turnout in the 2010 Iraqi parliamentary elections was “a major focus of attention for Sunni leaders in Iraq, who are hoping a solid turnout among their community will counterbalance a strong vote among the Shiite majority for their own religious parties”).

53. Paul Benjamin Linton, *Religious Freedom Claims and Defenses Under State Constitutions*, 7 U. ST. THOMAS J.L. & PUB. POL’Y 103, 108-83 (2013) (giving examples of state constitutions religious freedom provisions).

54. *United States v. Seeger*, 380 U.S. 163, 165-66 (1965) (stating that a person may be exempted under the Universal Military Training and Service Act if the person has a belief “that is sincere and meaningful” which “occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption”).

in Art. VI, Section 3,<sup>55</sup> could be read along the same line, even though its application to non-believers was highly controversial in the ratifying debates.<sup>56</sup> Nevertheless, the express nature of the Free Exercise Clause as originally written demonstrates a high public regard for religion as a matter of law.

*Employment v. Smith*,<sup>57</sup> which cut back on the reach of the Free Exercise Clause, does not alter this conclusion for two reasons: First, discrimination against religious practice is still banned, even under *Smith*,<sup>58</sup> and second, the overwhelming support in Congress for enactment of the Religious Freedom Restoration Act—practically unanimously<sup>59</sup>—shows that Americans continued to highly value freedom of religion as a matter of legal protection.<sup>60</sup> Of course, today that commitment to religious practice is contested, and the RFRA would not pass with such majorities today, or perhaps even pass at all.<sup>61</sup> Nevertheless, there is still a lot of public support for the practice of religion and for legal protections for the practice of religion.<sup>62</sup> And historically, when America was, after all, still a liberal constitutional

55. U.S. CONST. art. VI, § 3 (“[B]ut no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

56. See Frederick B. Jonassen, “*So Help Me?*”: *Religious Expression and Artifacts in the Oath of Office and the Courtroom Oath*, 12 CARDOZO PUB. L. POL’Y & ETHICS J. 303, 331-42 (2014) (highlighting the controversy sparked in the ratifying debates).

57. See 494 U.S. 872, 881-82 (1990) (showing that this case reduced the reach of the Free Exercise Clause, yet maintained a high public regard for religion as a matter of law).

58. See *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993) (showing how discrimination against religious practice is still banned).

59. See Michael Paisner, Note, *Boerne Supremacy: Congressional Responses to City of Boerne v. Flores and the Scope of Congress’s Article I Powers*, 105 COLUM. L. REV. 537, 539 (2005).

60. See *id.* at 537.

61. See Richard J. D’Amato, Note, *A “Very Specific” Holding: Analyzing the Effect of Hobby Lobby on Religious Liberty Challenges to Housing Discrimination Laws*, 116 COLUM. L. REV. 1063, 1102 (2016) (footnotes omitted) (“RFRA began as a bipartisan effort to protect religious exercise from oppression and discrimination in a legal environment that was widely seen as subordinating individual religious freedom to secular goals. In the wake of *Hobby Lobby*, many legitimately fear that it has become a tool for individuals to use religion as an excuse to thwart even vitally important social goals, such as access to health care or discrimination prevention. Such concerns have even led some to call for RFRA’s repeal and have made such provisions at the state level extremely controversial.”).

62. See, e.g., Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J.F. 416, 418 (2016).

democracy, that support for religious practice was even higher than it is today.

Even though America is not neutral toward religion, it does not follow that religious practitioners will be vindicated in their legal claims in every case that involves the practice of religion.<sup>63</sup> There are other values as well, such as equality, which might prevail against claims of religious exemption in certain circumstances.<sup>64</sup> Indeed, in large part it is the tension between religious practice and the recognition of equal rights for gay Americans that has sparked reconsideration of the role of legal protections for religious practice.<sup>65</sup> I only mean that America has historically assumed, even if this assumption is now weakening, that a good life includes religious worship. This is the import of President Dwight Eisenhower's widely cited support for a generic form of religion: "Our [form of] government . . . makes no sense unless it is founded on a deeply felt religious faith—and I don't care what it is."<sup>66</sup>

Given all this, what can it frankly mean to describe the American system as secular, a quite common description?<sup>67</sup> I will go on to discuss some aspects of the secularism of American constitutionalism, but my conclusion ends not far from where Andrew Koppelman neatly puts his summary of this matter:

American First Amendment doctrine has used "neutrality" as one of its master concepts, but it treats religion as a good thing. Its neutrality is its insistence that religion's goodness be understood at a high enough level of abstraction that the state takes no position on any live religious dispute. It holds that religion's value is best honored by prohibiting the state from trying to answer religious questions. This neutrality has over time become more vague as America has become more religiously diverse, so that today

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63. See, e.g., D'Amato, *supra* note 61, at 1064.

64. See *id.*; see also Lederman, *supra* note 62, at 419.

65. See Lederman, *supra* note 62, at 419 ("[T]here is widespread fear in some quarters—and presumably hope in others—that such claims might become a template for similar claims, pursuant to federal or state RFRA or analogous state constitutional provisions, for religious exemptions from laws that prohibit discrimination in employment, or in the provision of public accommodations, on the basis of sexual orientation.").

66. Patrick Henry, "And I Don't Care What It Is": *The Tradition-History of a Civil Religion Proof-Text*, 49 J. AM. ACAD. RELIGION 35, 36 (1981).

67. The assumption that America is a secular democracy is so conventional and widespread as to be unassailable. See, e.g., Wendie L. Kellington, *God and the Land: Thoughts About Land Use Controls and Religious Freedom in the American Religious System*, 2 ALB. GOV'T L. REV. 537, 539 (2009) ("The United States of America is the first truly secular democracy in the recorded history of the planet.").

(with the exception of a few grandfathered practices) the state may not even affirm the existence of God.<sup>68</sup>

Thus, according to Professor Koppelman, despite the formal appellation of neutrality, the American constitutional system is not neutral toward religion, but favors it.<sup>69</sup> This does not mean that references to our constitutional democracy as secular are altogether wrong, but that the term, secular, in this formulation must be understood in a very restricted sense.

As a start to a more nuanced understanding, it should be noted that America has, at the federal level, what has been called the Godless Constitution, which does not name any religious goal as the telos of the State.<sup>70</sup> The government does not participate in bringing salvation, for example. Nor does the text of the Constitution acknowledge the role of God in the affairs of human beings or express gratitude toward God for the blessings of liberty, as some state constitutions do.<sup>71</sup> The Godless Constitution was no oversight, but was a matter of some controversy at the time of the founding.<sup>72</sup> Rather than refer to God, “We the People of the United States” were the authors of our own political system, legal system, and destiny, according to the constitutional text.<sup>73</sup>

In addition, the Constitution’s Establishment Clause at least forbids the establishment of a national church.<sup>74</sup> At the time of the founding, this did not mean that government sponsored churches were unconstitutional.<sup>75</sup> Official state churches remained in place for

68. Andrew Koppelman, *The Piety of My Negative Judaism*, 16 RUTGERS J.L. & RELIGION 303, 305 (2015) (footnote omitted). *But see infra* Section I.B (containing my disagreement with Koppelman over the significance of the symbol, God).

69. *See* Koppelman, *supra* note 68, at 305.

70. *See* ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS 12 (1997).

71. *See, e.g.*, PA. CONST. pmb. (“W[e], the people of the Commonwealth of Pennsylvania, grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this Constitution.”).

72. *See generally* Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927 (1997).

73. U.S. CONST. pmb.

74. U.S. CONST. amend. I.

75. William G. Ross, *The Need for an Exclusive and Uniform Application of “Neutral Principles” in the Adjudication of Church Property Disputes*, 32 ST. LOUIS U. L.J. 263, 266 (1987)

a period of time<sup>76</sup> and the federal Establishment Clause was adopted at least in part to prevent federal interference with the religious choices of the state governments.<sup>77</sup>

However, it is fair to say that the Establishment Clause means more than that now. What the Establishment Clause is now understood to prevent is institutional merging or mixing of religious and government authority.<sup>78</sup> This means that the government can have only the most limited role in structuring religious institutions. For example, the government has no say in who should be a religious leader under the aegis of anti-discrimination laws.<sup>79</sup> The government may not participate in resolving the religious aspects of a religious dispute.<sup>80</sup> On the other hand, religious institutions are bound by numerous government-imposed obligations, such as health, safety, and labor laws, that are judged not to unduly interfere with religious practice.

In the opposite direction, religious institutions cannot be granted governmental power.<sup>81</sup> They can have no final authority with regard to any aspect of public life.

In terms of taxpayer support of religious institutions, although the contours of this field have changed substantially in the last thirty years, it is still the case that government may not directly fund the religious aspects of a religious institution's mission. This does not prevent the government from supporting secular portions of the curriculum of religious schools or using religious institutions to provide government benefits or run government programs on a contract basis.<sup>82</sup>

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76. *Id.* (“In Massachusetts, Connecticut and New Hampshire, churches continued to receive state support well into the Nineteenth Century.”).

77. Rupal M. Doshi, *Nonincorporation of the Establishment Clause: Satisfying the Demands of Equality, Pluralism, and Originalism*, 98 GEO. L.J. 459, 465 (2010) (“[T]he Establishment Clause was a federalist constraint on the powers of Congress to restrain the federal government from establishing a national religion and to protect state establishments that existed at the time of the founding.”).

78. U.S. CONST. amend. I.

79. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 712-13 (2012).

80. *See Jones v. Wolf*, 443 U.S. 595, 613 (1979).

81. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122-23, 127 (1982).

82. For an account of the more permissive interpretation of the Establishment Clause by 1999, see Bryan D. LeMoine, Note, *Changing Interpretations of the Establishment Clause: Financial Support of Religious Schools*, 64 MO. L. REV. 709, 709 (1999). Recent developments are too numerous for me to describe here, but the biggest change is the Court's acceptance of vouchers in *Zelman v. Simmons-Harris*, 536 U.S. 639, 643 (2002).

Does all this add up to secular government? The answer to that is yes and no. It adds up to a government with almost no role in the running of religious institutions. It also adds up to a government that cannot really teach or promulgate religious doctrines in its educational role. This is so despite fights over the presence of Biblical symbols in public schools, like the Ten Commandments or the national motto, “In God We Trust,” or the Pledge of Allegiance, with its reference to “one nation under God.” Once the Court ended Bible reading<sup>83</sup> and school led prayer,<sup>84</sup> the role of public schools in religious formation basically ended. The most contested issues today concerning religion in public schools, such as continuing concerns about the teaching of evolution, would be regarded by religious believers who oppose such government teaching as defensive in nature—as an attempt to prevent government interference with religious practice and formation in the young through the presentation of a materialist view of reality.<sup>85</sup>

Given the absence of any formal role for government in religious life, and vice versa, why do I object to the term “secular democracy?” There are three reasons. First, government policies taken as a whole have historically been friendly toward religious practice by arranging public life to allow religious denominations to create their own institutional structures.<sup>86</sup> This has been the case even at the expense of other important values. For example, permitted religious use of certain banned intoxicants in rituals is a common legal exemption.<sup>87</sup> The government has also taken many steps toward easing burdens on religious practice, especially burdens on the practice of Christianity, through, for example, designating Christmas as a national holiday and, in an earlier period, banning commercial practices on Sunday.<sup>88</sup> All in all, government has seen to it that

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83. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963).

84. *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

85. This is in part what Justice Stewart was warning against in his dissent in *Schempp* that public education could inculcate a child in “a religion of secularism” in which religion would be viewed by the student as only something “private” rather than something pertaining to the world. *See Schempp*, 374 U.S. at 313 (Stewart, J., dissenting).

86. *See Emp’t Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 890 (1990) (referencing accommodations for religious groups who use intoxicants in rituals).

87. *Id.* (referencing this statutory accommodation).

88. *See, e.g., McGowan v. Maryland*, 366 U.S. 420, 422 (1961) (upholding Sunday closing laws).

religious practices in America have every advantage. It is hard to think of such a government as genuinely secular.

The second reason that secular democracy does not seem an apt description of the American constitutional system is the reserved place for God in American public life, from the national motto to the Pledge of Allegiance.<sup>89</sup> As Justice Douglas famously wrote in 1952, “We are a religious people whose institutions presuppose a Supreme Being.”<sup>90</sup> Largely without interference from the courts, except for issues of coercion,<sup>91</sup> the government has allowed a kind of symbolic space for this all-important religious reference.<sup>92</sup> For all the loose talk by the Justices of ceremonial deism and its implied lack of genuine piety,<sup>93</sup> this symbolic space is significant, for reasons I will return to below. To put it simply for the moment, the constitutional permission to use the word God is significant because there are different kinds of secularisms. The ontologies of some of those secularisms are incompatible with the order and intelligence in reality implied by the symbol, God. Those secularisms would maintain that the universe is not governed at all, but is a manifestation of chance and accident.<sup>94</sup> A government that promotes the concept of God is promoting an understanding of reality that these secularists would dispute. Is such a government really secular?

Finally, I object to the term secular democracy because of its association with the Rawlsian Project of banishing from public reason, and thus from public life, “comprehensive doctrines of truth or right,” in favor of “an idea of the politically reasonable addressed

89. The use of the symbol God in American public discourse has always been ubiquitous and even today is common. Professor Koppelman may be correct that government may not “affirm” the existence of God, but that existence (or perhaps presence is a better word) is still generally assumed, as President Trump’s reference to God in his Inauguration Address shows. *See* Koppelman, *supra* note 68, at 305.

90. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

91. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 592 (1992).

92. Of course the case law has its ups and downs concerning the meaning of endorsement—*compare* *Van Orden v. Perry*, 545 U.S. 677, 691-92 (2005), *with* *McCreary Cty. v. ACLU*, 545 U.S. 844, 881 (2005) (opposite holdings on the permissibility of Ten Commandment displays on public property)—the details of which are beyond my scope here. I only mean that government use of the term God has never by itself been held unconstitutional.

93. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37-40 (2004) (O’Connor, J., concurring).

94. For the contrasts of these secularisms, see Bruce Ledewitz, *The New New Secularism and the End of the Law of Separation of Church and State*, 28 *BUFF. PUB. INT. L.J.* 1, 22-23 (2009) [hereinafter *The New New Secularism*].

to citizens as citizens.”<sup>95</sup> The genesis of this project is the supposed incommensurability of the comprehensive doctrines of various communities, especially religious ones.<sup>96</sup>

This is a large topic, of course; the discussion of which is beyond my scope here. But the very use of terms like secular democracy or secular constitutionalism grants a kind of legitimacy to this effort to forge a thin politics in which people are expected to park their deepest religious and moral commitments at the door, before entering the room of public life.<sup>97</sup> Such a vision of politics excludes, in principle, religious views of the world from influencing public debate. That is a way for one side to win in politics without ever having to convince anyone of anything.

The Rawlsian Project collapsed.<sup>98</sup> Symbolically, I associated that collapse in my book with the Presidential campaign of 2004, in which massive electoral mobilization of religious voters foretold President Bush’s reelection.<sup>99</sup> After that result, no one any longer could seriously expect to tell religious communities what they were allowed to say in political discourse.<sup>100</sup>

Today, the collapse of the Rawlsian Project looks like part of a more general political reorientation in the West that is undermining elite institutions and globalization in favor of thick commitments of all types—religious, ethnic, and national. That change, or, some would say, reaction, had numerous manifestations in 2016, from the British Brexit to the rise of nationalisms in Europe to the American Presidential campaign. A purely secular democracy is part of what lost in the Presidential election of 2016.

In its limits on religion, the Rawlsian Project did not operate in good faith. When Rawls essentially decreed that a robust pro-life

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95. John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 766 (1997).

96. For discussion of the Rawlsian Project and its shortcomings, see Bruce Ledewitz, *The Role of Religiously Affiliated Law Schools in the Renewal of American Democracy*, U. MASS. L. REV. (forthcoming 2017).

97. See Bruce Ledewitz, *Up Against the Wall of Separation: The Question of American Religious Democracy*, 14 WM. & MARY BILL RTS. J. 555, 662-63 (2005) (explaining that “thin, liberal politics” are insufficient to address the deeper yearnings of political life).

98. See LEDEWITZ, *supra* note 47, at 11.

99. See *id.* at 3-12.

100. See *id.* at 12.

position could not be expressed by public reason,<sup>101</sup> he betrayed his own undertaking. Far from a pro-choice position following from anything Rawls had argued in *A Theory of Justice*, the persons in Rawls' original position, whom Rawls insisted would be risk averse,<sup>102</sup> would presumably have insisted on outlawing abortion in any liberal state, for fear that they would be the gestating baby aborted. In his inconsistent pro-choice stance, Rawls revealed himself as liberal ideologue first and political thinker second.

Nevertheless, the political renaissance of religion in American public life was not brought about by reason or criticism. Religious thinking did not defeat Rawls. It happened because religious voters insisted that their interests be served. In other words, it happened as a matter of power.

The result in the 2016 Presidential election continued to reflect the raw political power of religious voters. The outpouring of white, religious votes for President Trump occurred in part because of a suggestion in oral argument in *Obergefell* that religious institutions might lose their tax exempt status if they failed to adapt to a judicial decision constitutionalizing gay marriage.<sup>103</sup> That suggestion in oral argument turned the 2016 Presidential election almost into a last stand for religion. That urgency had a political impact, particularly when the politics of 2016 were otherwise so dispirited.

I wrote above that the answer to Leiter's question, *Why Tolerate Religion*, was that we had to do so. Tolerance for religion was not granted; it was wrested out of the hands of the secular elite. American constitutionalism is not neutral with regard to religion because the American people have never been neutral about religion. So, we can say that religion is a necessary aspect of liberal constitutionalism whenever the people are serious about religion.

But, what if that situation changes, as it indeed is now changing in America? Is religion a necessary aspect of liberal

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101. JOHN RAWLS, POLITICAL LIBERALISM 243-44 n.32 (1993). See also John Finnis, *Public Reason, Abortion, and Cloning*, 32 VAL. U. L. REV. 361, 368-69 (1998).

102. See JOHN RAWLS, A THEORY OF JUSTICE 172 (1971) ("[T]he parties do not know whether or not they have a characteristic aversion to taking chances. . . . What must be shown is that choosing as if one had such an aversion is rational given the unique features of that situation.").

103. See David Bernstein, *The Supreme Court Oral Argument that Cost Democrats the Presidency*, WASH. POST: VOLOKH CONSPIRACY (Dec. 7, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/07/the-supreme-court-oral-argument-that-cost-democrats-the-presidency/?utm\\_term=.02f1dbd52e06](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/07/the-supreme-court-oral-argument-that-cost-democrats-the-presidency/?utm_term=.02f1dbd52e06) [<https://perma.cc/T339-45PZ>].

constitutionalism when the voters are increasingly secular, or at least no longer religious? That question is the subject of the next Part. It turns out that there is more to the necessity of religion for liberal constitutionalism than mere power. There is another kind of necessity.

## II. THE CRISIS IN SECULARISM NECESSITATES A TURN TO RELIGION

The 2016 Presidential Campaign, between two of the most unpopular figures in American political history, revealed deep dissatisfaction on the part of the American people.<sup>104</sup> This was not just true of voters for Trump.<sup>105</sup> There was, in general, a pervasive lack of hope and lack of trust.<sup>106</sup> That attitude was not caused by the events of the campaign. That attitude was what made those events possible in the first place.

How did we get here? What happened to our democracy? Part of the answer to those questions is that the American commitment to religion has both diversified and faded.<sup>107</sup> Christianity is no longer the dominant cultural resource that it had been for all of American history.<sup>108</sup> Not only are we now much more religiously diverse, but we are also in the midst of a cultural decline of religion in general.<sup>109</sup> Religion is increasingly rejected, or maybe better, ignored, by the young.<sup>110</sup> The culture no longer finds its expression and renewal in

104. See Press Release, Quinnipiac University Poll, Deep Dissatisfaction Among U.S. Voters, Quinnipiac University Poll Finds; Trump Supporters Want Leader Who Ignores the Rules (Apr. 5, 2016), <https://poll.qu.edu/national/release-detail?ReleaseID=2340> [<https://perma.cc/YCY7-KCJ7>].

105. See *id.* (noting that many Democrats and Republicans agreed with statements like “America has lost its identity,” “I’m falling further and further behind economically,” and “beliefs and values are under attack”).

106. See *id.*

107. See Anthony B. Pinn & Tom Krattenmaker, *Christian America Is in Decline—Here’s Why It Impacts Everyone*, WASH. MONTHLY (Dec. 23, 2016), <http://washingtonmonthly.com/2016/12/23/christian-america-is-in-decline-heres-why-it-impacts-everyone/> [<https://perma.cc/4VQ9-CK5E>].

108. Anthony B. Pinn and Tom Krattenmaker captured the fading of Christianity in the culture in Washington Monthly last December: “Christmas is nearly here and, with it, the fulfillment of Christians’ expectant wait for the arrival of the savior. Decades ago, this religious experience of the Christmas season would captivate nearly all Americans. Not so today. . . . Who will be observing a religiously inflected Christmas in another 20 years? In another 50 years?” *Id.*

109. These two factors are often put together. As Pinn and Krattenmaker put it: “America’s growing pluralism and secularity are what they are.” *Id.*

110. The generally accepted figures are that 25% of Americans are not religiously affiliated, and 40% are among younger adults. See *id.*

religious imagery and religious messages. The era of the Biblical cadences of Martin Luther King, Jr., is over. When President Trump announced in his Inaugural Address that “we will be protected by God,”<sup>111</sup> the sentiment rang hollow both because of who he is—not by any stretch does he seem to be a person of faith, and he did not campaign as one—and who we now are.

But no sources of meaning have yet emerged to replace what we have lost. America once had a story from which we could live. That story was a religious one—actually a Protestant story. That story is now a story from America’s past.<sup>112</sup> In that past, America was not a secular constitutional democracy. But it will be in the future.

The question is what kind of secularism is going to come forward in that future? Religion is currently a necessary aspect of liberal constitutionalism in America because there are still enough religious voters, sufficiently motivated, to so insist.<sup>113</sup> In the future, however, religion will be a necessary aspect of liberal constitutionalism for a different reason—because secularism will not have, on its own, the necessary sources of meaning to build a sustainable public life.

#### A. The Cultural Emergency of Distrust

Why did America nominate two candidates the voters regarded as untrustworthy? Undoubtedly there are structural political imperfections in the nomination process that account for these events in part.<sup>114</sup> But fundamentally, the American people did not insist on more trustworthy candidates. The failure of more upright candidates to emerge reveals a decline in social trust. We no longer expected anything better than the candidates who were nominated.

Given the nature of the candidates who were nominated, it was no surprise that the campaign consisted not of reasoned discourse,

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111. Mark Pattison, “*We Will Be Protected by God*,” *Trump Declares in Inaugural Address*, CATH. NEWS SERV. (Jan. 20, 2017, 1:25 PM), <http://www.catholicnews.com/services/englishnews/2017/we-will-be-protected-by-god-trump-declares-in-inaugural-address.cfm> [https://perma.cc/7ZWW-CAZJ].

112. See Pinn & Krattenmaker, *supra* note 107.

113. See discussion *supra* Section I.B.

114. Election law expert Eugene Mazo tells me that interest in the structure of the Presidential nomination process is a part of the neo-institutionalism movement. See Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS 90 (Guy-Uriel E. Charles et al. eds., 2011).

and not of hope for the future, but of personal criticisms, outright lies, and widespread anger—of cries of “deplorables” and “lock her up!”<sup>115</sup> The major campaign promises of Donald Trump were ludicrous in their unreality—a wall Mexico would pay for, a 4% growth rate, and massive numbers of coal and steel jobs.<sup>116</sup> I cannot say the same about Secretary Clinton’s promises, because she did not promote policy. Clinton ran an almost exclusively negative campaign aimed at Trump’s shortcomings.

I have described at some length in an upcoming law review article this “breakdown in American Democracy” during the 2016 Campaign.<sup>117</sup> Here I wish to emphasize only one aspect of that breakdown—the pervasive lack of trust that Americans feel toward the major institutions of public life and toward each other.<sup>118</sup> A Trump supporter, Al Ameling, perfectly illustrated this distrust in an article in the *New York Times* on January 13, 2017, when he stated in terms of the media criticism of President-elect Trump, “The way it is nowadays, unless I see positive proof, it’s all a lie.”<sup>119</sup> This insistence on irrefutable proof leads to ideological fixation, in which no proof contrary to one’s already established preference will ever be “positive” enough.

Though the distrust I describe is here attributed to a Trump supporter, the same phenomenon can be found, for example, in persons who, though lacking any empirical basis, oppose vaccines and genetically modified food. Such opponents are generally identified with the left wing of the political spectrum.<sup>120</sup> Distrust is our nonpartisan state.

115. See Edward B. Colby, *Campaign Phrases from Donald Trump, Hillary Clinton and More You’ll Remember Long after the Election Is Over*, *NEWSDAY* (Nov. 23, 2016, 6:13 PM), <http://www.newsday.com/news/nation/donald-trump-hillary-clinton-campaign-phrases-you-ll-remember-long-after-the-election-is-over-1.12539123> [<https://perma.cc/K5LV-9S6S>].

116. See *Trump Promise Tracker*, *WASH. POST*, <https://www.washingtonpost.com/graphics/politics/trump-promise-tracker/> [<https://perma.cc/92BL-EL2N>] (last updated Mar. 16, 2017).

117. See Ledewitz, *supra* note 96.

118. See *id.* at 3-5.

119. Trip Gabriel, *In Iowa, Trump Voters Are Unfazed by Controversies*, *N.Y. TIMES* (Jan. 12, 2017), <https://www.nytimes.com/2017/01/12/us/donald-trump-iowa-conservatives.html> [<https://perma.cc/FFG6-T38U>].

120. See Chris Mooney, *Tea Party Supporters Distrust Scientists Not Only On Climate, But On Vaccines—Study*, *WASH. POST* (Aug. 27, 2015), [https://www.washingtonpost.com/news/energy-environment/wp/2015/08/27/study-suggests-that-tea-partiers-distrust-scientists-more-on-vaccines/?utm\\_term=.9bc2e53d8ea0](https://www.washingtonpost.com/news/energy-environment/wp/2015/08/27/study-suggests-that-tea-partiers-distrust-scientists-more-on-vaccines/?utm_term=.9bc2e53d8ea0) [<https://perma.cc/GV7T-TLG5>].

The formulation by Mr. Ameling is not one of skepticism in which assertions are put to a test in order to discover the truth of things.<sup>121</sup> It is, instead, a guiding orientation that assumes—in the words of the student in Daniel Quinn’s classic book *Ishmael*—that we are being lied to by shadowy interests and powers that will keep us from ever learning the truth.<sup>122</sup> For Mr. Ameling, it was the mainstream media that controls information.<sup>123</sup> For a political liberal, it might be the corrupting influence of dark money that does so.<sup>124</sup> The attitude of distrust is the same.

What is missing on both sides of the political spectrum is a faith in the power of truth to become accepted in Justice Holmes’s “free trade in ideas,”<sup>125</sup> notwithstanding the contrary forces arrayed against it. That fundamental tenet of constitutional democracy embodied in the First Amendment has somehow eroded.

The distrust is so pervasive that its manifestations would be comical if they were not so serious. So, a few weeks after the election, Edgar Welch, a seemingly normal citizen, a 28-year-old father of two children, read online that a pizza shop in Washington, D.C., was holding children as sex slaves in a child abuse ring led by Hillary Clinton.<sup>126</sup> Concerned, and willing to at least consider the possibility that the story was accurate, Mr. Welch went to the pizza shop armed with a rifle and shot the rifle once.<sup>127</sup> Fortunately, no one was hurt.<sup>128</sup>

Obviously, the whole episode was nuts, but that is somehow where we are. Progress, in Bernard Lonergan’s sense in the book *Insight*, requires that we live our lives on trust.<sup>129</sup> The scientist, for example, does not verify all of the experiments upon which her

121. See Gabriel, *supra* note 119.

122. See DANIEL QUINN, *ISHMAEL: AN ADVENTURE OF THE MIND AND SPIRIT* 27-28 (1992).

123. See Gabriel, *supra* note 119.

124. For just such an account of hidden political forces, see generally JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* (2016).

125. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

126. See Cecilia Kang & Adam Goldman, *In Washington Pizzeria Attack, Fake News Brought Real Guns*, N.Y. TIMES (Dec. 5, 2016), <https://nyti.ms/2h8nPmp> [<https://perma.cc/MR2A-L7D6>].

127. See *id.*

128. See *id.*

129. See BERNARD LONERGAN, *INSIGHT: A STUDY OF HUMAN UNDERSTANDING* 741 (Frederick E. Crowe & Robert M. Doran eds., 1992).

research relies.<sup>130</sup> In contrast, the state of distrust in which we live exemplifies Lonergan's concept of decline.<sup>131</sup> That is part of what makes distrust an emergency for this culture.

Distrust is experienced—perhaps practiced is a better word—at the highest societal levels. In one important and revealing episode, candidate Trump claimed, before the election and without evidence, that the voting would be “rigged.”<sup>132</sup> After the election, he claimed that he would have won the popular vote except for the “millions of people who voted illegally.”<sup>133</sup> As President, he is still pursuing this claim.<sup>134</sup> This is an example of distrust that Trump's supporters endorse as well.

Before the voting, the media produced election officials, often Republicans, to reassure the public that voting would not be fraudulent but would accurately reflect the ballots that were cast.<sup>135</sup> Hillary Clinton admonished Trump to accept the result of the election.<sup>136</sup>

But then, after Clinton lost the election, her campaign joined lawsuits initiated by the left-of-center Green Party, demanding a recount and challenging the results in selected states, apparently on some theory of possible hacking of the vote totals—the sort of claim

130. See MARK T. MILLER, *THE QUEST FOR GOD & THE GOOD LIFE: LONERGAN'S THEOLOGICAL ANTHROPOLOGY* 83 (2013). While the specific quotes upon which Miller relies for this point come from Lonergan's *Method in Theology*, the observation still applies to progress and decline. *Id.*

131. See LONERGAN, *supra* note 129, at 716, 725.

132. See Linda Qui, *Donald Trump's Pants on Fire Claim of "Large Scale Voter Fraud"*, POLITIFACT (Oct. 17, 2016, 3:32 PM), <http://www.politifact.com/truth-o-meter/statements/2016/oct/17/donald-trump/donald-trumps-pants-fire-claim-large-scale-voter-f/> [<https://perma.cc/V2PQ-AE4N>].

133. See Arnie Seipel, *Trump Makes Unfounded Claim that 'Millions' Voted Illegally for Clinton*, NPR (Nov. 27, 2016, 8:18 PM), <http://www.npr.org/2016/11/27/503506026/trump-makes-unfounded-claim-that-millions-voted-illegally-for-clinton> [<https://perma.cc/DTV6-RBFS>].

134. See Michael D. Shear & Peter Baker, *After His Claim of Voter Fraud, Trump Vows 'Major Investigation'*, N.Y. TIMES (Jan. 25, 2017), <https://nyti.ms/2kte4AP> [<https://perma.cc/L6RA-SYAJ>].

135. See Qui, *supra* note 132.

136. See Virginia Kruta, *Hillary 'Horrified' Trump Might Not 'Accept' Election Results—She Sang a Different Tune in 2000*, INDEP. J. REV. (Nov. 2016), <http://ijr.com/2016/10/718387-hillary-horrified-trump-might-not-accept-election-results-she-sang-a-different-tune-in-2000/> [<https://perma.cc/R5UV-6ZCX>]. At the third debate, Clinton called Trump's reluctance to say he would accept the voting results “horrifying.” See *id.*

that Democrats earlier had dismissed as fantasy.<sup>137</sup> The point is that while Clinton herself may have known that such hacking was impossible, the distrust among her supporters of official reassurances by voting officials pressured her to act.<sup>138</sup> In its own way, the claimed basis for these recounts was as crazy as shooting up a pizza shop.

When distrust like this characterizes the political scene, debate about policy becomes impossible. For example, both political parties turned away from free trade during the 2016 political campaign, even though there does not seem much doubt that automation, rather than trade, is the reason for the great majority of lost factory jobs.<sup>139</sup> There did not seem to be an appetite for any kind of debate on this issue, even among persons who were formerly pro-trade.<sup>140</sup> And so, counter-productive policies are about to be adopted without meaningful discussion and without any basis. Both political parties were guilty of this irrationality.

Of course one could say that there is a good reason for popular distrust. People feel they are being lied to because they *are* being lied to by our leaders and leading institutions.<sup>141</sup> So, for example, there never was a complete and candid account by Clinton of the private email matter. As for President Trump, the lies continued even after he was sworn in as President.<sup>142</sup> Trump's Press Secretary falsely accused the media of doctoring photographs to show a smaller crowd than had been present at President Obama's first inauguration in

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137. See Matt Zapotosky, *Clinton Campaign Will Participate in Wisconsin Recount, with an Eye on 'Outside Interference,' Lawyer Says*, WASH. POST (Nov. 26, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/11/26/clinton-campaign-will-participate-in-wisconsin-recount-with-an-eye-on-outside-interference-lawyer-says/?utm\\_term=.877e18187c96](https://www.washingtonpost.com/news/post-nation/wp/2016/11/26/clinton-campaign-will-participate-in-wisconsin-recount-with-an-eye-on-outside-interference-lawyer-says/?utm_term=.877e18187c96) [<https://perma.cc/969D-UL6G>].

138. See *id.*

139. See Paul Wiseman, *Why Robots, Not Trade, Are Behind So Many Factory Job Losses*, ASSOCIATED PRESS (Nov. 2, 2016, 1:49 PM), <http://bigstory.ap.org/article/265cd8fb02fb44a69cf0eaa2063e11d9/mexico-taking-us-factory-jobs-blame-robots-instead> [<https://perma.cc/5NUP-Y562>].

140. See *id.*

141. See Jeremy Stahl & Derreck Johnson, *Can You Tell the Difference Between These Two Inauguration Photos?*, THE SLATEST (Jan. 20, 2017, 11:40 AM), [www.slate.com/blogs/the\\_slatest/2017/01/20/can\\_you\\_tell\\_the\\_difference\\_between\\_these\\_two\\_inauguration\\_photos.html](http://www.slate.com/blogs/the_slatest/2017/01/20/can_you_tell_the_difference_between_these_two_inauguration_photos.html) [<https://perma.cc/8AUT-4W6Z>]. See also Julie Hirschfeld Davis and Matthew Rosenberg, *With False Claims, Trump Attacks Media on Turnout and Intelligence Rift*, N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/us/politics/trump-white-house-briefing-inauguration-crowd-size.html> [<https://perma.cc/E5ZR-YSXY>].

142. See *id.*

2009.<sup>143</sup> At the same time, President Trump accused the media of falsely promoting stories of a rift between the Intelligence Community and himself, calling the media “dishonest,” when his own recent words clearly demonstrated his numerous criticisms of intelligence reports about meddling by Russia in the 2016 Presidential Campaign.<sup>144</sup>

Trump has inaugurated an era in which lies like these actually do not seem to matter—an era of “alternative facts.”<sup>145</sup> Without intending any hyperbole, former conservative radio talk-show host Charles Sykes wrote in an op-ed on February 4, 2017, that “[t]he battle over truth is now central to our politics.”<sup>146</sup>

But how much change does this really reflect? We have been moving down this road of dishonesty for a while. President Clinton’s mincing words about sex with an intern was a lie told directly to the cameras—“I did not have sexual relations with that woman.”<sup>147</sup> An aide to President George W. Bush, later revealed to be Karl Rove, referred to the journalism “reality-based community,” as opposed to the power of propaganda (he did not use that term) to change the world.<sup>148</sup> ExxonMobil for years told the public, and supported researchers who claimed, that there was no proof of global warming,

143. See Davis & Rosenberg, *supra* note 141; Stahl & Johnson, *supra* note 141. It was unfortunate that the Trump White House chose to attack the photos as dishonest when they were not. For the stories about the Inauguration crowd did suggest media bias, just not by doctoring photos. After all, why was the size of the crowd a news story at all and why was it compared to the historic crowd drawn by the first African-American President in a predominantly African-American City? Why not a comparison, if one was to be made at all, to President Clinton or President Reagan?

144. See Davis & Rosenberg, *supra* note 141.

145. See Charles J. Sykes, *Why Nobody Cares the President Is Lying*, N.Y. TIMES (Feb. 4, 2017), <https://www.nytimes.com/2017/02/04/opinion/sunday/why-nobody-cares-the-president-is-lying.html> [<https://perma.cc/9VAW-2GKZ>].

146. See *id.*

147. See Lily Rothman, *The Story Behind Bill Clinton’s Infamous Denial*, TIME (Jan. 26, 2015), <http://time.com/3677042/clinton-lewinsky-response/> [<https://perma.cc/7YAJ-2W2W>].

148. The story originally appeared in 2004. Ron Suskind, *Faith, Certainty and the Presidency of George W. Bush*, N.Y. TIMES (Oct. 17, 2004), [http://www.nytimes.com/2004/10/17/magazine/faith-certainty-and-the-presidency-of-george-w-bush.html?\\_r=0](http://www.nytimes.com/2004/10/17/magazine/faith-certainty-and-the-presidency-of-george-w-bush.html?_r=0) [<https://perma.cc/9A73-B3XS>]. For later commentary, see Damon Linker, *The Left vs. the Reality-Based Community*, THE WEEK (Jan. 27, 2016), <http://theweek.com/articles/601420/left-vs-realitybased-community> [<https://perma.cc/MD7P-25SX>].

while its scientists told a different story internally in the company.<sup>149</sup> And politicians, who probably knew better, repeated these lies for personal advantage. Of course the origin of this kind of thinking goes back much further, at least to the birth of the advertising, now marketing, industry captured in Vance Packard's 1957 book, *The Hidden Persuaders*.<sup>150</sup> Marketing is the practice of unreality. And that acceptance of unreality owes much to philosophical deconstruction and post-modernism.<sup>151</sup>

Distrust and lies go hand in hand. On January 18, 2017, the New York Times reported the story of the fake news article created by Cameron Harris, a recent college graduate, in the period leading up to the 2016 election.<sup>152</sup> After candidate Trump made his claim that the voting would be rigged, Harris published a fake news story that reported that “thousands of fraudulent Clinton voters” had been found in an Ohio warehouse.<sup>153</sup> Harris's explanation for why he wrote the story the way he did illustrates the relationship of lies and distrust: “Given the severe distrust of the media among Trump supporters, anything that parroted Trump's talking points people would click. Trump was saying ‘rigged election, rigged election.’ People were predisposed to believe Hillary Clinton could not win except by cheating.”<sup>154</sup> So, Harris could get away with his lie because people were predisposed to expect dishonesty.

But the story shows an even deeper corruption. Harris had lost his own moral compass because of his distrust. Harris was asked “whether he felt any guilt” about what he had done?<sup>155</sup> The answer was no, because after all, politics is not about truth: “Hardly anything

149. See David Kaiser & Lee Wasserman, *The Rockefeller Family Fund vs. Exxon*, N.Y. REV. OF BOOKS (Dec. 8, 2016), <http://www.nybooks.com/articles/2016/12/08/the-rockefeller-family-fund-vs-exxon/> [<https://perma.cc/JFD9-AJYE>].

150. See VANCE PACKARD, *THE HIDDEN PERSUADERS* (1957).

151. See Linker, *supra* note 148. For example, Damon Linker attributes to Duke Law Professor Jedediah Purdy, whom he associates with the political left, the philosophical view that there is no truth, but only human convention: “[A]ll appeals to permanent, intrinsic truths or standards by parties involved in political, economic, or environmental debates have become unconvincing. Nothing is natural in the normative sense—no political or economic arrangement, and not even any specific construal of the natural world and its meanings. All such appeals to nature are in fact conventional, artificial constructs of the human mind imposed upon the world.” *Id.*

152. Scott Shane, *From Headline to Photograph, A Fake News Masterpiece*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/us/fake-news-hillary-clinton-cameron-harris.html> [<https://perma.cc/LS8H-94GQ>].

153. See *id.*

154. See *id.*

155. See *id.*

a campaign or a candidate says is completely true.<sup>156</sup> This situation was for Harris just a fact of life—not something to try to correct.

Distrust and lies also affected the failed Supreme Court nomination of the Chief Judge of the D.C. Circuit, Merrick Garland. When Judge Garland was presented as a non-ideological moderate, and was literally described that way by Noah Feldman,<sup>157</sup> it was assumed that everyone was lying—that Judge Garland was a committed liberal ideologue who had already made up his mind to maintain *Roe* and *Obergefell* and oppose *Heller* and *Citizens United*, or he would not have been nominated.<sup>158</sup> It was assumed that President Obama's declaration that the Supreme Court should be above politics was a lie to get case results that President Obama favors.<sup>159</sup>

Similarly, when Senate Majority Leader Mitch McConnell announced that the American people should decide the direction of the Supreme Court, it was assumed that he was lying.<sup>160</sup> That if Hillary Clinton had won the Presidential election, her nominees to the Court would have met automatic Republican Party rejection, despite the American people having decided in her favor.<sup>161</sup> Worse than the assumption that they were all lying is the reality that they all probably were lying. In a world in which nothing and no one can be trusted, there really isn't anything but the result that one favors. There is no underlying rationality or order. So, if I feel *Roe* should be overturned, or protected, I cannot have faith in truth triumphing in the future. I must do or say what I have to now in order to achieve that result. I may even fool myself into believing that I am not lying.

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156. *Id.*

157. See Noah Feldman, *Supreme Court Nominations Will Never Be the Same*, BLOOMBERG VIEW (Dec. 20, 2016, 11:06 AM), <https://www.bloomberg.com/view/articles/2016-12-20/supreme-court-nominations-will-never-be-the-same> [https://perma.cc/K8C6-4KTV].

158. See Dennis Prager, *Judge Garland and the Left's Disdain for Truth*, NAT'L REV. (Mar. 22, 2016), <http://www.nationalreview.com/article/433067/merrick-garland-liberal-media-lies-about-his-record> [https://perma.cc/NBN4-PVQP].

159. *See id.*

160. See Frank Vyan Walton, *Mitch McConnell Lies Again to Deny Merrick Garland a Fair Up or Down Vote*, DAILY KOS (Feb. 6, 2017), <http://www.dailykos.com/story/2017/2/6/1630587/-Mitch-McConnell-lies-again-to-deny-Merrick-Garland-a-fair-up-or-down-vote> [https://perma.cc/57D5-JK64].

161. See David A. Graham, *What Happens if Republicans Refuse to Replace Justice Scalia?*, THE ATLANTIC (Nov. 1, 2016), <https://www.theatlantic.com/politics/archive/2016/11/whats-the-opposite-of-court-packing/506081/> [https://perma.cc/6495-AP2K]. There were plenty of indications that that would have been the course chosen by Senate Republicans. *See id.*

In our current world of distrust, the institutions usually considered forthright also are treated with skepticism. So, scientific explanations of human induced global warming, which are predominantly factual matters, become politically controversial. After all, why should scientists in particular be believed?

Religion, which aspires to be foundational, expressing ultimate truth, does not fare any better. It is often pointed out by conservative religious leaders that liberal religion, in particular the mainstream Protestant denominations, are in radical decline.<sup>162</sup> That is correct, and it is the case as well for Reform and Conservative Judaism. But truly, it is religion as a whole that is fading.<sup>163</sup> The young are increasingly identifying with no religious institutions at all and are identifying as nones (answering “none” to questions about religious affiliations).<sup>164</sup> The claims of religion are not met by precisely the same kind of distrust as are other leaders. No one would say that religious leaders lie. The skepticism of religion is on a deeper level. In part, the skepticism is that religious claims are mythical and do not reflect the reality of the universe. But also, it may be the very ordering and discipline of a religious reality—its claim of truth—that is rejected by a distrustful and unreal culture. That would link the decline in religion with the political crisis identified by Charles Sykes.<sup>165</sup>

If that is so, then the source of America’s emergency of distrust roots ultimately in the death of God.<sup>166</sup> In that formulation, Nietzsche was not making any claims about the existence of God. The death of God referred to the power of Christian imagery and its values to found a civilization, to orient that civilization, and to give meaning to

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162. Cf. David Haskell, *Liberal Churches Are Dying. But Conservative Churches Are Thriving*, WASH. POST (Jan. 4, 2017), [https://www.washingtonpost.com/posteverything/wp/2017/01/04/liberal-churches-are-dying-but-conservative-churches-are-thriving/?utm\\_term=.c3c1c7d90555](https://www.washingtonpost.com/posteverything/wp/2017/01/04/liberal-churches-are-dying-but-conservative-churches-are-thriving/?utm_term=.c3c1c7d90555) [<https://perma.cc/ZAD4-9R56>].

163. Cf. John Sides, *White Christian America Is Dying*, WASH. POST (Aug. 15, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/15/white-christian-america-is-dying/?utm\\_term=.b739ead55165](https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/15/white-christian-america-is-dying/?utm_term=.b739ead55165) [<https://perma.cc/X9AZ-YBP4>].

164. See Michael Lipka, *Millennials Increasingly Are Driving Growth of ‘Nones’*, PEW RES. CTR. (May 12, 2015), <http://www.pewresearch.org/fact-tank/2015/05/12/millennials-increasingly-are-driving-growth-of-nones/> [<https://perma.cc/9B94-2LWU>]. Fully 36% of those born between 1990 and 1996 identify as nones—atheist, agnostic or nothing in particular. *Id.*

165. See Sykes, *supra* note 146.

166. See Bruce Ledewitz, *The Five Days in June When Values Died in American Law*, 49 AKRON L. REV. 115, 124-25 (2016) [hereinafter *Five Days*] (providing sources and discussion).

that civilization.<sup>167</sup> That is what has ended. We are living now with the immense consequences that Nietzsche himself foresaw.

Nietzsche acknowledged that people still go to church and might well continue to do so.<sup>168</sup> But God was no longer the key to the culture.<sup>169</sup> That is the case in America now. Many people are not affiliated with religion, while others are affiliated but do not attend, and others attend but are unaffected by any religious message, while others are affected by religious claims that are drained of genuine religious content. We know this because the true Christian would not be angry and distrustful, but joyous and trusting, like Jesus. Those are the very traits that this culture no longer exhibits.

When G.K. Chesterton wrote that “[w]hen a man stops believing in God he doesn’t then believe in nothing, he believes anything” he did not just mean that people would believe crazy things.<sup>170</sup> It also follows that people who believe crazy things would be distrustful of every other claim that they do not already believe and of the evidence purporting to support these other claims. This is indeed the stance of Mr. Ameling above: “If my beliefs are challenged I will be very skeptical of the proof supporting that challenge. But, will I be just as skeptical of my own beliefs?”<sup>171</sup> There, Chesterton is right. I will not be. I will believe anything.

But when I say distrust and dishonesty root in the death of God, I do not mean to suggest that there can be any going back to some simpler, more religious, and more trusting time. We are here, in the post-Christian era. This is now, as Charles Taylor aptly named it, *A Secular Age*.<sup>172</sup> The next section asks what resources of meaning our secularism can provide to respond to this emergency of distrust? Unfortunately, the answer may be that there are few resources.

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167. *See id.* at 124.

168. *See id.*

169. *See id.* at 124-25.

170. *When Man Ceases to Worship God*, AM. CHESTERTON SOC’Y, <https://www.chesterton.org/ceases-to-worship/> [<https://perma.cc/M3VZ-KJXY>] (last visited Apr. 10, 2017).

171. I am not suggesting that the real Mr. Ameling lacks belief in God. I don’t know anything about him beyond the newspaper story. I am describing a cultural phenomenon when a culture ceases to believe in God.

172. CHARLES TAYLOR, *A SECULAR AGE* (2007).

## B. The Poverty of Political/Legal Secularism in the Face of this Emergency

In my 2011 book, *Church, State, and the Crisis in American Secularism*, I described the crisis of secularism as the threat of relativism<sup>173</sup> and of meaninglessness.<sup>174</sup> We can appreciate the scope of the crisis if we ask, what is the worldview of secularism?

Of course, there are a number of secularisms,<sup>175</sup> and the description of this crisis does not fit them all. However, when one encounters the concept of secularism in the political world or in the world of law, one is always confronting one particular type of secularism: The anti-religion movement associated with the New Atheists and their heirs—such figures as Christopher Hitchens in *god is not Great*<sup>176</sup> and Sam Harris in *The End of Faith*<sup>177</sup> and numerous others. This is the secularism of Brian Leiter, and as I suggested above, it is the secularism that lies behind the question put to this panel. It is probably also the dominant understanding of secularism in our culture. We can call this political–legal secularism. This is the type of secularism that lacks the resources of meaning to be of any aid in this emergency.

The main thrust of Leiter’s worldview, particularly with regard to the difference between religion and secularism, is simple: religion is based on faith and secularism is based on reason.<sup>178</sup> That is also the view of Sam Harris.<sup>179</sup> This is why another popular, yearly manifestation of secularism in this culture is called, The Reason

173. BRUCE LEDEWITZ, *CHURCH, STATE, AND THE CRISIS IN AMERICAN SECULARISM*, xviii (2011) [hereinafter *CRISIS IN AMERICAN SECULARISM*].

174. I described in the book the denial by the New Atheist writers of the widespread feeling that human life is meaningless unless we “fit into some grand, cosmic scheme.” *Id.* at 178. To be fair, the New Atheists claimed that meaning could be found in other ways. In the book, I conclude that these efforts fail because the worldview asserted is too thin to found meaning. *Id.* at 179. It turns out that a grand cosmic scheme is necessary after all.

175. In the book, I distinguished between two trends in Church, State: the New Atheism and the new New Secularism, among which I put myself. *Id.* at 171-209.

176. CHRISTOPHER HITCHENS, *GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING* (2007).

177. SAM HARRIS, *THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON* (2004).

178. See Ledewitz, *Vietnam Draft Cases*, *supra* note 2, at 6 (citing LEITER, *supra* note 1, at 31).

179. See HARRIS, *supra* note 177 (justifying the subtitle of Harris’s book, “the Future of Reason”).

Rally, with the tag line on the Reason Rally website, “On June 4, 2016 thousands of secular Americans came together at the Lincoln Memorial in Washington, DC to Speak Up for Reason!”<sup>180</sup>

The problem with this view, aside from the insult to religious believers, who undoubtedly consider themselves rational, is that, as I noted in 2011, as traditional religious belief declined, American culture did not seem to be growing more rational: “Instead, America seem[ed] to be sliding into forms of irrationalism that are even stranger than the supernaturalism of monotheism.”<sup>181</sup> Today, in 2017, the irrationalism of American culture is even more obvious—hence the political crisis described above—even while the rapid secularization proceeds apace. And, I can now add, America in 2017 is certainly as hate-filled and divided as it ever was during the ascendancy of Christianity, with the exception of the period of the struggle over slavery.

Why would America be struggling with irrationality and division if, as Hitchens’s subtitle puts it—*How Religion Poisons Everything*—religion is the problem?<sup>182</sup> Now, in America we have less religion, yet the particular kinds of social pathologies that the New Atheists attributed to religion—disregard of science, nationalist self-regard, militarism, and on and on—are worse than ever.

One might argue that it is the vestiges of religious belief that are driving all of our problems. Yes, religious belief is fading, but it is still the majority commitment in America, and those who remain religious are the voters who elected Donald Trump. Those are the voters who manifest all of these negative qualities.

This is certainly the crucial question, because it asks, what will the secular future be like? If this view of religious voters is correct, then, as religious believers age and die, American culture will improve. It will become healthier.

This short essay is not the place to try to evaluate this possibility. But I mentioned the recount story above for a reason—the irrationality of Americans seems to me to be an issue on both sides of the political divide. I do not hear reasoned discourse on the left. For example, it was widely believed and asserted that Hillary Clinton and the Democratic National Committee stole the

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180. THE REASON RALLY COALITION, <http://reasonrally.org> [<https://perma.cc/4KES-A8MR>] (last visited Apr. 10, 2017). I should also mention here the slogans of the American Humanist Association: “Now more than ever, AMERICA NEEDS REASON” and the “In Reason We Trust,” bumper sticker.

181. CRISIS IN AMERICAN SECULARISM, *supra* note 173, at 180.

182. See HITCHENS, *supra* note 176.

nomination from Bernie Sanders.<sup>183</sup> But there was no evidence that anything was actually done that changed the basic political realities of the nomination race. Clinton won the nomination when she won the California Primary, fair and square. Left-wing politics in America seems equally tribal and irrational.

Beside that, as J.D. Vance's insightful memoir, *Hillbilly Elegy*, makes clear, the decline of Christianity among much of the white working class that voted for President Trump has already happened.<sup>184</sup> As Rod Dreher explained in a review in *The American Conservative*: "Religion among the hillbillies is not much help. Vance says that hillbillies love to talk about Jesus, but they don't go to church, and Christianity doesn't seem to have much effect at all on their behavior."<sup>185</sup> If that is the case, the current plight of American life will only get worse as religion further declines.

It turns out that the reason that is supposed to characterize political–legal secularism is quite thin. It amounts to saying that the natural laws discovered by science cannot be overturned by a Sky God and that, in general, ordinary people should listen to scientists and experts.

This is not bad advice, of course, but it is not something one can really live from or with which one can ground a civilization. This kind of reason is merely instrumental and does not purport to say what human life is supposed to be about. And without some vision of that kind, human beings are lost. "Where there is no vision, the people perish."<sup>186</sup>

What is the purpose of human life according to this secularism? Here is the key to the crisis—there is no purpose to human life. Humans are not part of any grand scheme.<sup>187</sup> The ultimate commitment of this political–legal secularism is one of human insignificance—of the scientific view of Richard Dawkins: "The universe we observe has precisely the properties we should expect if

183. Michael D. Shear & Matthew Rosenberg, *Released Emails Suggest the D.N.C. Derided the Sanders Campaign*, N.Y. TIMES (July 22, 2016), <https://www.nytimes.com/2016/07/23/us/politics/dnc-emails-sanders-clinton.html> [<https://perma.cc/B95S-MWUV>].

184. See generally J.D. VANCE, *HILLBILLY ELEGY: A MEMOIR OF A FAMILY AND CULTURE IN CRISIS* (2016).

185. Rod Dreher, *Hillbilly America: Do White Lives Matter?*, AM. CONSERVATIVE (July 11, 2016, 11:31 AM), <http://www.theamericanconservative.com/dreher/in-hillbilly-america-white-lives-matter> [<https://perma.cc/2Z3V-NFKJ>].

186. *Proverbs* 29:18 (King James).

187. See CRISIS IN AMERICAN SECULARISM, *supra* note 173, at 178 (citing VICTOR J. STENGER, *GOD: THE FAILED HYPOTHESIS* 251-52 (2007)).

there is, at bottom, no design, no purpose, no evil and no good, nothing but blind, pitiless indifference.”<sup>188</sup> This is not an understanding that inspires social morale. Nor does it inspire trust, because there is literally nothing in reality that is trustworthy.

The insignificance of human beings from the perspective of the universe is actually hopeful in the view of some secularists. As I have pointed out elsewhere,<sup>189</sup> Carl Sagan went to a lot of trouble to get NASA to take one last photograph of the Earth from the Voyager spacecraft that would show the pale blue dot—how fragile the Earth is and how alone we are in the universe in order to cure human pretention:

Our posturings, our imagined self-importance, the delusion that we have some privileged position in the Universe, are challenged by this point of pale light. Our planet is a lonely speck in the great enveloping cosmic dark. In our obscurity, in all this vastness, there is no hint that help will come from elsewhere to save us from ourselves.<sup>190</sup>

In other words, Sagan did not mean to undermine human striving and hope by demonstrating our insignificance. He sought to promote human cooperation. But Sagan failed to anticipate that the image of human beings alone in the darkness of an indifferent universe might have the opposite effect. He did not realize that Nietzsche had had the very same insight and had come to a different kind of conclusion:

In some remote corner of the universe, poured out and glittering in innumerable solar systems, there once was a star on which clever animals invented knowledge. That was the highest and most mendacious minute of “world history”—yet only a minute. After nature had drawn a few breaths the star grew cold, and the clever animals had to die.<sup>191</sup>

Fortunately, matters do not have to be left at this bleak point. There is a whole different kind of secularism emerging that has a different relationship to religion and nature. And to be fair, even the other secular figures I have quoted have a different side as well. Again, I can only sketch this in the last section.

188. RICHARD DAWKINS, *RIVER OUT OF EDEN: A DARWINIAN VIEW OF LIFE* 133 (1995).

189. See Ledewitz, *Five Days*, *supra* note 166, at 126.

190. *Id.* (quoting *Cosmos: A Spacetime Odyssey: Unafraid of the Dark* (Fox Network television broadcast June 8, 2014)). This famous episode was repeated in the second *Cosmos* Series. See *id.*

191. Frederich Nietzsche, *On Truth and Lie in an Extra-Moral Sense*, [http://oregonstate.edu/instruct/phl201/modules/Philosophers/Nietzsche/Truth\\_and\\_Lie\\_in\\_an\\_Extra-Moral\\_Sense.htm](http://oregonstate.edu/instruct/phl201/modules/Philosophers/Nietzsche/Truth_and_Lie_in_an_Extra-Moral_Sense.htm) [<https://perma.cc/6AK5-RYPV>].

However, before proceeding in this more hopeful direction, I have to add that even if there is another possibility for secularism, it may be difficult for it to emerge in the realms of politics and law, which tend to emphasize dualisms and antagonisms. Even on the panel, there was little recognition that secularism might blend religious themes and images and that religion itself might be a continuum from supernatural belief all the way to beliefs very close to secularism. The reason for this difficulty is that law and government policies require a kind of black and white clarity that may not accurately reflect a messy social reality.

So, for example, when I suggested years ago that a possible solution to the Establishment Clause problem of religious imagery in the public square might be a recognition that such imagery can stand for both religious and nonreligious truths—that “In God We Trust,” for example, can mean that God is trustworthy for the believer and that reality is trustworthy for the nonbeliever<sup>192</sup>—the argument fell flat because it did not take seriously the separate categories of religion and non-religion that constitutional jurisprudence is built on. The same kind of categorically oppositional thinking also infects politics. Thus, even if secularism does change, it may take a long time for that change to penetrate law and political life.

Eventually, American law will realize that the categories of religion and non-religion need not be separated for all purposes—that the word “religion” in the phrase “establishment of religion” can be understood institutionally to prohibit the mixing of clerical and governmental power—while the same word in the phrase, “free exercise [of religion],” can be understood to permit and even encourage all kinds of mixing of religious and secular thinking and belief.<sup>193</sup>

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192. See generally Bruce Ledewitz, *Could Government Speech Endorsing a Higher Law Resolve the Establishment Clause Crisis?*, 41 ST. MARY'S L.J. 41 (2009).

193. There have been suggestions that the word religion might have different meanings in the two clauses—compare Marc S. Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 217-19 (1966)—but traditionally this idea has met with hostility from defenders of traditional religions. See Wendell R. Bird, *Freedom from Establishment and Unneutrality in Public School Instruction and Religious School Regulation*, 2 HARV. J.L. & PUB. POL'Y 125, 126 (1979). Some years ago, Ira C. Lupu suggested that the two clauses could be reconciled by distinguishing between permitting individual religious interests and government aid to religious institutions. See generally Ira C. Lupu, *Keeping the Faith: Religion, Equality, and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739 (1986). Others have made similar suggestions. Perhaps the most creative use of

A few years ago, Ronald Dworkin gave us a negative example of the consequences of applying Establishment Clause concerns to questions of meaning when he suggested, in the context of pro-life legislation, that the view that human life is “objectively valuable” from the perspective of the universe is an inherently religious commitment and, if embodied in law, might violate the Establishment Clause.<sup>194</sup> That is the kind of thinking that is leading to the crisis of meaning in secularism. What is needed, instead, is a secularism that unapologetically takes its meaning from the perspective of the universe and freely borrows from the religious traditions.<sup>195</sup>

### C. Secularism and the Search for Cosmic Law

A student of mine, Jessie Francis, has been studying the philosophy of law using Thomas Berry and Brian Swimme as leading examples. He calls this effort his search for cosmic law. Thus far, conventional legal materials have disappointed him with their narrow, anthropocentric focus. So, for example, when Jessie searched online for the term “cosmic law,” he told me that what mostly came up were references to efforts to apply contract and property rules to explorations of outer space. Still, genuinely cosmic law has to be our goal: a wide perspective, open to the vast wonder of the universe and our place in it, always alert to the hidden orderings that religion calls the divine.

To recapitulate, American culture is in an emergency of distrust and dishonesty—a crisis of meaning. The culture no longer has a shared narrative to express who we are, why we are here, and what we might hope for. There is a generalized breakdown of order and civility. And there is a kind of irrationality that is becoming normal and acceptable.

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the concept of a unitary definition of religion in the two clauses is that applying the expansive definition of religion associated with free exercise to Establishment Clause analysis would prevent the government from adopting laws motivated by public morality. See generally Sherryl E. Michaelson, Note, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301 (1984).

194. Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 413-15 (1992).

195. In a related context, I have called this “seeking common ground.” See generally Bruce Ledewitz, *Seeking ‘Common Ground:’ A Secular Statement*, 38 HASTINGS CONST. L.Q. 49 (2010).

The religious traditions are no longer able, on their own, to speak to the culture as a whole in order to address this emergency. Therefore, secularism must be looked to as a source of meaning for the future. But the political–legal secularism that currently occupies the public space lacks the resources of meaning that are needed. That secularism is a function of a worn out hostility to religion and of a materialist ontology.

Something quite different is needed—a form of secularism that is capable of hope and wonder and which is not hostile, but open, to the insights and themes of religion. Such a secularism will not dispute the teachings of science but will not rest with them either. It will realize that acceptance of science by the general public does not rest on reason—most people cannot verify scientific claims after all—but on trust. And so, such a secularism will speak, in effect, about faith.

As I have pointed out elsewhere, this new secularism is already emerging all around us.<sup>196</sup> There are, for example, scientists who see the universe as welcoming rather than hostile and as emergent rather than pointless; there are philosophers who merge religious and non-religious points of view and who are respectful and even affectionate toward the religious traditions.<sup>197</sup>

There is also already a well-established starting point for loose communities of religious and non-religious people to work together to arrest just the sort of cognitive decline, just the sort of bias, and just the sort of social irrationality that we are now experiencing. Bernard Lonergan, a Jesuit theologian, called such a loose community *Cosmopolis*, which Mark Miller describes as “a redemptive community that would motivate people on a *cultural* level instead of attempting through economics or politics to impose new social structures.”<sup>198</sup> This community is not one that occupies a particular geographic area or is composed of any one profession or discipline.<sup>199</sup> It is a loose formation of people from different walks of life who all see and confront the decline that is all around them.<sup>200</sup>

*Cosmopolis* differs from the current opposition movements against President Trump. It does not have a program in that sense. It does not look for redemption from any such quarter.<sup>201</sup> Its main focus

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196. See Ledewitz, *The New New Secularism*, *supra* note 94, at 2-3.

197. See *id.* at 20.

198. MILLER, *supra* note 130, at 177-78.

199. *Id.* at 178.

200. *Id.*

201. See *id.*

is on the clarity of thinking.<sup>202</sup> Even that, however, is a misleading formulation because, for Lonergan, thinking includes a form of life in Wittgenstein's sense.<sup>203</sup> It is as much a matter of character as of cognition.<sup>204</sup> One could say that only a certain kind of person in a certain social context is really adequate to the emergency in which we find ourselves.

Of course in speaking of formation in that way, I am also repeating the close connection between religion and this kind of secularism. It is religion that tends to speak of formation. When conventional secularism does so, as in the book *Good Without God*,<sup>205</sup> the results are usually disappointing.

Beyond these already existing models, which present a rich starting point, there are two issues that must be addressed if this different kind of secularism is to confront the emergency: The significance of human beings and the role of humanity in the story of the universe.

In terms of human significance, I continue to hear a way out of meaninglessness in the words of a character in E.L. Doctorow's novel, *City of God*.<sup>206</sup> In the novel, Sarah Blumenthal, a liberal rabbi, gives a talk at the end of the book in which she acknowledges that the "exclusionary, the sacramental, the ritualistic, and simply fantastic elements of religion" will have to be left behind.<sup>207</sup> But she adds that a "universalist ethics" must still be maintained "*in its numinousness*"—that is, in its mysterious power.<sup>208</sup> She calls not only for separation of civil law and religious ethics, in good

202. See *id.*

203. Compare *id.*, with LONERGAN, *supra* note 129, at 267.

204. See LONERGAN, *supra* note 129, at 268.

205. GREG EPSTEIN, *GOOD WITHOUT GOD: WHAT A BILLION NONRELIGIOUS PEOPLE DO BELIEVE* (2010). There is nothing wrong with the book. Here, I believe, is a fair overall statement of its thesis: "The dignity of mutual concern and connection and of self-fulfillment through service to humanity's highest ideals is more than enough reason to be good without God." *Id.* at 103. But there is not much more than that in the book and that does not strike me as the foundation of a new secular civilization. Part of the problem is the remaining sense of difference between religion and nonreligion. A related part of the problem is the heavy emphasis on the human. The trick for secularism in the future will be to discern the power of the God symbol without including the literally supernatural. Or, as Sarah Blumenthal put it, to retain the numinous without the fantastic. E.L. DOCTOROW, *CITY OF GOD* 255-56 (2000).

206. DOCTOROW, *supra* note 205, at 255-56.

207. *Id.* at 255.

208. *Id.*

constitutional fashion, but for “appropriation” as well.<sup>209</sup> That appropriation is what she means by calling for a “hallowed secularism.”<sup>210</sup> And that is what I believe is needed.

At the heart of this hallowed secularism is a God who evolves along with humanity. But this God is not a being. At this point, one could be reminded of Hegel’s understanding of humanity’s growth as the growth of the self-consciousness of Geist.<sup>211</sup>

Sarah has no doubt of the significance of humanity: “[W]e pursue a teleology thus far that . . . has given us only the one substantive indication of itself—that we, as human beings, live in moral consequence.”<sup>212</sup> What we do matters—crucially and ultimately. This is no illusion. That recognition alone would end the pointless ironies of post-modernism. It would cure our ennui.

The New Atheists, strangely, although they might describe a human existence that is meaningless, did not themselves live as if that were the case.<sup>213</sup> They all lived in moral consequence. They desperately urged people to live in the truth as they understood that truth—that there is no God and the universe has no order.<sup>214</sup> So they refuted themselves—obviously, there was an ultimate meaning to life that they served faithfully, while they denied that concept—but at the same time, they actually exhibited a kind of health.

The other necessary matter lies in the nature of the universe and our role in it. Here, Thomas Berry and his book, *The Great Work*,<sup>215</sup> and even more, his life, have inspired countless people all over the world. Berry’s hope was to cure the disease of industrial organization exploiting the natural world.<sup>216</sup> His thinking was vast, but he did tend to summarize his thought in the following well-known formulation: “[T]he universe is a communion of subjects rather than a collection of objects.”<sup>217</sup> You might say that Berry aimed to reverse the disenchantment of the world that Max Weber

209. *See id.* at 255-56.

210. *Id.* at 255.

211. *See* CHARLES TAYLOR, HEGEL AND MODERN SOCIETY 11 (1979).

212. DOCTROW, *supra* note 205, at 256.

213. *See* CRISIS IN AMERICAN SECULARISM, *supra* note 173, and text accompanying notes 174.

214. *See supra* notes 173-77 and accompanying text.

215. THOMAS BERRY, THE GREAT WORK: OUR WAY INTO THE FUTURE (1999).

216. *See id.*

217. The quote here is taken from another, related work, BRIAN SWIMME & THOMAS BERRY, THE UNIVERSE STORY 243 (1992), but was a common theme in Berry’s life.

described.<sup>218</sup> Another, somewhat similar source in this effort is Martin Heidegger, in particular Heidegger's critique of technology.<sup>219</sup>

Berry also exemplified the mixing of the secular and the religious.<sup>220</sup> He was himself a Catholic priest, and yet most of his influence was among at least nominal secularists like Brian Swimme. Berry is a very apt figure for our post-Christian age.

I do not intend in this brief essay to try to describe in full the necessary secular response to America's emergency. Nor do I detail the nature of the secularism that I believe is needed. But the reader is entitled to one working example that operates on all levels. The example I once used in a class on law and secularism was the troubadour of secularism, the late poet, songwriter, and singer, Leonard Cohen.

Cohen is the perfect embodiment of the secularism that I have been promoting. He was secular, as his famous sexual antics alone would show, but at the same time, he was thoroughly at home in, and drew meaning from, the Biblical tradition, Jewish and Christian.<sup>221</sup> His closest institutional commitment was probably Buddhism.<sup>222</sup> Cohen was Canadian, but he also identified with American constitutional democracy, as his song, *Democracy*, makes plain.<sup>223</sup>

218. See Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031, 1050 (2004). See generally Yishai Blank, *The Reenchantment of Law*, 96 CORNELL L. REV. 633 (2011) (explaining the potential for reenchantment of law, which is wonderful, but just demonstrates how difficult this task is going to be if one begins with anything touching on law today).

219. See MARTIN HEIDEGGER, *The Question Concerning Technology*, in THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS 3 (William Lovitt trans., 1977).

220. See BERRY, *supra* note 215, at 72.

221. See Sasha Frere-Jones, *Remembering Leonard Cohen: Close Friends, Collaborators & Critics on How He Changed Music Forever*, BILLBOARD (Nov. 17, 2016, 8:57 AM), <http://www.billboard.com/articles/news/magazine-feature/7580513/leonard-cohen-friends-remember-legend> [<https://perma.cc/7GTA-GT8C>].

222. See *id.*

223. See LEONARD COHEN, *Democracy*, on THE FUTURE (Columbia Records 1992). Here is the key lyric—I assume the “it’s” refers to democracy: “It’s coming to America first, the cradle of the best and of the worst. It’s here they got the range and the machinery for change and it’s here they got the spiritual thirst.” *Id.*

What we receive from Cohen is a sense of the power of the unity of the whole.<sup>224</sup> That power is embodied in inexpressible beauty, as in the classic song *Suzanne*.<sup>225</sup> There is for Cohen something real and mysterious all around us—Rudolph Otto’s *mysterium tremendum et fascinans*<sup>226</sup> and Sarah’s numinous<sup>227</sup>—to which the human imagination responds. Or yearns to respond. This vast scale allows Cohen to expose human pretension. Cohen’s voice will only speak, “if it be your will.”<sup>228</sup> In his songs, the place of humanity is very much like that of traditional Judeo-Christianity, except that the source of all is not the Sky God doing tricks—it is the Lord of Song,<sup>229</sup> that is, the mysterious visit of human creativity that comes from we know not where. So Cohen, unlike modern secular man as we now know him, is able to participate whole-heartedly in a tradition—the *Tower of Song*—and to sing praise to reality in the song, *Hallelujah*.

My main reason for introducing Cohen is that it should be understood that the secularism we are searching for cannot be a set of ideas. Ideas do not forge a civilization or sustain one. Secularism will have to answer all human needs, as religion has done in the past.

In that regard, Cohen left us one last great gift—his final CD, produced by his son, and released just shortly before his death—*You Want It Darker*.<sup>230</sup> In this CD, Cohen breaks the last secular taboo,

224. See L.S. DORMAN & C.L. RAWLINS, *LEONARD COHEN: PROPHET OF THE HEART* 23 (1990). In their early biography of Leonard Cohen, Dorman and Rawlins ground this sense of oneness in Cohen’s religious upbringing:

As soon as Leonard learned to talk, he was taught to recite the first words of the *Shema*, the ‘creed’ of Judaism which originated on Sinai with Moses and is recited daily: “Hear, O Israel, the Lord our God is One . . .” . . . In so doing, from his earliest possible moments, Leonard Cohen became a witness in testifying to the unity of God (his ‘oneness’) and his creation.

*Id.*

225. LEONARD COHEN, *Suzanne*, on *SONGS OF LEONARD COHEN* (Columbia Records 1967).

226. RUDOLPH OTTO, *THE IDEA OF THE HOLY: AN INQUIRY INTO THE NON-RATIONAL FACTOR IN THE IDEA OF THE DIVINE AND ITS RELATION TO THE RATIONAL* 12 (John H. Harvey trans., 1931).

227. See DOCTOROW, *supra* note 205, at 255.

228. See LEONARD COHEN, *If It Be Your Will*, on *VARIOUS POSITIONS* (Columbia Records 1984).

229. See LEONARD COHEN, *Hallelujah*, on *VARIOUS POSITIONS* (Columbia Records 1984). This reference is to the song, *Hallelujah*: “And even though it all went wrong I’ll stand before the Lord of Song With nothing on my tongue but *Hallelujah*.” *Id.*

230. LEONARD COHEN, *YOU WANT IT DARKER* (Columbia Records 2016).

perhaps the only secular taboo, and addresses death. Obviously, death for Cohen is an end to his personal existence, and despite his participation in the tradition of song, a participation that will outlive him, one had to wonder how such a secularist could really be reconciled to death. And yet, anyone who listens to this short CD will say, as my wife, Patricia, did: “I have never heard such comfort toward death.”

This accomplishment is probably Cohen’s greatest contribution to secularism because, as Martin Heidegger observed, the way to authentic human life is to develop a way of being toward death—*Sein zum Tode*.<sup>231</sup> But political–legal secularism has never exhibited that depth. With Cohen, secularism enters a new and hopeful phase. It is now possible to imagine a secularism that can sustain us.

#### CONCLUSION

I began with the panel question: Is secularism a non-negotiable aspect of liberal constitutionalism? In this essay, I answer no. In fact, I substitute for the question asked the opposite question—is it not really religion that is a non-negotiable aspect of liberal constitutionalism?

There are two reasons for the no and the substitution. First, in America, liberal constitutionalism is already religious and has always been religious. We have never been a genuinely secular democracy, despite efforts to make us one. Simply put, American Religious Democracy is what the people have chosen. So, in terms of the question, we can conclude that, wherever the people are religious, religion is a non-negotiable aspect of liberal constitutionalism. Otherwise, that constitutionalism would not be democratic.

The second reason for the no and the substitution is more fundamental than just the political power of religious voters. America is now moving rapidly away from religion and toward a secular democracy. But the answer to the question is still that religion is necessary, because at the same time that the culture has become more secular, it has also become more diseased. That decline became visible and undeniable in the pathologies of the 2016 Presidential Campaign, but it shows no sign of ebbing now that the campaign is over. It is not clear that liberal constitutionalism will survive in America. But it is clear to me that if it is to survive, it will

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231. See MARTIN HEIDEGGER, *BEING AND TIME* 234 (Joan Stambaugh trans., 2002).

have to depend on a renewing secularism. Since such secularism will have to be in serious dialogue with religion, it can still be said that religion is a non-negotiable aspect of liberal constitutionalism. The need for this dialogue is based simply on the yearning for depth and meaning in our public life, and, for that matter, in our private lives. It is not so much that religion has cornered the market on answers to perennial human questions. But compared to what secularism has been offering, religion has certainly cornered the market on asking the crucial questions.

The jury is out on the future of American public life. I hope that we will justify the dreams of the framers and come through the current crisis. We will not do so, however, if we retain the artificial and destructive separation between the religious traditions and our constitutional democracy that we currently imagine is necessary and helpful. More than ever, we all—believers and nonbelievers, affiliated and not affiliated—need religion.