

“Religious” Secularism and Legitimacy in American Democracy

JULIA E. FAY*

This Note seeks to contribute to scholarship on the growing tension between secularism and religion in the United States by considering the claim, made by some commentators, that secular liberalism should be considered a religion for the purposes of the First Amendment. Part I explains the historical background of the First Amendment’s Religion Clauses and surveys what little jurisprudence there is from the U.S. Supreme Court and lower courts regarding secular liberalism’s potential status as a religion. Part II lays out the landscape of current scholarship on the status of secularism, secular liberalism, and adjacent nontheistic belief systems as religions, including: (1) arguments made by some conservative Christians who maintain that secular liberalism is a religion; (2) related but distinct arguments made by scholars who argue that non-theistic beliefs should be accorded respect equal to that granted religions under the First Amendment; and (3) arguments from scholars who believe religion should continue to be treated as “special” and separate from non-religious, secular belief systems. Part III argues that, even if secular liberalism could be defined as a religion, it should not be, for two reasons. First, the proposition that secular liberalism is a religion is conceptually incoherent because it conflates strong moral conviction with religious belief. Advocates of this position misconstrue passion as transcendent commitment and treat “religion” as a functionalist label. Second, if accepted as true, this proposition would be problematic for legal theory and for the Constitution. This Note argues that the answer to the question of whether secular liberalism is a religion implicates the legitimacy of our government, because without a neutral principle of governance a democracy cannot justify its use of force against its citizens.

* Executive Articles Editor, Colum. J.L. & Soc. Probs., 2023–2024. J.D. 2024, Columbia Law School. The author would like to thank her Note advisor, Professor David Pozen, for his generous guidance; the editorial staff of the *Columbia Journal of Law & Social Problems* for their hard work and patience; and her family and friends for their constant kindness and support.

CONTENTS

INTRODUCTION	217
I. "RELIGION" IS NOT CLEARLY DEFINED IN FEDERAL CASE LAW	223
A. Supreme Court Jurisprudence	228
B. Circuit Court Jurisprudence	233
II. THE SCHOLARLY LANDSCAPE REGARDING SECULAR LIBERALISM'S STATUS AS A RELIGION IS POLARIZED AND INCONCLUSIVE.....	237
A. Religion and Freedom of Conscience	244
III. TREATING SECULAR LIBERALISM AS A RELIGION WOULD BE THEORETICALLY AND CONSTITUTIONALLY UNSOUND.....	248
A. Without a Neutral Secular Principle of Governance, a Pluralistic Democracy Cannot Justify Its Coercive Use of Force.....	253
CONCLUSION	259

INTRODUCTION

Sixteenth-century England witnessed a sea change in the substance and aesthetics of the relationship between religion and the state. Though the proliferation of ideas challenging the teachings of the Catholic Church began in continental Europe decades earlier, England’s formal break with Catholicism under Henry VIII¹ marked a new stage in England’s Reformation and in the evolution of church-state doctrine. The Church of England was established as the nation’s official religion, with Henry VIII anointed as its head.² Though still a Christian nation, England now looked to its monarch as both its secular and its religious leader.³

This reconfiguring of the church-state relationship was accompanied by doctrinal shifts within various sects of the Christian faith. Protestant Reform efforts extended to the material trappings of worship—expensive church decorations and works of art were viewed as idolatrous icons reflecting lingering Catholic influence, and many villages burned religious objects in acts of ritual desanctification.⁴ Some items, however, were put to new uses within the community instead of being destroyed.⁵ Stone

1. England’s separation from the Catholic Church took place from roughly 1529 to 1534. See ALEC RYRIE, *THE ENGLISH REFORMATION: A VERY BRIEF HISTORY* 26–28 (2019) (ebook) (“Like many of their predecessors, Henry VII and Henry VIII loudly proclaimed their loyalty to Rome, quietly defended their own sovereignty, and steadily chipped away at the legal privileges of the English Church. . . . But in 1527, Henry VIII butted up against one of the papacy’s few undisputed powers: matrimonial law. The root of the crisis, plainly, was Henry’s determination to trade in his first wife for a newer model, and to do so in good conscience. . . . [But] he could not browbeat Rome into [granting a dispensation to invalidate his first marriage]. Under this intolerable pressure, something had to give, and that something was the king’s religious convictions. . . . At some point in 1529 or early 1530, aided by proto-Protestants who had his ear, Henry VIII came to an astonishing conclusion: that . . . the papacy as such was entirely without legitimacy. Indeed, it did not even exist. . . . Plainly, self-evidently, the Church in England ought to be under the authority of the man God had appointed to rule the country as a whole. . . . [T]he 1534 Act of Supremacy formally recognized the king as the Supreme Head, immediately under Christ, of the Church of England.”).

2. See *id.* at 28.

3. See *id.*; see also KENT GREENAWALT, *RELIGION AND THE CONSTITUTION, VOLUME 2: ESTABLISHMENT AND FAIRNESS* 19 (2008) (ebook) (“When Henry VIII established the Anglican Church in England, he became the head of the church, bishops sat in the House of Lords, and Parliament formally prescribed details in the Book of Common Prayer.”).

4. See MARGARET ASTON, *BROKEN IDOLS OF THE ENGLISH REFORMATION* 14, 17, 108, 111 (2016).

5. See, e.g., *id.* at 177 (“All the implements of papal rites . . . were to undergo what amounted to a ritual reversal. They were to be cut off from all associations of holiness . . . If they survived the were to be handed over to the secular world.”).

basins that once held holy water became washbasins, or troughs for pigs and horses; sepulchers became clothes presses and chicken pens; banner cloths became bed curtains; vessels that once held the Eucharist became playthings for children.⁶ One altar stone in the town of Dorrington was repurposed as a cattle gate.⁷

Many Protestants strove for a purification of Christian religious practice that went deeper than iconoclasm, or the other reforms enacted by the Church of England. Influenced by the teachings of Martin Luther, John Calvin, and other prominent reformers, these Protestants sought a more far-reaching disavowal of what they viewed as Catholic material and theological excess.⁸ In the following century, some such reformers would migrate to North America and form new communities in the British colonies, where they could practice their versions of Christianity without interference by a sovereign empowered by religious beliefs different from—and hostile to—their own.⁹ This religious pluralism, and the principle of separation of church and state that enables it, is in many ways central to the mythology of American identity as it is often understood today.¹⁰

Religious pluralism is, by most accounts, a central tenet of modern political liberalism; John Rawls has credited “the

6. *See id.* at 178–79 (“Holy water stoups were turned into pig or horse troughs, a milk vessel and a clothes washing basin; a holy bread skip became ‘a basket to carry fish in’; two pyxes were given to a child to play with, and another was made into a salt cellar; banner cloths were handed over to children for acting clothes; handbells became mortars, sacring bells dinner or door bells or bells for horse or calf or sheep. Easter sepulchres (more often made of wood than stone) made useful clothes presses, and were variously converted into a hen pen, ‘a shelf for to set dishes on’ or used to make ‘necessaries’ in the house of a churchwarden at Markby. Torn-up mass books were painted to make house hangings, and sold to a mercer who used them to wrap spice in. Vestments, banner cloths and church linen in all its variety found a multiplicity of new secular guises—as cushions, tablecloths, sheets, hangings for halls and other rooms, as bed curtains and testers, as painted cloths, to make players’ coats or props, and turned over to tailors were made into doublets or other items of clothing.”)

7. *See id.* at 175–76 (“[O]ne was stood on end ‘to kepe cattall from the chappell wall.”) (quoting, EDWARD PEACOCK, ENGLISH CHURCH FURNITURE, ORNAMENTS AND DECORATIONS AT THE PERIOD OF THE REFORMATION: AS EXHIBITED IN A LIST OF THE GOODS DESTROYED IN CERTAIN LINCOLNSHIRE CHURCHES, A. D. 1566 73 (1866)).

8. *See* RYRIE, *supra* note 1, at 33.

9. *See id.* at 49.

10. *See, e.g.*, Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1351 (2019). Though, it must be said, the centuries of persecution of non-Christian religious groups by Christians—and especially by Protestant Europeans—in the United States adds a painfully contradictory dimension to this aspect of the American mythos. *See, e.g.*, Catherine A. Brekus, *Contested Words: History, America, Religion*, 75 WM. & MARY Q. 3, 5–8 (2018) (discussing the Protestant bias of religious toleration in early America).

[Protestant] Reformation and its aftermath” as “the historical origin of political liberalism (and of liberalism more generally).”¹¹ Political liberalism, broadly defined, refers to a society that is fundamentally pluralistic as well as protective of individual rights.¹² A politically liberal society protects certain rights of personal autonomy and “assumes the fact of reasonable pluralism . . . of comprehensive doctrines, including both religious and nonreligious doctrines.”¹³ This Note understands the term “secular liberalism” to refer to a politically liberal system in which the state does not endorse a particular religion over others; rather, the state serves—to borrow from Chief Justice John Roberts’ description of the Supreme Court—as an umpire, accommodating comprehensive religious worldviews that often conflict with one another.¹⁴ Typically, secular liberalism attempts to exclude the practices and rationales of any specific religion from the realm of public reason and debate.¹⁵ It can also be understood to refer to a more comprehensive ideology of pluralism, individual rights, and autonomy.¹⁶ To some commentators—Rawls, perhaps, among them—secularism may seem like an inherent feature of liberalism, or of any kind of pluralistic society. Many people, however, question how “secular” political liberalism is or ought to be. Some scholars propose that what we call “liberal” political principles, such as a commitment to human rights and public welfare, are merely secularized versions of Protestant religious principles carried here by Puritan settlers.¹⁷ Others argue that secular

11. JOHN RAWLS, *POLITICAL LIBERALISM* xxiv (2005). Rawls suggests, however, that political liberalism was something of a side effect of the Reformation, rather than a direct result of its most prominent teachings: “pluralism made religious liberty possible, certainly not Luther’s or Calvin’s intention.” *Id.*

12. *See id.*

13. *Id.*

14. *See id.* at 10–11; *See also* United States Courts, Chief Justice Roberts Statement - Nomination Process, <https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process> [https://perma.cc/F8FD-J78D].

15. *See* RAWLS, *supra* note 11, at 10–11.

16. *See, e.g.*, Schragger & Schwartzman, *supra* note 10, at 1344 (“Liberalism is often ill-defined. Most critics agree, however, that liberalism is a political, economic, and social theory of personal autonomy, rights (property and otherwise), a distinction between public and private spheres, religious toleration (if not religious neutrality), and the rejection of rule based on inherited authority and tradition.”); *see also* RAWLS, *supra* note 11, at xxvii (discussing political versus comprehensive liberalism).

17. This genealogy is embraced to varying degrees by a wide variety of scholars. *See, e.g.*, ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 171 (2013) (“Did the idea of human rights, at least in the West, emerge from Christian doctrine? The answer

“liberalism” is itself a religion: some call it a modern iteration of paganism or Gnosticism, while others label it a new religion entirely.¹⁸

These arguments are legally significant because the way we define and treat “religion”—and therefore secular liberalism, if it is classified as a religion—has constitutional consequences that are playing out in real time at the Supreme Court and in the popular consciousness. Many scholars maintain that the Constitution does not require a strict separation of church and state; some argue that only “neutrality” among religions is required.¹⁹ Recent Supreme Court cases on the Religion Clauses have shifted away from strict separation and towards this “neutrality” interpretation of the Establishment Clause.²⁰ Some commentators and public figures skip neutrality altogether, arguing that the Constitution establishes—and was always meant to establish—an explicitly Christian government.²¹

Popular support for these and similar ideas appears to be remarkably strong: in a 2022 Pew Research Center poll, sixty percent of American adults said that they believed the nation’s Founders originally intended it to be a Christian nation.²² Forty-five percent of American adults said that the United States “should be a Christian nation today.”²³ Within that group, respondents were divided as to whether the separation of church and state should be maintained: “[T]hree-in-ten U.S. adults who want the U.S. to be a Christian nation (31%)”—so, about fourteen percent of American adults—“said in the March 2021 survey that the federal government should stop enforcing the separation of church and state.”²⁴ Only thirty-nine percent “took the opposite position, saying the federal government should enforce that separation.”²⁵ Another thirty percent had no opinion either way regarding whether the government should enforce the separation of church

to this is yes.”); *see also* Vermeule, *infra* note 111 (“Liberalism, on this view, is best understood as an imperfectly secularized offshoot of Christianity.”).

18. *See infra* Part II, at pp. 24–28.

19. *See infra* Part I, at p. 11–12.

20. *See infra* Part I, at p. 14.

21. *See infra* Part I, at pp. 11–12.

22. *See* Gregory A. Smith et al., *45% of Americans Say U.S. Should Be a ‘Christian Nation’*, PEW RSCH. CTR. (Oct. 27, 2022), <https://www.pewresearch.org/religion/2022/10/27/45-of-americans-say-u-s-should-be-a-christian-nation> [<https://perma.cc/Y86P-U4ES>].

23. *Id.*

24. *Id.*

25. *Id.*

and state.²⁶ Support for privileging religion in lawmaking, however, transcended the question of enforcing church-state separation: twenty-seven percent of all American adults said that, if they conflict, the Bible should have more influence on U.S. law than does the will of the people.²⁷

Christian nationalist sentiments like these are not new,²⁸ but their popularity and their visibility on today’s political stage make it all the more urgent for Americans—whether they are personally religious or not—to think about how to define religion, and how they believe the law should treat it.²⁹ Answering these questions is challenging, and guidance on how to think about them varies widely between sources and disciplines. From a legal perspective, the Supreme Court’s jurisprudence on the First Amendment’s definition of “religion” is murky at best, and the lower courts offer scant interpretation of their own.³⁰ From a theoretical or philosophical perspective, religion could be defined in many ways: a set of theistic or non-theistic beliefs; a set of practices; a system of ritualized meaning-making; a personal creed. This Note looks to legal precedent and scholarly debate to examine what a “religion” can be in the eyes of the law, whether secular liberalism could be one, and what the consequences would be if it were.

26. *Id.* Respondents also differed in their understanding of what being a “Christian nation” would mean: “it is much more common for people in this category to see a Christian nation as one where people are more broadly guided by Christian values or a belief in God, even if its laws are not explicitly Christian and its leaders can have a variety of faiths or no faith at all.” *Id.* Nevertheless, it is evident from these surveys that a meaningful subset of the population believes that the United States should not have a firm separation between church and state.

27. *Id.*

28. *See infra* Part II, at p. 29–30.

29. The rise of Christian nationalism, and its concomitant political commitments, is covered extensively in other scholarship. *See, e.g.,* Ashley Lopez, *More Than Half of Republicans Support Christian Nationalism, According to a New Survey*, NPR (Feb. 14, 2023), <https://www.npr.org/2023/02/14/1156642544/more-than-half-of-republicans-support-christian-nationalism-according-to-a-new-s> [<https://perma.cc/L5W8-C8QJ>] (“Christian nationalism is a worldview that claims the U.S. is a Christian nation and that the country’s laws should therefore be rooted in Christian values. This point of view has long been most prominent in white evangelical spaces but lately it’s been getting lip service in Republican ones, too.”); *see also* *A Christian Nation? Understanding the Threat of Christian Nationalism to American Democracy and Culture*, PUB. RELIGION RSCH. INST. (Feb. 8, 2023), <https://www.prii.org/research/a-christian-nation-understanding-the-threat-of-christian-nationalism-to-american-democracy-and-culture/> [<https://perma.cc/ET33-7X9G>] (“The rising influence of Christian nationalism in some segments of American politics poses a major threat to the health of our democracy. Increasingly, the major battle lines of the culture war are being drawn between a right animated by a Christian nationalist worldview and Americans who embrace the country’s growing racial and religious diversity.”).

30. *See infra* Part I, at p. 10.

The issue of the state's religious allegiance has implications for our constitutional democracy just as portentous as—if different in kind from—those it had for rulership in sixteenth-century England. The First Amendment promises that sources of religious meaning—the “patterns of meaning that give rise to effective or ineffective social control”—“are to be left to the domain of Babel.”³¹ Many systems, and many voices, are meant to coexist.³² The state must stand apart from religion in order to be neutral towards it: as Henry VIII (or perhaps his advisors) came to understand, a sovereign with religious commitments is never fully in control.³³ If secular liberalism is a religion, then “secularism,” per se, would seem to be impossible, and the state's authority must necessarily be connected to some higher religious calling (in this formulation, the “religion” of liberalism). In such a world there can be no religiously neutral sovereign, and without that, other aspects of our system of law come into question. In a democracy, state legitimacy rests primarily on the idea that the government represents the will of the people. A democracy that answers to a religious order is no longer free to represent the will of the people it purports to govern; it is a democracy compromised.

The state of the law regarding secular liberalism's potential religious status remains unclear. This Note argues that, though the legal definition of religion may be fungible and the nature of secular liberalism may be up for interpretation, legally classifying secular liberalism as a religion would be constitutionally and theoretically untenable. The adoption of such an interpretation would raise serious questions about the constitutional coherence of the First Amendment, and would implicate the legitimacy of American democracy. Without a neutral, secular principle to underpin its claim to power, the state's use of force against its citizens can no longer be justified on terms agreeable to and representative of the will of a religiously pluralistic society.

31. Robert Cover, *Foreword to The Supreme Court, 1982 Term*, 97 HARV. L. REV. 4, 17 (1983).

32. *See id.* at 17.

33. And a religion helmed by the government is also not fully in control of its own theology, as politician and author Thomas More understood at the time: when it was established “that Parliament would have ultimate authority over the English Church . . . Thomas More . . . immediately resigned as Lord Chancellor.” *See RYRIE, supra* note 1.

I. “RELIGION” IS NOT CLEARLY DEFINED IN FEDERAL CASE LAW

A full understanding of the debate over secular liberalism’s supposed status as a religion requires some historical background on the Constitution’s special treatment of religion. The constitutionally appropriate definition of religion and religion’s proper relation to the U.S. government are both far from clear, leaving room for scholarship on this issue to sprout into complex and often interesting shapes.³⁴ The First Amendment to the Constitution begins as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”³⁵ Known jointly as the Religion Clauses, these two proscriptions of Congressional authority are understood to create the conditions for religious freedom in the United States.³⁶ First, the Establishment Clause—“Congress shall make no law respecting an establishment of religion”—seems to, at minimum, prevent the state from adopting an official national religion.³⁷ Then, the Free Exercise Clause—“or prohibiting the free exercise thereof”—seems to deny the United States the right to quash religious communities that spring up within its borders.³⁸

These interpretations of the Religion Clauses are reflected in twentieth-century legislation and jurisprudence, but judges, scholars, and lawmakers do not universally accept them as accurate. The true meaning of the Religion Clauses has been disputed virtually since the ratification of the First Amendment. Broadly speaking, commentators tend to interpret the intended effect of the Religion Clauses in one of three ways: (1) as requiring the total separation of church and state; (2) as instituting a ban on state-established religion, while simultaneously creating a privileged place for religion in society; and (3) as establishing an explicitly Christian state. The first of these interpretations is frequently traced to the writings of Thomas Jefferson. In an oft-quoted 1802 letter to the Danbury Baptist Association, Jefferson celebrates the constitutional “wall of separation between Church

34. See *infra* Part II, at p. 25.

35. U.S. CONST. amend. I.

36. See FRANK S. RAVITCH, LAW AND RELIGION, A READER: CASES, CONCEPTS, AND THEORY 2 (2d ed. 2008).

37. U.S. CONST. amend. I.

38. *Id.*

& State” created by the Religion Clauses.³⁹ Jefferson’s characterization of the First Amendment has come to define the way many Americans understand the Constitution’s treatment of religion.⁴⁰

In the eyes of some legal scholars, Jefferson’s “wall of separation” never existed, and was never meant to.⁴¹ Philip Hamburger, for example, focuses on the distinction between separation of church and state and disestablishment of religion, arguing that while Jefferson (and countless judges, lawyers, and scholars since) may have understood the Religion Clauses to fully separate religious and civic life, the Founders merely meant to prevent the government from establishing one state religion.⁴² Religious dissenters in the early United States wanted protection from state laws that “gave government salaries to ministers on account of their religion” and other similar protections for minority believers; they did not, Hamburger argues, intend to endorse an impenetrable boundary between religion and politics.⁴³ Hamburger also points to efforts by anti-Christian secularist “Liberals” in the nineteenth century who sought to amend the Constitution to establish more clearly the separation of church and state as a constitutional right.⁴⁴ By Hamburger’s account, these

39. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 1 (2002) (citing Daniel L. Dreisbach, “Sowing Useful Truths and Principles”: *The Danbury Baptists, Thomas Jefferson, and the “Wall of Separation”*, 39 J. CHURCH & STATE 455, 468 (1997)) (quoting Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephriam Robbins & Stephen S. Nelson, a Committee of the Danbury Baptist Association in the State of Connecticut (Jan. 1, 1802)).

40. See HAMBURGER, *supra* note 39, at 1; see also STEVEN K. GREEN, THE THIRD DISESTABLISHMENT 111–12 (2019) (discussing the prominent role Jefferson’s “wall of separation” played in the Supreme Court’s case incorporating the Establishment Clause, *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 15–16 (1947)).

41. See, e.g., HAMBURGER, *supra* note 39, at 1–2, 7.

42. See *id.* at 2–3.

43. *Id.* at 9–10. Hamburger cites several twentieth-century sources that question the soundness of the “separation” interpretation of the Religion Clauses, including Justice Burger’s opinion for the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 606, 614 (1971), a seminal religion case, and Justice Rehnquist’s dissent in *Wallace v. Jaffree* 472 U.S. 38, 92 (Rehnquist, J., dissenting). Rehnquist apparently complains that separation doctrine lacks historical support and is unhelpful as a guide to adjudication. See HAMBURGER, *supra* note 39, at 7.

44. HAMBURGER, *supra* note 39, at 288–89. Both Hamburger and Steven K. Green describe the formation of an alliance between anti-religion “liberals” and anti-Catholic Protestants in the late nineteenth and early twentieth centuries; both groups sought to entrench Jefferson’s “wall of separation” more firmly in the Constitution, but for very different reasons. See GREEN, *supra* note 40, at 5–6. Some Protestants, these authors say, felt threatened by the rising Catholic population in the United States (and the consequent rise in Catholic political influence); they took particular issue with Catholic schools

groups abandoned their efforts at constitutional amendment in the early twentieth century, and began arguing instead that the Constitution has always, as written, established a strict separation between church and state.⁴⁵

The constitutional argument that secular liberalism is a religion begins here, with these divergent views of the purpose of the Religion Clauses. To some critics, the ascendancy of state secularism is an affront to the Founders’ intention, evidenced in founding-era rhetoric about church-state separation, of creating a society openly guided by religion but lacking a single formal state religion.⁴⁶ Other critics take this analysis a step further and argue that the Constitution authorizes, or even requires, an explicitly Christian state.⁴⁷

The “wall of separation” thesis, however, prevailed for most of the twentieth century.⁴⁸ In 1971, the Supreme Court established a three-pronged conjunctive test in *Lemon v. Kurtzman* to determine whether a government action or law violated the Establishment Clause.⁴⁹ The *Lemon* test asked whether proposed government action or aid had a clear secular purpose, whether its primary effect would be to advance or hinder religion, and whether

receiving money from the government. Green also connects the early twentieth century separationist movement to rising anti-Catholic and anti-Semitic sentiments and the revival of the Ku Klux Klan. See GREEN, *supra* note 40, at 23.

45. HAMBURGER, *supra* note 39, at 285, 287.

46. See generally *id.* at 1–11 (discussing sources indicating that Jefferson’s understanding of the Religion Clauses as reflected in his letter to the Danbury Baptist Association did not reflect the views of many contemporaries).

47. See, e.g., William P. Barr, Att’y Gen., Remarks to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame (Oct. 11, 2019), in U.S. DEPT. OF JUST. OFFICE OF PUB. AFF.’S, <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-law-school-and-de-nicola-center-ethics> [https://perma.cc/M6XX-6QGV]. Former Attorney General William P. Barr has said that, under the Framers’ understanding of a free government, “social order must flow up from the people themselves—freely obeying the dictates of inwardly-possessed and commonly-shared moral values. And to control willful human beings, with an infinite capacity to rationalize, those moral values must rest on authority independent of men’s will—they must flow from a transcendent Supreme Being.” He says that, “in short, in the Framers’ view, free government was only suitable and sustainable for a religious people—a people who recognized that there was a transcendent moral order antecedent to both the state and man-made law and who had the discipline to control themselves according to those enduring principles.” *Id.*

48. In 1940, the Free Exercise Clause was incorporated into the Fourteenth Amendment in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), and in 1947, the Establishment Clause was incorporated in *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 15–16 (1947). See also RAVITCH, *supra* note 36, at 1 (discussing the incorporation of the Religion Clauses).

49. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–613 (1971).

the proposed government action or aid would create an excessive government entanglement with religion.⁵⁰ The present Supreme Court, however, recently disavowed *Lemon* in *Kennedy v. Bremerton School District*.⁵¹ The Court explicitly overruled *Lemon*—asserting that it had “long ago abandoned” that test—and stated, citing *Town of Greece v. Galloway*, that the Establishment Clause must instead “be interpreted by ‘reference to historical practices and understandings.’”⁵² The Court insisted that the *Bremerton* opinion’s “analysis focused on original meaning and history” has “long represented the rule” with respect to the interpretation of the Religion Clauses, and reflects “a natural reading of the First Amendment” under which “the [Religion] Clauses have ‘complementary’ purposes, not warring ones where one Clause is always sure to prevail over the others.”⁵³

Carson ex rel. O. C. v. Makin, the Supreme Court’s other major religion decision from July 2022,⁵⁴ constitutes a similarly firm

50. *Id.* *Lemon* was slowly eviscerated by subsequent cases but seemed to keep reviving itself for decades. Justice Scalia lamented *Lemon*’s long life in memorably macabre terms: “Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398, (1993) (Scalia, J., concurring); see also RAVITCH, *supra* note 36, at 383 (discussing the *Lamb’s Chapel* decision).

51. 142 S. Ct. 2407, 2428 (2022). In *Bremerton*, Joseph Kennedy lost his job coaching public high school football because of his practice of leading the team in Christian prayer on the football field after each game. Kennedy’s subsequent § 1983 action alleging infringement of his First Amendment rights to free speech and free exercise of religion resulted in summary judgment for Bremerton School District at the District Court, affirmed by the Ninth Circuit. On appeal, the Supreme Court reversed. See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022).

52. *Id.* at 2411 (citing *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

53. *Bremerton*, 142 S. Ct. at 2411 (citing *Everson v. Bd. Of Ed. Of Ewing Twp.*, 330 U.S. 1, 13, 15 (1947)). To that end, citing historical practice, *Bremerton* held that the school district needed to (and failed to) show that Kennedy coerced students into praying with him in order to show good cause for Establishment Clause concerns relating to his behavior. See *id.* at 2421, 2429 (citing *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). The Court held that Bremerton School District failed to demonstrate such coercion, despite findings by the District Court that players reported feeling that they had to join Kennedy in prayer in order to get playing time or feel like part of the team. *Id.* at 2429.

54. 142 S. Ct. 1987, 1993 (2022). Parents of Maine public school students brought Free Exercise and Equal Protection challenges to a state program providing families with education vouchers to send children to private schools if their school district does not operate a secondary school or contract with another district’s secondary school. See *id.* at 1994. The state program did not permit families to use these vouchers to send their children to “sectarian” schools; the parents in this case wished to use the vouchers to send their children to private Christian schools, which included proselytizing and an explicitly Christian evangelical perspective as a part of their educational mission. See *id.* at 1994–95. As in *Bremerton*, the Supreme Court reversed both lower courts. See *id.* at 2002, 2008.

(though less widely publicized) step towards tearing down Jefferson’s “wall of separation.”⁵⁵ In *Carson*, Chief Justice Roberts’ opinion for the Court found a Maine school voucher program to be invalid, holding that the state’s program violated the Free Exercise Clause by improperly withholding otherwise-available benefits from religious organizations.⁵⁶ In her dissent, Justice Sotomayor argued that, by requiring the state to fund religious education (instead of merely allowing the state to fund religious education, as in *Zelman v. Simmons-Harris*, another school voucher case), *Carson* erased the Establishment Clause entirely.⁵⁷ The *Carson* Court, she concluded, “leads us to a place where separation of church and state becomes a constitutional violation.”⁵⁸

Kennedy and *Carson* now set the tone for jurisprudence interpreting the Religion Clauses. The current Court seems intent on firming up a “neutrality” approach, under which the state still may not privilege one religion over any other, but church and state are at the same time no longer so firmly “separate” as to preclude any government funding of religious institutions.⁵⁹ This state of affairs is significant for future efforts to classify secularism as

55. The 2023 Supreme Court term saw two more rulings favorable to Free Exercise claims. In *Groff v. DeJoy*, the Court held that “Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.” 143 S. Ct. 2279, 2281 (2023). In *303 Creative LLC v. Elenis*, the Court held that “[t]he First Amendment prohibit[ed] Colorado from forcing a website designer to create expressive designs speaking messages with which the designer disagrees.” 143 S. Ct. 2298, 2303 (2023). After the Court decided *303 Creative*, news broke that the alleged website design request at issue in the case was in fact fake. See Adam Liptak, *What to Know About a Seemingly Fake Document in a Gay Rights Case*, N.Y. TIMES (July 3, 2023), <https://www.nytimes.com/2023/07/03/us/politics/same-sex-marriage-document-supreme-court.html> [https://perma.cc/75LK-EZ7G].

56. See *Carson*, 142 S. Ct. at 2002. Justice Roberts’ opinion for the majority frames this decision as a natural extension of the Court’s prior rulings in *Trinity Lutheran* and *Espinoza*, but Justice Breyer and Justice Sotomayor spell out in their dissents the magnitude of the shift *Carson* represents in Religion Clause jurisprudence. See *id.* at 2002–15. Breyer articulates the issue in terms of the schools’ curricula, pointing out that by requiring the state to provide funds towards students’ educations at these schools, the Court is compelling the state to use taxpayer dollars in support of a proselytizing curriculum that Maine does not consider to be the equivalent of a public education. See *id.* at 2010.

57. See *id.* at 2014 (Sotomayor, J., dissenting); *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–54 (2002).

58. *Carson*, 142 S. Ct. at 2014.

59. Jefferson’s wall, as many have pointed out, has been eroding slowly since *Everson*. See Larry Catá Backer, *Frank S. Ravitch and Larry Catá Backer Discuss Carson v. Makin, --- U.S. (No. 20–1088; June 21, 2022), Establishment, Free Exercise and the Constitutional Obligation to Fund Religious Education*, L. END DAY (July 21, 2021), <https://lbackerblog.blogspot.com/2022/07/frank-s-ravitch-and-larry-cata-backer.html> [https://perma.cc/K2AS-VG9F] (commenting on the burgeoning neutrality standard).

religion insofar as these recent decisions create the conditions for the debate. If the Establishment Clause is now all but a dead letter, then secular liberalism could be a legitimate state religion; but so, on the other hand, could anything else.

A. SUPREME COURT JURISPRUDENCE

The Supreme Court has confronted—or skirted—the question of whether to define certain beliefs or practices as “religious” many times.⁶⁰ Few Supreme Court cases, however, have directly implicated the issue of whether “secularism,” “liberalism,” or some other broad category of nontheistic or non-religious ethical commitment might be deemed a “religion” for First Amendment purposes. Where they do appear, judicial opinions grappling with the definition of religion tend to happen more frequently in Free Exercise Clause cases than in Establishment Clause cases, because the Free Exercise Clause’s prohibition on state interference with religion more plainly necessitates the delineation of some legal boundary between religious and nonreligious activity.⁶¹ This is a sticky question for courts to resolve, and indeed the Supreme Court has never imparted “definitive meaning to the word ‘religion’ as it appears in the Constitution.”⁶²

The modern Court has, in the few cases in which it has directly considered this question, taken a relatively broad view of the definition of religion. One nineteenth-century Supreme Court case, *Davis v. Beason*, adopted a narrow, theistic definition of religion, describing it as “one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”⁶³ This definition was

60. The definition of “religion” has also come before the Supreme Court in drug-related cases. See, e.g., *Emp. Div., Dept. of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 890 (1990) (holding that the First Amendment did not preclude Oregon state law from prohibiting the use of peyote for religious purposes and that it was appropriate for the state to deny unemployment benefits to claimants who were fired for using peyote). Partly in response to public disapproval of *Smith*’s outcome, Congress passed the Religious Freedom Restoration Act in 1993, substantially raising the bar for governmental infringement on the free exercise of religion. See RAVITCH, *supra* note 36, at 659.

61. See RAVITCH, *supra* note 36, at 580.

62. LARRY S. FELDMAN & KATHLEEN M. SULLIVAN, *FIRST AMENDMENT LAW* 635 (7th ed. 2019).

63. 133 U.S. 333, 342 (1890), *overruled by* 517 U.S. 620 (1996). *United States v. Ballard*, 322 U.S. 78, 86 (1944), did not define religion directly but did hold that it is unconstitutional for the government to require people to prove their religious beliefs—the

decidedly abandoned, however, in twentieth-century cases. Though it does not directly hold on the definition of secularism as religion, the 1961 case *Torcaso v. Watkins* is often cited in support of the proposition that secularism or secular liberalism is a religion.⁶⁴ In *Torcaso*, the Supreme Court struck down a Maryland state law requiring holders of public office to declare their belief in the existence of God as a prerequisite for taking office.⁶⁵ Though the decision did not hinge on the definition of “religion,” dicta in Justice Black’s opinion addressed this question anyway. In footnote 11 of his majority opinion, Black lists “Secular Humanism” and “Ethical Culture”—capitalized as proper nouns—alongside Buddhism and Taoism as examples of “religions in this country which do not teach what would generally be considered a belief in the existence of God.”⁶⁶

The Vietnam War draft produced a series of cases regarding conscientious-objection exceptions to combat service that forced the Court to directly confront the legal meaning of “religion.”⁶⁷ These cases are often cited by scholars of all political stripes in arguments over treatment of nontheistic values or “secularism” as religions. This line of cases provides the clearest Supreme Court guidance on the legal status of “secular” creeds vis-à-vis religion to date—indeed, it is difficult to find other Supreme Court holdings that bear directly on the question. The Universal Military Training and Service Act of 1948 (hereafter, “the UMTSA” or “the Act”) provides an exemption from combat service for those who oppose participation in “war in any form” due to their personal

state cannot “reject beliefs because [its agents] consider them ‘incomprehensible.’” RAVITCH, *supra* note 36, at 581–82 (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)). The state is limited to determining whether religious beliefs are “sincerely held.” *See Seeger*, 380 U.S. at 185.

64. *See Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961); *see also* case discussed *infra* note 105.

65. *See Torcaso*, 367 U.S. at 495–96; *see also* RONALD B. FLOWERS, *THAT GODLESS COURT? SUPREME COURT DECISIONS ON CHURCH-STATE RELATIONSHIPS* 116–17 (2d. ed. 2005) (discussing the significance of *Torcaso* to the rise of the “Christian Right”).

66. *Torcaso*, 367 U.S. at 495 n.11. The Supreme Court sometimes treats “Secular Humanism” as a proper noun, but many other sources—including some lower courts, and sources published by self-identified secular humanists—treat it as a common noun. This Note treats secular humanism as a common noun, except when quoting from a source in which it is treated as a proper noun.

67. *See* FELDMAN & SULLIVAN, *supra* note 62, at 635; *see also* RAVITCH, *supra* note 36, at 580–81.

“religious training and belief.”⁶⁸ The original language of the UMTSA defined “religious training and belief” as “belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code.”⁶⁹ The UMTSA’s definition of “religion” is not so different from the definition offered by the 1890 Supreme Court in *Beason* (and, in fact, the reference to a “Supreme Being” was later struck from the UMTSA in 1967).⁷⁰

When presented, however, with legal challenges by conscientious objectors, the Supreme Court evinced a much broader understanding of “religion” than that articulated by the Act.⁷¹ In *United States v. Seeger*, the Court found that objectors Seeger, Jakobson, and Peter were all entitled to exemptions from combat service under the Act, even though their religious beliefs did not neatly cleave to the Act’s definition of religion in relation to a Supreme Being or God.⁷² Seeger said that he did not believe in God or in a Supreme Being, but nonetheless held “a religious faith in a purely ethical creed” which would not brook participation in combat service.⁷³ Jakobson said he believed in some form of “‘Supreme Being’ who was ‘Creator of Man’” but not, seemingly, one to whom mankind owed particular duties.⁷⁴ Peter acknowledged belief in something akin to a Supreme Being but

68. Universal Military Training and Service Act of 1948, 50 U.S.C. § 3806(j) [hereinafter UMTSA]; see also FELDMAN & SULLIVAN, *supra* note 62, at 635–36 (discussing the UMTSA).

69. FELDMAN & SULLIVAN, *supra* note 62, at 635–36.

70. See FELDMAN & SULLIVAN, *supra* note 62, at 636 (“A 1967 amendment [to the UMTSA] deleted the statutory reference to a “belief in a relation to a Supreme Being” after the 1966 conviction and three-year sentence that gave rise to Welsh [sic], which follows.”).

71. See *United States v. Seeger*, 380 U.S. 163, 165–66 (1965); see also FELDMAN & SULLIVAN, *supra* note 62, at 636 (discussing the *Seeger* decision).

72. See *Seeger*, 380 U.S. at 165–69.

73. *Id.* at 165–66. Seeger “declared that he was conscientiously opposed to participation in war in any form by reason of his ‘religious’ belief; that he preferred to leave the question as to his belief in a Supreme Being open, ‘rather than answer “yes” or . . . [no]; that his ‘skepticism or disbelief in the existence of God’ did ‘not necessarily mean lack of faith in anything whatsoever’; that his was a ‘belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.’” *Id.* at 165–66 (citation omitted).

74. *Id.* at 167–68. Jakobson “had concluded that man must be ‘partly spiritual’ and, therefore, ‘partly akin to the Supreme Reality’; and that his ‘most important religious law’ was that ‘no man ought ever to willfully sacrifice another man’s life as a means to any other end.’” *Id.*

chose not to use those words to describe his beliefs.⁷⁵ None of them professed to be a member of any organized religion.⁷⁶ Justice Clark’s majority opinion held that the “test of belief ‘in a relation to a Supreme Being’ is whether a given belief that is sincere and meaningful 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.”⁷⁷ Justice Douglas concurred, adding that a different reading of the statute could create Free Exercise and Equal Protection issues by singling out some (presumably mainly nontheistic) religious faiths for different treatment.⁷⁸

The *Seeger* Court did not extend the conscientious-objector exemption to those whose objection is “based on a ‘merely personal moral code,’”⁷⁹ but five years later *Welsh v. United States* did just that.⁸⁰ Petitioner Welsh explicitly insisted that his beliefs were not “religious,” but the Court nonetheless held that he was entitled to an exemption under § 6(j) of the UMTSA.⁸¹ The Court justified Welsh’s exemption by essentially dismissing Welsh’s own comprehension of the language of the statute—“very few registrants,” the Court said, “are fully aware of the broad scope of the word ‘religious’ as used in § 6(j),” and it would therefore be improper to take Welsh’s disclaimer of religious belief at face value.⁸² The “registrant’s statement that his beliefs are nonreligious” was therefore not a reliable “guide for those charged with administering the exemption.”⁸³

Welsh also held that § 6(j)’s bar on exemptions for “essentially political, sociological, or philosophical views or a merely personal moral code” did not apply to Welsh.⁸⁴ Writing for the plurality, Justice Black reasoned that the UMTSA should not be read to bar exemptions for citizens “who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to

75. Peter “hedged the question as to his belief in a Supreme Being by saying that it depended on the definition,” but “quoted with approval Reverend John Haynes Holmes’ definition of religion as ‘the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands.’” *Id.* at 169.

76. *See id.* at 165–69.

77. *Id.* at 165–66.

78. *See id.* at 188 (Douglass, J., concurring).

79. *See Seeger*, 380 U.S. at 185–86.

80. 398 U.S. 333, 343–44 (1970).

81. *See id.* at 341.

82. *Id.*

83. *Id.*

84. *See id.* at 342–44.

participation in all wars is founded to a substantial extent upon considerations of public policy.”⁸⁵ The exceptions to the UMTSA’s exemption rules are designed, Black inferred, to prevent those whose beliefs are not deeply held or whose objections to the war are not rooted in “moral, ethical, or religious principles[,] but instead [rest] solely upon considerations of policy, pragmatism, or expediency.”⁸⁶ Black, in other words, viewed the Court’s role vis-à-vis the Act to be one of sniffing out insincere claims of moral or religious objection to war designed only to facilitate draft-dodging, while still recognizing and honoring sincere moral objections to fighting even if those objections are not “religious” in the strictest sense of the statute’s language. Justice Harlan concurred in the result, and wrote separately to express the view that, while § 6(j) did in fact limit its exemption to those with theistic beliefs, this limitation was unconstitutional because Congress cannot, under the Establishment Clause, distinguish “between theistic or nontheistic religious beliefs on one hand and secular beliefs on the other.”⁸⁷ In contrast, Justice White dissented, concluding that a plain reading of the text of the statute barred exemptions for those whose objection arises from personal moral views rather than avowedly religious beliefs.⁸⁸

Black’s very generous purposivist⁸⁹ construction of the UMTSA’s religion exemption in *Welsh* leaves the legal definition of “religion” in an odd place. Can the government really call a belief system a religion if the person whose beliefs are at issue does not think of their views as religious? Or does *Welsh* rely on a highly

85. *Id.* at 342.

86. *See id.* at 342–43.

87. *Id.* This is basically the core of the contemporary argument, discussed *infra* in Part II, that nonreligious values systems deserve treatment equal to that of religious beliefs under the Free Exercise Clause.

88. *See id.* at 367–68 (White, J., dissenting). Notably, a year after *Welsh*, a nearly unanimous court held in *Gillette v. United States* that a Catholic objector’s moral objection to the Vietnam War did not qualify him for a § 6(j) exemption because he did not object to war in general, just to this war in particular. 401 U.S. 437, 461–462 (1971). Though he said he believed it was “his duty as a faithful Catholic to discriminate between ‘just’ and ‘unjust’ wars,” Justice Marshall (writing for eight Justices) concluded that § 6(j) exemptions required “conscientious opposition to participating personally in any war and all war.” *Id.* at 441, 443. “Valid neutral reasons” justified limiting the statute’s exemption to only those who object to all war, and the government’s interests overrode any Free Exercise concerns implicated here for selective objectors. *See id.* at 445–61.

89. Purposivism is a school of statutory interpretation that holds “that Congress enacts statutes to achieve certain purposes, and that judges should construe statutory language to fulfill those purposes.” John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 113 (2011).

context-specific statutory construction that can be cabined as a matter of imprecise drafting inadequate to answer today’s religion clause questions? The Supreme Court has not addressed this question directly since deciding *Welsh* in 1970, and it is unclear how the current Court would approach these issues.⁹⁰

On the whole, Supreme Court jurisprudence does not offer clear guidance regarding the status of secular liberalism as a religion. The secular liberalism at issue in contemporary critiques is not quite the same as the “Secular Humanism” or “Ethical Culture” of Black’s *Torcaso* footnote.⁹¹ Neither is it quite comparable to the individual’s moral (but non-religious) commitments at issue in *Welsh*.⁹² The circuit courts, however, have been somewhat more direct in addressing claims that secularism or secularist ideologies might be considered religions.

B. CIRCUIT COURT JURISPRUDENCE

The Seventh and Ninth Circuits in particular have developed analytical frameworks for defining religion that may suggest directions this question could take in other courts. The Seventh Circuit has developed a jurisprudence that treats atheism as a religion for Establishment Clause purposes. In *Kaufman v. McCaughtry*, the Seventh Circuit court reversed the district court and held that Kaufman’s First Amendment rights were violated when the prison in which he was incarcerated refused to allow him to form an atheist reading group for prisoners, while allowing the formation of reading groups for other religions.⁹³ The district court, *Kaufman* held, erred when it “failed to recognize that Kaufman was trying to start a ‘religious’ group”; Kaufman’s religion was atheism, and his proposed reading group “was

90. Ravitch posits that, under the method of analyzing the definition of “religion” espoused in *Seeger* and *Welsh*, “a belief in science and proof by the scientific method might qualify as ‘religious.’” See RAVITCH, *supra* note 36, at 582. Ravitch acknowledges here the arguments advanced by some critics “that the public schools teach a creed of ‘secular humanism,’ which is akin to a religious doctrine.” *Id.* Ravitch maintains that, for the purposes of the Establishment Clause (as opposed to the Free Exercise Clause, at issue in *Seeger* and *Welsh*), the legal definition of religion appears to be narrower—“most cases involve some connection to a deity or supernatural forces.” *Id.* It also, according to Ravitch, appears to include “[a]theism”—any sort of affirmative government endorsement of the idea that there is no God. *See id.*

91. *See Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961); *see also* discussion *infra* p. 23.

92. *See infra* Part III, at p. 31, for further discussion distinguishing *Welsh*.

93. 419 F.3d 678, 684 (7th Cir. 2005).

religious in nature even though it expressly rejects a belief in a supreme being.”⁹⁴ The group’s purpose of studying “religious beliefs, creeds, dogmas, tenets, rituals, and practices” from “an atheistic perspective” sufficed to qualify it as a religious group.⁹⁵

In *Adeyeye v. Heartland Sweeteners, LLC*, a footnote to the Seventh Circuit’s majority opinion cited *Reed v. Great Lakes Companies, Inc.* for the proposition that “the incorporation of some form of deity or deities into a belief system is not required for Title VII protection, which recognizes atheism as a religion.”⁹⁶ *Center for Inquiry, Inc. v. Marion Circuit Court Clerk* built on *Adeyeye*, holding that even though “atheists[] don’t call their own stance a religion,” they “are nonetheless entitled to the benefit of the First Amendment’s neutrality principle, under which states cannot favor (or disfavor) religion vis-à-vis comparable secular belief systems.”⁹⁷ The plaintiffs in *Center for Inquiry* sought recognition of secular celebrants as marriage officiants, and argued that “when a secular moral system is equivalent to religion except for non-belief in God,” or is equivalent to a nontheistic religion, “the state must treat them the same way it treats religion” with respect to recognition of marriage officiation.⁹⁸ States cannot, *Center for Inquiry* held, “favor religions over non-theistic groups that have moral stances that are equivalent to theistic ones except for non-belief in God or unwillingness to call themselves religions.”⁹⁹

The Ninth Circuit and its district courts have developed a somewhat different jurisprudence on religion, under which “Secular Humanism” can be considered a religion.¹⁰⁰ In 1985, the

94. *Id.*

95. *Id.*

96. 721 F.3d 444, 448 n.1 (7th Cir. 2013) (“If we think of religion as taking a position on divinity, then atheism is indeed a form of religion.”) (citing *Reed v. Great Lakes Companies, Inc.*, 330 F.3d 931, 934 (7th Cir. 2003)). The *Adeyeye* court considers “three factors . . . determin[e] whether a belief is in fact religious for purposes of Title VII: (1) the belief necessitating the accommodation must actually be religious, (2) that religious belief must be sincerely held, and (3) accommodation of the employee’s sincerely held religious beliefs must not impose an undue hardship on the employer”; essentially, the *Lemon* factors. *Adeyeye*, 721 F.3d at 448 (citing *Redmond v. GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978)).

97. *Ctr. for Inquiry, Inc. v. Marion Cir. Ct. Clerk*, 758 F.3d 869, 873 (7th Cir. 2014).

98. *Id.*

99. *Id.*

100. The courts appear to understand “Secular Humanism” to be a distinct concept from atheism. Although the term is not defined in the proceedings discussed here, other legal writing has provided definitions of secular humanism from those who purport to practice it. “Secular humanists themselves no doubt would deny that secular humanism is a religion in any traditional sense: ‘Secular humanism places trust in human intelligence rather than in

Ninth Circuit rejected a claim in *Grove v. Mead School District Number 354* that the school district’s teaching of a certain book advanced secular humanism as a religion in violation of the Establishment Clause.¹⁰¹ The court avoided holding directly on whether secular humanism was a religion, determining instead that the book had been assigned not for the purpose of promoting any religion, but for other permissible secular purposes.¹⁰² The opinion stated that “[s]ecular humanism may be a religion,” but did not consider the question further.¹⁰³ The Ninth Circuit has since drawn clear lines, however, to protect scientific teaching from similar Establishment Clause challenges. In *Peloza v. Capistrano Unified School District*, for example, the Ninth Circuit explicitly rejected assertions that “evolution” or “evolutionism” was a religion for Establishment Clause purposes, citing the lack of Supreme Court or Ninth Circuit precedent, the “dictionary definition of religion[,] and the clear weight of the caselaw.”¹⁰⁴ High school teacher Peloza advanced a familiar creationist argument: by requiring him to teach evolution in his biology class, the school district violated the Establishment Clause. The Ninth Circuit responded that evolution is a “scientific theory” held by the Supreme Court not to constitute a religion.¹⁰⁵

More recently, however, the U.S. District Court for the District of Oregon pulled on the thread of religious “Secular Humanism” left hanging by *Grove*. In 2014, the District of Oregon held in

divine guidance. Skeptical of theories of redemption, damnation, and reincarnation, secular humanists attempt to approach the human situation in realistic terms: human beings are responsible for their own destinies.” Gail Paulus Sorenson, *Religion and the Public School Curriculum*, 31 ED. L. REP. 1065, 1069 (1986) (quoting *A Secular Humanist Declaration*, FREE INQUIRY, <https://secularhumanism.org/a-secular-humanist-declaration/> [<https://perma.cc/4FZF-MDJ3>]). Atheism, by contrast, is defined by its rejection of the idea of God. See generally Richard Cimino & Christopher Smith, *Secular Humanism and Atheism Beyond Progressive Secularism*, 68 SOCIO. OF RELIGION 407 (2007).

101. See *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1534 (9th Cir. 1985). In *Grove*, parents and taxpayers brought an action against the school district alleging that the school violated the First Amendment’s Religion Clauses when it refused to remove a book—*The Learning Tree* by Gordon Parks—from its sophomore English Curriculum. *Id.* at 1531. The plaintiffs objected to the book’s inclusion in the curriculum on both Free Exercise and Establishment Clause grounds, saying it contained ideas that were offensive to their religious beliefs. *Id.* However, students were allowed to read a different book as an alternative to *The Learning Tree*, and the teaching of that book “served a secular educational function.” *Id.* at 1532–34.

102. *Id.* at 1534.

103. *Id.* (citing *Rhode Island Fed’n of Tchr’s v. Norberg*, 630 F.2d 850, 854 (1st Cir. 1980)).

104. *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994).

105. See *id.*

American Humanist Association v. United States that “Secular Humanism is a religion for Establishment Clause purposes.”¹⁰⁶ The District Court cited dicta from footnote 1 of Justice Black’s opinion in *Torcaso* to support this proposition.¹⁰⁷

So, the Seventh Circuit has protected atheists from “religious” discrimination, and the Ninth Circuit has affirmed that evolution is not a religious belief but has skirted deciding whether secular humanism is a religion—though the District of Oregon has held that it is. The takeaway here is that there is no plain definition of religion to which courts can turn in evaluating claims that liberalism should be considered a religion. None of the federal religious liberty statutes offer a definition of religion.¹⁰⁸ In fact, according to Andrew Koppelman’s research as of 2013, no jurisdiction in the world has settled on a clear definition of religion.¹⁰⁹

Ultimately, the circuit courts do not provide much more guidance regarding the definition of religion than does the Supreme Court. This latitude in the courts leaves substantial room for arguments by legal and political commentators about what is or is not a religion, and whether “secular liberalism”—however we define that term—should be considered one. The terms used in these cases and by commentators are hard to keep track of, and some that seem similar—“Secular Humanism” or “secular liberalism,” for example—arguably differ in key ways. The existing scholarship considering this question is clouded by these issues of definition. For current purposes, it is important at the threshold to distinguish the use of the word “secular” as an adjective—as in the Supreme Court’s proper noun “Secular Humanism”—from “secularism” itself. Secular humanism connotes a belief system that does not identify as religious. The broader notion of secularism derided by religious critics of liberalism refers to a principle of governance that seeks not to favor any religious viewpoint. “Secularism” itself appears to remain

106. *Am. Humanist Ass’n v. United States*, 63 F. Supp. 3d 1274, 1283 (D. Or. 2014). The American Humanist Association (a secular humanist group) and Jason Michael Holden, who was incarcerated in federal prison, brought suit against the federal government, the Federal Bureau of Prisons, Federal Correctional Institution Sheridan, Oregon, and various individual prison officers, alleging that they violated Holden’s First Amendment rights “by their refusal to authorize either a Humanist study group or an Atheist study group, or to recognize Humanism as a religious assignment.” *Id.* at 1278.

107. *See id.* at 1286.

108. *See* KOPPELMAN, *supra* note 17, at 43.

109. *See id.* at 44 n.128.

distinct from secular humanism in jurisprudence; at least, no court has stated outright that secularism itself is impossible, though the Supreme Court’s recent decisions in *Carson* and *Kennedy* may indicate a sympathy for that viewpoint. As discussed in the next Part, the issue of definitions creates a strange scholarly landscape over the status of various “secular” ideologies vis-à-vis religion, with religious critics of liberalism and proponents of secular ideology almost seeming, at times, to align in some aspects of their arguments. Their claims are different in crucial ways, but the interplay between these ideological camps sets up the context for any discussion of secular liberalism’s status as religion in the modern legal landscape.

II. THE SCHOLARLY LANDSCAPE REGARDING SECULAR LIBERALISM’S STATUS AS A RELIGION IS POLARIZED AND INCONCLUSIVE

The absence of consistent analysis at the Supreme Court and circuit court levels has left an open field of legal interpretation that makes possible the present scholarly debate over secular liberalism’s status as a religion. Proponents of the view that secular liberalism is a religion—“religious antiliberals,” as Micah Schwartzman, Richard Schragger, and other scholars have called them—do not even agree on how to define the religion of secular liberalism they purport to have identified.¹¹⁰ Some religious antiliberals frame secular liberalism as a new religion while others revile secular liberalism as a modern form of paganism. Adrian Vermeule seems to embrace the former argument: he has described liberalism as “an imperfectly secularized offshoot of Christianity” that follows its own “anti-liturgy, the Festival of Reason, which celebrates and re-enacts the dawning of rational freedom against

110. See, e.g., Schragger & Schwartzman, *supra* note 10, at 1344, 1359. In a 2020 article titled “Religious Antiliberalism and the First Amendment,” published in the *Minnesota Law Review*, Richard Schragger and Micah Schwartzman describe the role of antiliberalism (a “comprehensive critique” of liberalism encompassing all aspects of liberal society) in the conservative shifts in religion law in the United States. See *id.* Schragger and Schwartzman break religious antiliberalism down into four broad categories: anti-secularism, anti-paganism, organicism, and integralism. See *id.*; see also JASON C. BIVINS, *THE FRACTURE OF GOOD ORDER: CHRISTIAN ANTILIBERALISM AND THE CHALLENGE TO AMERICAN POLITICS* 3 (2003) (“Christian antiliberalism . . . [is a] mode of critical action . . . [that] self-consciously uses religious protests—rituals, symbols, narratives, and communities grounded in Christian traditions—to denounce features of American liberalism as it is understood by the practitioners.”).

the dark background of unreasoned, obscurantist tradition.”¹¹¹ In other writings he has traced this liberal anti-liturgy back to specific events of the French Revolution, when “revolutionaries deliberately desecrated the holy altar of Our Lady in Paris, one of the great sacred places of Christendom”; for Vermeule, the desecration of a monument to the Virgin Mary embodies the violent hostility towards Christianity he attributes to contemporary liberalism.¹¹²

The hegemony of the liberal “faith,” Vermeule asserts, “stands upon a sacramental political theology.”¹¹³ Liberalism as a theory, he says, orbits a “master commitment to the autonomy of the individual.”¹¹⁴ Liberalism as a regime is, for Vermeule, characterized by “public ‘secularism,’ individual autonomy, and egalitarianism, ‘tolerance’ except of the intolerant, and aggressive attempts to police non-liberal forces internally and non-liberal

111. Adrian Vermeule, *All Human Conflict is Ultimately Theological*, UNIV. NOTRE DAME CHURCH LIFE J. (July 16, 2019), <https://churchlifejournal.nd.edu/articles/all-human-conflict-is-ultimately-theological/> [<https://perma.cc/MXG3-UTSA>].

112. See Adrian Vermeule, *A Christian Strategy*, FIRST THINGS (Nov. 2017), <https://www.firstthings.com/article/2017/11/a-christian-strategy> [<https://perma.cc/V6T4-LFCW>]. Vermeule goes on to suggest, with little endeavor at subtlety, that liberalism is, in fact, Satan: “Liberalism’s deepest enmity, it seems, is ultimately reserved for the Blessed Virgin—and thus Genesis 3:15 and Revelation 12:1–9, which describe the Virgin’s implacable enemy, give us the best clue as to liberalism’s true identity.” *Id.* Genesis 3:15 reads as follows (God talking to Satan in snake form): “And I will put enmity between thee and the woman, and between thy seed and her seed; it shall bruise thy head, and thou shalt bruise his heel.” Genesis 3:15. Revelation 12:1–9 read as follows: “And there appeared a great wonder in heaven; a woman clothed with the sun, and the moon under her feet, and upon her head a crown of twelve stars: And she being with child cried, travailing in birth, and pained to be delivered. And there appeared another wonder in heaven; and behold a great red dragon, having seven heads and ten horns, and seven crowns upon his heads. And his tail drew the third part of the stars of heaven, and did cast them to the earth: and the dragon stood before the woman which was ready to be delivered, for to devour her child as soon as it was born. And she brought forth a man child, who was to rule all nations with a rod of iron: and her child was caught up unto God, and to his throne. And the woman fled into the wilderness, where she hath a place prepared of God, that they should feed her there a thousand two hundred and threescore days. And there was war in heaven: Michael and his angels fought against the dragon; and the dragon fought and his angels, And [sic] prevailed not; neither was their place found any more in heaven. And the great dragon was cast out, that old serpent, called the Devil, and Satan, which deceiveth the whole world: he was cast out into the earth, and his angels were cast out with him.” Revelation 12:1–9.

113. Vermeule, *supra* note 111. It should also be noted that Vermeule does not seem to think political theology is a bad thing; in fact, he endorses a Catholic U.S. government. He supports Catholic integralism, which is a school of thought that argues that governments should be guided by Catholic religious principles. KEVIN VALLIER, *ALL THE KINGDOMS OF THE WORLD: ON RADICAL RELIGIOUS ALTERNATIVES TO LIBERALISM* 5 (2023).

114. Vermeule, *supra* note 111.

regimes externally, often by force.”¹¹⁵ Liberalism’s sacraments include “the shaming and, where possible, legal punishment of the intolerant or illiberal.”¹¹⁶ He cites other critics of liberalism, who describe liberalism variously as “a Christian heresy, a mutation of Gnosticism,” and a reaction against “the inegalitarian character of Christian salvation.”¹¹⁷

Like Vermeule, former Attorney General William Barr seems to frame liberalism as a new religion.¹¹⁸ In a 2019 speech at the University of Notre Dame, then-Attorney General Barr remarked that “some have observed . . . that the secular project has itself become a religion, pursued with religious fervor.”¹¹⁹ Secularism, he said, “is taking on all the trappings of a religion, including inquisitions and excommunication”; liberals will figuratively “[burn] at the stake” anyone who defies them, through lawsuits, social media attacks, and professional, social, and educational censure.¹²⁰

In an effort to “illuminate America’s chaotic search for truth,” Daniel Conkle has argued that political liberalism constitutes a sort of secular fundamentalism, not so different from religious fundamentalism in its zeal and its refusal to accept conflicting interpretations or sources of truth.¹²¹ Reason, Conkle argues, is the only “source of truth” acceptable to liberalism in the public domain, making liberal thought “both insulated and insular.”¹²² Religious fundamentalists, too, regard their faith and its canonical text as “the only legitimate source[s] of truth on whatever issues [they address].”¹²³ Conkle describes “comprehensive secular fundamentalism” in particular as a secular viewpoint from which

115. *Id.* Vermeule says adherents of the secular liberal “religion” engage cultural signifiers like attire and modes of speaking that frequently make it “possible to identify a believer in sacramental liberalism on sight.” *Id.*

116. Vermeule, *supra* note 112.

117. *Id.*

118. See Barr, *supra* note 47.

119. *Id.*

120. *Id.*

121. See Daniel O. Conkle, *Secular Fundamentalism, Religious Fundamentalism, and the Search for Truth in Contemporary America*, 12 J. LAW & RELIGION 337, 349–50 (1996) (“With reason as their ultimate value, comprehensive secular fundamentalists virtually close their minds to religious insights, and therefore to the possibility of religious truth or meaning, whether in public or in private life. Thus, like religious fundamentalists, they are absolutists in the sense that they are unwilling even to consider claims of truth that proceed from premises they do not already share.”).

122. *Id.* at 347.

123. *Id.* at 348.

rationalism and modern science are the only legitimate sources of truth in both public and private life.¹²⁴ Comprehensive secular fundamentalists are “absolutists,” much like religious fundamentalists; secular fundamentalists “virtually close their minds to religious insights, and therefore to the possibility of religious truth and meaning.”¹²⁵

Robert George’s work endorses the second form of the religious antiliberal case against secularism: he argues that secular liberalism is a modern form of paganism.¹²⁶ He advances this view both in explicit arguments about the religious nature of “secular liberalism” and in implicit assumptions that underpin his other arguments.¹²⁷ In a speech delivered at the Catholic Information Center Annual Dinner in 2019, George argues that “orthodox secularist liberalism” has “smuggled controversial substantive ideas” about destiny, human nature, and the greater good into the “neutrality” approach to religion, and that these substantive ideas are “just as controversial” as the tenets of major religions.¹²⁸ He cites “cherished, even identity-forming beliefs” liberals hold “about what is meaningful, valuable, important, good and bad, right and wrong” as evidence of their religiosity.¹²⁹ George identifies “what [liberals] regard as racial justice, LGBT rights, [and] environmental responsibility” as examples of tenets of faith “sacred” to liberalism; he refers to climate activist Greta Thunberg

124. *Id.* at 348–49.

125. *Id.* at 349.

126. See Robert P. George, Remarks at the Catholic Information Center Annual Dinner (Oct. 23, 2019), in MIRROR OF JUSTICE, <https://mirrorofjustice.blogs.com/mirrorofjustice/2019/10/remarks-at-the-2019-catholic-information-center-annual-dinner.html>

[<https://perma.cc/J62T-PY8K>]. George draws his definition of “paganism” from the work of Stephen D. Smith, whose book he quotes. *Id.* Pagans, he says, are those who “[locate] the sacred within this world.” *Id.*; see also Robert P. George, *Foreword* to STEVEN D. SMITH, PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC ix–xiv (2018) (discussing Smith’s arguments about secular progressivism’s similarities to paganism).

127. See George, Remarks, *supra* note 126; see also Robert P. George, *Perspective: Performing the Rituals of a Religion Does Not Make You a Member of That Faith*, DESERET NEWS (June 30, 2022), <https://www.deseret.com/2022/6/30/23186416/perspective-performing-the-rituals-of-a-religion-does-not-make-you-a-member-of-that-faith-catholic>

[<https://perma.cc/5T4P-JQ89>] (“At the end of the day, one’s actual religion is a matter of what one actually believes and how a person allows himself to be guided in the important dimensions of one’s private and public lives. If a person is guided by the tenets of a secular ideology—be it of the left or right, be it expressive individualism, fascism, communism or what have you—that ideology is one’s true faith. ‘Identifying’ as Catholic or Jewish or Muslim or Latter-day Saint is neither here nor there.”).

128. See George, Remarks, *supra* note 126.

129. *Id.*

as a “child-preacher.”¹³⁰ Elsewhere, George describes “secular progressivism” as a “competing ideology (or religion),” the embrace of which is incompatible with being “a faithful Catholic.”¹³¹

The idea that secular liberalism is a religion is not a new one.¹³² In light of twentieth-century Supreme Court decisions reinforcing the separation of church and state—ending prayer in public schools; quashing state laws forbidding the teaching of evolution—conservative Protestants recast secular liberalism as an enemy, rather than a protector, of religion. Christian author and public figure Beverly LaHaye described people who sought to remove religious education from the public schools as “priests of religious humanism . . . [who] are evangelizing our children for Satan.”¹³³ Francis Schaeffer, an evangelical theologian who rose to prominence in the 1970s, “[attacked] secularism as itself a religion,” arguing “that secularism was the product of humanistic philosophy, which inverted true religion by making man the center of all things.”¹³⁴

Schaeffer, Beverly LaHaye and her husband Tim, and other major evangelical figures of the 1970s and 1980s—celebrity Reverends Jerry Falwell and Adrian Rogers among them—recast state religious neutrality as hostility: “the common enemy of true religion . . . [was] the humanist religion disguised as ‘secularism.’”¹³⁵ The ranks of the “(anti)religious zealots” were not confined to those who belonged to humanist organizations; rather, the “secularist tenets of atheism, evolution, amorality, human autonomy, and one-world socialism” had, the argument went, taken over American and European culture.¹³⁶ Tim LaHaye’s list of examples of this secular-liberal cultural depravity included sex

130. *Id.*

131. *See* George, *Perspective*, *supra* note 127.

132. Advocates of the argument that liberalism is a modern form of paganism often turn first for support to T.S. Eliot’s 1948 lecture *The Idea of a Christian Society*, in which Eliot proposed that modern culture faced a choice between Christianity and paganism. *See* T. S. ELIOT, *THE IDEA OF A CHRISTIAN SOCIETY* 16 (1940). Steven Smith—in a book with a foreword written by George—takes up Eliot’s banner as a way of framing the contemporary culture wars. *See* SMITH, *supra* note 126, at 8, 11. Eliot’s views on pagan liberalism have been interpreted as being linked to his anti-Semitism. *See* Schragger & Schwartzman, *supra* note 10, at 1365.

133. *See* SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA* 141 (2010) (citing BEVERLY LAHAYE, *WHO BUT A WOMAN?* 100 (1984)).

134. GORDON, *supra* note 133, at 142.

135. *Id.* at 143.

136. *Id.*

education, abortion rights, gay rights, children's rights, gambling, disarmament, deficit spending, support for the United Nations, higher taxes, "unnecessary busing," and "the giveaway of the Panama Canal," among other things.¹³⁷ He contended that a "one-world government . . . under the control of elite humanists" would come to power if secular liberals were allowed to see their agenda through.¹³⁸

The contemporary authors discussed here are cultivating the same intellectual soil as the LaHayes, Schaeffer, and their cohort. Vermeule and George are influential in the conservative Christian community in the United States; Barr, needless to say, occupied a position of great power as a U.S. Attorney General and remains a prominent figure in the American legal community.¹³⁹ Their voices carry. Their arguments are framed in different ways, but their overall message is the same: Christianity has been subjugated not to the measured compromises of a neutral secular government, but to a competing religious faith set on eradicating conservative Christian values. This is the secular liberal religion to religious antiliberals: secularism itself.

The end goal of this effort to elide secularism into religion is not stated explicitly in the works of the authors cited here, but one can imagine the consequences of its success. Ronald Flowers has outlined some of the practical effects of the belief that liberalism is a religion. Wide acceptance of this idea could, for example, prompt some parents to bring claims arguing that secular, "humanist" beliefs (such as a belief in evolution, as was at issue in *Welsh*) have no more place in public education than do religious beliefs (for example, creationism). According to Flowers, some on what he calls the "Christian Right" claim that, although "the Supreme Court has ruled that traditional, theistic religion cannot be taught or practiced in the public schools . . . a religion is being taught in the schools: secular humanism."¹⁴⁰ Proponents of this view insist that "[t]hey can say that secular humanism is a religion because

137. *Id.* (citing TIM LAHAYE, *THE BATTLE FOR THE MIND* 130, 137–138, 142 (1980)).

138. See GORDON, *supra* note 133, at 143 (citing LAHAYE, *supra* note 137, at 137, 147; FRANCIS A. SCHAEFFER, *HOW SHALL WE THEN LIVE?* 225 (1976)).

139. For a profile on George, see David D. Kirkpatrick, *The Conservative-Christian Big Thinker*, N.Y. TIMES (Dec. 16, 2009), <https://www.nytimes.com/2009/12/20/magazine/20george-t.html> [<https://perma.cc/7WLW-5UFJ>]. For a profile on Vermeule, see Jason Blakely, *The Integralism of Adrian Vermeule: Not Catholic Enough*, COMMONWEAL MAGAZINE (Oct. 5, 2020), <https://www.commonwealmagazine.org/not-catholic-enough> [<https://perma.cc/9HH4-DG4G>].

140. See FLOWERS, *supra* note 65, at 117 (emphasis omitted).

the Supreme Court has said that it is.”¹⁴¹ They cite Black’s footnote in *Torcaso* for this proposition.¹⁴² The argument, more or less, is this: “if it is unconstitutional to teach traditional religious values, it is equally unconstitutional to teach the religion of secular humanism, which [religious antiliberals] believe is being taught all the time.”¹⁴³ These critics blame secular humanism for the apparent decline in quality, discipline, education, and even safety in the public schools (going so far, Flowers alleges, as to point to the massacre at Columbine High School “as only the most dramatic and terrible of many examples” of the impact of secular humanism on the public schools).¹⁴⁴

The practical effects Flowers discusses are not hypothetical concerns. People who hold these views have, among other things, pushed for private Christian education in the “Christian School” movement, and have tried to incorporate the Ten Commandments into public education.¹⁴⁵ As recently as the spring of 2023, Texas lawmakers came close to passing a bill—Texas Senate Bill 1515—that would have required Texas public schools to display the Ten Commandments “prominently in every classroom.”¹⁴⁶ South Carolina legislators introduced a similar (and similarly unsuccessful) bill in May of 2023.¹⁴⁷ These proposed laws have found traction despite the Supreme Court’s holding in *Stone v. Graham* in 1980 that a nearly identical Kentucky statute was unconstitutional.¹⁴⁸

A legally accepted definition of secular liberalism as a religion would offer lawmakers a new and powerful tool for passing and defending legislation like Texas Senate Bill 1515. The legal and political commentators discussed above have laid the groundwork for labeling a wide range of ideas and commitments as tenants of a secular liberal “faith.” The current Supreme Court’s evident

141. *Id.* at 117–18.

142. *See id.* at 118.

143. *Id.*

144. *Id.*

145. *See id.*

146. *See* J. David Goodman, *Bill to Force Texas Public Schools to Display Ten Commandments Fails*, N.Y. TIMES (May 24, 2023), <https://www.nytimes.com/2023/05/24/us/texas-ten-commandments-legislature.html> [<https://perma.cc/LS5L-UQW3>]. The bill passed in the Texas State Senate, but faltered in the State House, where time expired on the bill before a vote was held.

147. *Id.*

148. *See Stone v. Graham*, 449 U.S. 39, 42 (1980) (holding unconstitutional a Kentucky state statute requiring that the Ten Commandments be posted on the wall of every public classroom in the state).

openness to a more generous Free Exercise jurisprudence is already encouraging state lawmakers to test what strength remains in the Establishment Clause; Texas legislators pointed to *Kennedy* as an impetus for this type of legislation.¹⁴⁹ If liberal civil rights commitments can be classified as religious beliefs, many “secular” aspects of public education and civic life may become vulnerable to Establishment Clause attacks, and arguments against keeping theism out of those same public spaces would begin to ring hollow.

A. RELIGION AND FREEDOM OF CONSCIENCE

A related but fundamentally distinct body of criticism (largely from non-religious or non-conservative scholars) argues, in essence, that religion is not “special”—that it does not deserve special treatment under the law as compared to other central, meaning-making ideological commitments.¹⁵⁰ Often, this argument is made to advance the idea that nontheistic, nonreligious ideologies deserve Free Exercise protection.¹⁵¹ This is not unlike how the Court appears to have treated the registrant’s nonreligious moral commitments in *Welsh*, or the argument made by the petitioners in *Center for Inquiry*.¹⁵² A secular government, they say, should not distinguish between religious and non-religious ethical commitments. The Constitution should have called for freedom of conscience, not freedom of religion.¹⁵³

At perhaps the most inclusive end of this spectrum, Ronald Dworkin seems to embrace a definition of “religion” broad enough to potentially encompass evolution.¹⁵⁴ He writes in *Religion*

149. See Goodman, *supra* note 146.

150. For an example of this type of argument, see RONALD DWORKIN, RELIGION WITHOUT GOD 117 (2013) (ebook) (arguing that all “profound convictions” deserve legal protection equivalent to that given to religious belief).

151. See *id.* at 117 (“We have not discovered a justification for offering religion a right to special protection that is exclusive to theistic religions. So we must expand that right’s scope to reflect a better justification. How? The answer might seem obvious: we must just declare that people have a right in principle to the free exercise of their profound convictions about life and its responsibilities, whether derived from a belief in god [sic] or not, and that government must stand neutral in policy and expenditure toward all such convictions.”).

152. See *Welsh v. United States*, 398 U.S. 333, 343 (1970); *Ctr. for Inquiry, Inc. v. Marion Cir. Ct. Clerk*, 758 F.3d 869, 873 (7th Cir. 2014).

153. See, e.g., Micah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085, 1086 (2014).

154. See DWORKIN, *supra* note 150, at 127–28 (“[S]omeone’s judgment on the question whether divine authorship or random mutation provides a better explanation of human life is crucially influenced by his prior beliefs about whether a god exists. An atheist will from

Without God that the choice a school board makes when deciding to teach creationism or evolution constitutes a judgment as to whether God does or does not exist, such that the “school board, it might seem, cannot avoid selecting one religious opinion and rejecting another.”¹⁵⁵

Dworkin seems to go farther than most in his broad definition of religion. Jocelyn Maclure and Charles Taylor appear to reject the notion of absolute government neutrality towards moral values systems (and, by extension, religion), but they do not subsume secularism completely into the category of religion.¹⁵⁶ Focusing mainly on examples starker in their secularism than the United States, they describe different degrees of secularization possible within a society, and suggest that secularism can go too far in separating religion from public life.¹⁵⁷ They argue that there are no “principled reasons to isolate religion and place it in a class apart from the other conceptions of the world and of the good.”¹⁵⁸ Consequently, “the state must treat with equal respect all core beliefs and commitments” that are not inconsistent with “the requirements of fair social cooperation.”¹⁵⁹ At the same time, they affirm the possibility, under a “liberal-pluralist” secular model, of achieving a balance between “respect for moral equality and respect for freedom of conscience” in which religious and nonreligious ethical commitments are treated equally.¹⁶⁰

Some contributors to this debate have tried to defend a middle—and in some ways a rather traditionalist—ground, one

the start rule out divine creation: even if the chances that random mutation and selection would produce human life are antecedently small, intelligent design is not an alternative. But a theist may well find, given his prior belief that a god exists, that it is much more likely that that god, rather than chance, is responsible for the marvelously complex plants and animals that populate our planet. The two assumptions—that a god does or does not exist—seem on a par from the perspective of science. Either both count as scientific judgments or neither does. If relying on one judgment to mandate a curriculum is an unconstitutional establishment of a religious belief, then so is relying on the other.” (citing Thomas Nagel, *Public Education and Intelligent Design*, 36 PHIL. & PUB. AFF. 187, 187–205 (2008).

155. DWORKIN, *supra* note 150, at 128.

156. See JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* 13, 14 (Jane Marie Todd trans., 2011) (ebook).

157. See *id.* at 13–14. Their work concerns examples like bans on wearing religious symbols in public in France and in post-World War II Turkey, or the secularization of heavily Catholic Quebec. See *id.* They note that some forms of secularization involve “political system[s] replac[ing] established religion, as well as the core beliefs that define it, with a secular but antireligious moral philosophy, which in turn establishes an order of metaphysical and moral beliefs.” See *id.*

158. *Id.* at 105.

159. *Id.* at 105–106.

160. *Id.* at 34.

that preserves the special status of religion and distinguishes it from other strong ethical or moral commitments without asserting that those moral or ethical commitments are lesser. This perspective seems contrary to the bent of Supreme Court jurisprudence, and somewhat logically convoluted, though it does perhaps reflect what might be considered a baseline popular understanding of the nature of religion.¹⁶¹ Andrew Koppelman, in *Defending American Religious Neutrality*, acknowledges the kinship between secular liberalism and Christianity, noting that “modern Western secularism has its roots in Christian theology.”¹⁶² Both secular Western morality and Christianity are characterized by “a commitment to human rights,” which (according to Charles Taylor, whose view Koppelman seems to endorse), “had its roots in medieval movements of Church reform.”¹⁶³ Koppelman argues that secularism’s central “commitment to human rights . . . does not follow from atheism” and instead can be traced back to a sort of transmutation of medieval Christian values.¹⁶⁴ Koppelman, however, does not ultimately seem to consider very seriously the idea that atheism, for example, could be considered a religion at all—rather, he frames it as more of an opposite to religion, or a state of unbelief.¹⁶⁵

Some participants in this debate have implied a continued acceptance of the specialness of religion. Nelson Tebbe argues that it is indeed constitutionally appropriate for the government to single out religion for exclusion from support programs,¹⁶⁶ a position that implicitly accepts that there is a distinction between religious beliefs and comparable secular commitments that is relevant to the application of the First Amendment. Others have sought more functionalist compromises on the definition of

161. Or at least the baseline popular understanding that the Supreme Court imagined pervaded American culture when *Welsh* was decided, given Justice Black’s conclusion that the average person would not understand the word “religion” to possibly mean something other than a belief in God. See *Welsh v. United States*, 398 U.S. 333, 349 (1970).

162. KOPPELMAN, *supra* note 17, at 168 (citing CHARLES TAYLOR, *A SECULAR AGE* (2007)).

163. *Id.*

164. In religion, a transcendent commitment to certain notions of human goodness can come from God, but in secular liberalism a commitment to the good lacks grounding to some degree (at least in Koppelman’s analysis). See *id.* at 168–69. As Koppelman points out, religious belief in God is similarly ungrounded—it relies on faith, not proof. See *id.* at 169. However, as Koppelman puts it, at this point the analogy between liberalism and religion—or between theism and atheism—becomes increasingly abstract. See *id.* at 169–72.

165. See *id.* at 174–75.

166. See Nelson Tebbe, *Excluding Religion*, 156 UNIV. PA. L. REV. 1263, 1267 (2008).

religion. Laurence Tribe once argued “that religion should be defined broadly for [F]ree [E]xercise but narrowly for Establishment Clause purposes . . . allow[ing] broad religious exemptions” without “[jeopardizing] every government action that reflects some arguably religious precept.”¹⁶⁷ However, it is difficult to square this suggestion with the text of the First Amendment, where the word “religion” appears only once but governs both clauses alike; in fact, Tribe later changed his position on the issue.¹⁶⁸

Koppelman ultimately seems to think we should define religion according to “its conventional meaning, as denoting a set of activities united only by a family resemblance, with no set of necessary or sufficient conditions demarcating the boundary of the set.”¹⁶⁹ He appears to argue that in order to save secularism from religious antiliberal critique it is necessary to draw as bright a line as possible between religious belief and nonreligious ethical commitment for both Establishment Clause and Free Exercise purposes. But it is not clear that such a bright line is needed or desirable. Responding to Koppelman, Micah Schwartzman has written that “the inequality between religious and nonreligious views implied by the constitutional text is morally indefensible.”¹⁷⁰

This Note does not have the scope for the kind of metaphysical gymnastics needed to determine, finally, whether every possible definition of “secular liberalism” should or should not be called a religion. If the Court were to adopt a religious classification of “secular liberalism” as religious critics define the term, however, there would be damaging consequences for the way we theorize the structural effects of the Religion Clauses.

167. See FELDMAN & SULLIVAN, *supra* note 62, at 637 (citing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6 (1st ed. 1978)).

168. See *id.* at 638. Tribe “abandoned this proposal in the second edition of American Constitutional law.” KENT GREENAWALT, WHEN FREE EXERCISE AND NONESTABLISHMENT CONFLICT 275 n.28 (2017) (citing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6 at 1186 n.53 (2d ed. 1988)).

169. KOPPELMAN, *supra* note 17, at 128.

170. Schwartzman, *supra* note 153, at 1086.

III. TREATING SECULAR LIBERALISM AS A RELIGION WOULD BE THEORETICALLY AND CONSTITUTIONALLY UNSOUND

The current state of jurisprudence surrounding the definition of “religion” does not, ultimately, seem to offer sufficient guidance for evaluating the claim that liberalism is a religion. In order to decide whether liberalism is a religion, the Court would also have to define liberalism. Defining “liberalism” is easier than defining “religion,” but liberalism too is an amorphous concept. The scholarly views on secularism and religion outlined in Part II feel, at times, like a word game: authors adopt different definitions of words like “liberalism” and “religion” and speak past each other as a result. It can seem fruitless to attempt to reconcile the many meanings authors appear to attribute to these key words, and much of the scholastic debate here begins to feel ultimately aesthetic. Aesthetics do not typically play a large role in how legal scholars talk about the law, but they are not an analytical dead end—particularly where religion is concerned. Efforts to define as religion anything not typically understood as religion inevitably rely on reasoning by analogy. Reasoning by analogy is a fundamentally aesthetic mode of argumentation; it relies on comparisons of the descriptive qualities of the two ideas (or items) being compared. In the end, when deciding whether something is a religion, we just end up comparing fruit: are we looking at apples and apples, or apples and oranges? Is secular liberalism more like a player, or an umpire? Does its zeal make it similar enough to Christianity for a taxonomy of religion to overlook the absence in secular liberalism of some sort of transcendent metaphysical commitment?

Similar questions arise concerning the relationship between the scholarly debate about secularism-as-religion and Supreme Court case law. Is “liberalism” distinct from the kind of “secular humanism” or nontheistic sincere principles that the Supreme Court and other courts have held can constitute religion in some contexts for the purposes of the First Amendment? Must there be consistency across the Religion Clauses about how government treats “religion?”¹⁷¹ Would it be fair to have a jurisprudence of religion that treats secular humanism or strong moral stances as

171. Laurence Tribe’s recanted argument on this subject would suggest that he, at least, thinks the answer to this question is yes. See TRIBE, *supra* note 168.

religions for the purposes of reaping legal benefits (like avoiding the draft) but not in a context where having secularism considered a religion could have negative consequences for non-Christians (like the choice to teach evolution or creationism in public schools)?¹⁷² There must, too, be a meaningful difference between someone identifying their own beliefs as broadly “religious” or “moral” for a specific legal purpose, even though their beliefs do not necessarily fall into a typically recognized group or sect, and a court externally applying the label of “religion” to a worldview held by millions of people, many of whom also practice a distinct religion.

Welsh does seem to show the Court explicitly authorizing just such an external application of religious labels to beliefs not deemed religious by those who hold them.¹⁷³ However, the *Welsh* Court’s reasoning rests on an assumption, essentially, of poor legislative drafting: the Court does not think it would be fair to expect ordinary registrants to understand what Congress really meant when it used the word “religion” in § 6(j) of the Universal Military Training and Service Act.¹⁷⁴ This analysis could be read as patronizing—the registrant is presumed to be a poorer identifier of his own religious beliefs than is the Court—but its naked functionalism helps to distinguish it from the claims made by contemporary critics asserting that secular liberalism is a religion. The *Welsh* court hangs its decision on the notion that Congress used the word “religion” in an unusual way, outside the scope of what ordinary people would understand it to mean.¹⁷⁵ They are saying, effectively, that the statute was not intended to limit exemptions to “religions” at all.¹⁷⁶

The argument that secular values systems deserve constitutional respect equivalent to that reserved for religious values is closely connected to the argument that secular liberalism is a religion. These two arguments share overlapping concerns

172. Cf. *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994) (rejecting claims that evolution is a religion); see also DWORKIN, *supra* note 150, at 127 (discussing legal treatment of creationism in public schools).

173. For a discussion of *Welsh*, see *supra* Part III at p. 5.

174. See *Welsh v. United States*, 398 U.S. 333, 349 (1970); Universal Military Training and Service Act of 1948, 50 U.S.C. § 3806(j).

175. See *Welsh*, 398 U.S. at 349.

176. One could argue that the treatment of “religion” in *Welsh* and cases that followed it could be appropriately cabined to cases specifically dealing with the UMTSA. *Welsh* still would not resolve the ambiguity of the Supreme Court’s jurisprudence on defining religion, so such an argument—while compelling—would not be dispositive in our analysis here.

about the fine line between religious belief and nonreligious ideological commitments and values, the legitimacy of religious views in public debate, and the specialness of religion under the Free Exercise Clause. They are, however, distinguished from one another in key ways. The goals of their proponents, and the definitions of secularism they employ, are different. Those who argue that nontheistic values systems should be given Free Exercise protection are not (with the exception, perhaps, of Dworkin) arguing that these secular values systems *are* religions. They are saying that non-religious values and commitments are just as important as religious ones, and should be treated as such for constitutional purposes. They disagree, essentially, with the phrasing of the First Amendment, not with its apparent spirit. By contrast, George, Vermeule, and other religious antiliberals do not quibble with the word choices in the First Amendment; they are squeezing secularism and secular liberalism into the existing category of religion. Their argument takes on an Establishment Clause valence, because they are not limiting their discussion to “secular” values in the senses of nontheistic ethical commitments—they attack the project of secularism itself. Religious antiliberals are arguing that secular liberalism *is* a religion.

These are fundamentally different claims about the nature of secular belief. The distinction between these two positions is perhaps most obvious in the case of the claim that secular liberalism is a form of paganism. Paganism is a label, created by religious adherents, that defines a non-theistic (or, as used by George, non-Christian) values system in relation to a theistic baseline.¹⁷⁷ Typically, paganism is understood to entail the location of moral value and normative good in the material world.¹⁷⁸ The secular values systems Maclure, Taylor, Schwartzman, and others describe as similar in importance to religion are not holding themselves out as religions—they are indeed often avowedly non-religious. Arguments for the Free Exercise protection of these secular values systems are an

177. See Schragger & Schwartzman, *supra* note 10, at 1364 (citing SMITH, *supra* note 126, at 210–12, 246–48) (defining pagans as those who “reject transcendent religion in favor of non-natural but immanent conceptions of the good. Culturally, pagans are the vast majority of secularized Westerners, who are assimilated to the dominant culture: liberalism.”).

178. See *id.* at 1364.

expansion of secularism’s neutral principle, not a repudiation of its possibility. Seeking equal respect for some secular values systems under the Free Exercise Clause is not the same as seeking to define secular liberalism as religious.

The “secular liberalism” identified by conservatives as a new kind of religion is not truly parallel to the secular moral commitments cited by Maclure, Schwartzman, and others working in the same vein. Rather the purported religious tenets of “secular liberalism” consist of views and policy decisions that reflect, generally speaking, a concern with civil rights and with equalizing treatment of all citizens across race, gender, sexuality, and economic status, among other things. Religious antiliberal critics take what amounts to a laundry-list of left-leaning political views and imbue it with the status of religion.

The zeal with which these liberal views are held, rather than any corresponding transcendent commitment, seems to be the main thing these religious antiliberals latch on to as meriting the distinction of religious belief. Vermeule and Barr in particular seem fixated on aesthetic similarities between secular liberalism (as they see it) and religion. This argument does not seem to inquire deeply into the philosophical or “theological” similarities between secular ethical commitments and religion. Conkle comes closer to a more substantive critique of secular liberalism as religion, framing it as a belief system in which reason is the only appropriate source of truth in the public sphere. But Maclure and Taylor, at least, have an answer to this argument: there are different varieties of secularism.¹⁷⁹ Moreover, democracy entails commitments regarding the justification of government action that are not compatible with purely religious rationales for legal and political decisions.¹⁸⁰

179. See MACLURE & TAYLOR, *supra* note 156, at 15–16 (“Political secularization is the process by which the state affirms its independence from religion, whereas one of the components of social secularization is an erosion of the influence of religion in social practices and in the conduct of individual lives. Whereas political secularization finds its expression in positive law and public policies, social secularization is a sociological phenomenon embodied in people’s conceptions of the world and modes of life.”).

180. See *id.* at 20–21 (“[A] democratic political system recognizes the equal moral value or dignity of all citizens and therefore seeks to grant them all the same respect. Realizing that aim requires the separation of church and state and the state’s neutrality toward religious and secular movements of thought. On one hand, since the state must be the state for all citizens, and since citizens adopt a plurality of conceptions of the good, the state must not identify itself with one particular religion or worldview. It is for that reason that the state must be ‘separate’ from religion. It must be sovereign within the fields of its jurisdiction. . . . To grant equal respect to all citizens, the state must be able to justify to

So, history, usage, and common sense would seem to suggest that secular liberalism as religious antiliberal commentators understand it should not be considered a religion for Establishment Clause purposes. It is not entirely clear, though, what real consequences this claim could have for typical Religion Clause jurisprudence—educational claims, parental rights claims, employment discrimination claims, and the like. It is difficult to conjure a hypothetical case in which a court would be forced to rule on whether or not secular liberalism constitutes a religion. If brought by someone hostile to liberalism, such a challenge would likely be argued on Establishment Clause grounds; it seems unlikely that an opponent of liberalism would wish to afford it Free Exercise protection, unless the purpose were to bring a test case on the issue. It also seems unlikely that anyone with real gripes about liberal “religion” in, say, a public school would take the Establishment Clause route—they would more likely seek to exempt their own child from the objectionable instruction through a Free Exercise claim (as in, for example, *Grove v. Mead School District*).¹⁸¹ The Supreme Court might not even agree to hear and rule on a direct challenge forcing it to confront this question—the Court could simply punt the issue by citing a political question, or choose not to grant certiorari.

It is also possible to imagine that secular liberals could use a classification of secular liberalism as a “religion” to their advantage. If the Establishment Clause has been all but gutted by the Supreme Court’s recent decisions, a “religion” of secular liberalism could be granted broad protections under the Free Exercise Clause. Given the strength of the Free Exercise Clause under the Court’s most recent decisions, plaintiffs could bring claims challenging certain state actions on the grounds that they violate a secular religious liberty right.¹⁸² This is the sort of strategy that Dworkin, Maclure, Taylor, or Schwartzman’s argument might lead to.¹⁸³ Such a strategy might, indeed, help

everyone the decisions it makes, which it will be unable to do if it favors one particular conception of the world and of the good. The reasons justifying its actions must be ‘secular’ or ‘public,’ that is, they must be derived from what could be called a ‘minimal political morality’ potentially acceptable to all citizens.”)

181. See *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1534 (9th Cir. 1985).

182. See generally Schwartzman, *supra* note 153, at 1095 (describing possible legal challenges that could be brought as claims of conscience if ethical values were protected in the same way as religious beliefs).

183. See *supra* Part II, at pp. 33–37.

counteract negative policy outcomes or results in specific cases that could flow from a legal definition of secular liberalism as religion. It would not, however, address the deeper and more structural problems that such a classification of secular liberalism would create for our interpretive theories of law and governance.

Even if we could contort the legal definition of religion in a way that encompasses this conception of secular liberalism, the more important question is whether we *should*. Normatively speaking, this Note argues that we should not, because doing so would be conceptually incoherent, constitutionally problematic, and deeply unsettling in its implications for the way the rule of law is justified in a democracy.

A. WITHOUT A NEUTRAL SECULAR PRINCIPLE OF GOVERNANCE, A PLURALISTIC DEMOCRACY CANNOT JUSTIFY ITS COERCIVE USE OF FORCE

Governments wield the power to physically coerce citizens into obeying their laws.¹⁸⁴ So how does a democracy—ostensibly governed by the citizens against whom such force would be used—justify the coercive use of force by its government? Legal theorists have grappled with this question in different forms for centuries, and one common thread seems to unite major analyses of the issue: the need for a neutral principle to establish the government’s legitimacy. Perhaps that legitimacy derives from democracy’s Hobbesian social contract¹⁸⁵—we elect our officials, and in doing so we authorize their use of violence against us should we refuse to follow the rules they put in place. In a similar vein, legal positivists would say that law’s legitimacy derives not from morality but from the approval of a sovereign willing to enforce its will: the power to coerce comes first, and the moral substance of the law comes later.¹⁸⁶ John Austin’s “command theory” roots the

184. See generally Cover, *supra* note 31 (discussing the violence that permeates the American judicial system).

185. See generally THOMAS HOBBS, *LEVIATHAN* (1651) (describing, among other things, Hobbes’s theory of a social contract between citizens and government).

186. For a succinct summary of John Austin’s theory of legal positivism, see Jules L. Coleman & Brian Leiter, *Legal Positivism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY CONTEMPORARY SCHOOLS AND PERSPECTIVES* 228 (Dennis Patterson ed. 2010) (ebook) (“It is natural to begin any discussion of positivist theories of legality and authority with John Austin’s so-called, ‘will’ or ‘command theory of law.’ According to Austin (1955), law is the order of a ‘sovereign’ backed by a threat of sanction in the event of noncompliance. A norm is law, then, only if it is the command of a sovereign. Legality, on

legitimacy of the law in the sovereign's threat of violence; H. L. A. Hart's modified account of command theory relies on "rules of recognition," divorced from popular morality, for law's legitimacy.¹⁸⁷ Under a theory of natural law (hardly distinguishable from religious law in some cases), the popular derivation of the substance of the rule seems to implicitly justify its enforcement; the majority's moral preferences should prevail, and those preferences give credence to the passage of laws and the use of force against offenders.¹⁸⁸ Utilitarianism adheres to a similar principle with respect to whatever law creates the greatest good for the greatest number of people.¹⁸⁹ Some traditionalists would argue that law's legitimacy derives in no small part from its roots in precedent: the fact that we have done it this way for generations is a good reason to keep doing it this way.¹⁹⁰ Theories of adjudication as virtuous legal interpretation—captured neatly in Dworkin's own theory of "law as integrity"—similarly imply a moral justification for state enforcement of law rooted in the supposed righteousness of the law's interpreters.¹⁹¹

this account, is determined by its source—that is, the will or command of a sovereign—not its substantive merits. The criteria of legality are matters of fact, not value.”)

187. *Id.*; see also H. L. A. HART, *THE CONCEPT OF LAW* 57–58, 105 (1961). A “rule of recognition” confers, essentially, a right of obedience onto a king or other sovereign figure, such that that sovereign’s “word will now be a standard of behavior so that deviations from the behavior he designates will be open to criticism.” *Id.* at 58. The rule of recognition is an “ultimate rule” insofar as it “[provides] the criteria by which the validity of other rules in the system is assessed.” *Id.* at 105.

188. Sir Patrick Devlin famously advocated for a religiously-inflected natural law in his defense of morality legislation in the United Kingdom. See PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 12 (1965). He argued that “it is not possible to set theoretical limits to the power of the State to legislate against immorality. It is not possible to settle in advance exceptions to the general rule or to define inflexibly areas of morality into which the law is in no circumstance to be allowed to enter. Society is entitled by means of its laws to protect itself from dangers, whether within or without.” *Id.* at 12–13. English law, he contends, is the law “of the reasonable man . . . [who] is not to be confused with the rational man.” *Id.* at 15. Morality law is the world according to “the man in the Clapham omnibus . . . [whose] judgment may be largely a matter of feeling,” and “the moral judgment of society must be something about which any twelve men or women drawn at random might expect after discussion to be unanimous.” *Id.* The law should be free to prohibit that which this average person meets with “intolerance, indignation, and disgust.” *Id.* at 17.

189. See, e.g., George P. Fletcher, *Punishment and Responsibility*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY CONTEMPORARY SCHOOLS AND PERSPECTIVES* 506 (Dennis Patterson ed. 2010) (ebook).

190. See, e.g., Anthony Kronman, *Precedent and Tradition*, 99 *YALE L. J.* 1029, 1038–39, 1043–45 (1990).

191. Dworkin’s theory of “law as integrity” purports to describe “what lawyers, law teachers, and judges actually do and much of what they say”; the goal of law as integrity is to “[secure] a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does.” See RONALD

All of these theories are—to borrow Robert Cover’s framing of the issue—ways of justifying the state’s authority to inflict violence on those who do not obey its laws.¹⁹² Law, in Cover’s analysis, negotiates the boundary between our real, physical world (the world as it is) and a normative world composed of meaning and morals (the world as it should be).¹⁹³ Legal texts codify the prescriptions of our normative worlds as they apply to the physical world; the “interpretive commitments” of law’s interpreters can determine whether their understanding of the law is perceived as just.¹⁹⁴ The state’s apparatus of legal interpretation and enforcement acts as a check on the influence of competing normative worlds.¹⁹⁵ Judges choose one meaning of the text of the law over another, and the state authorizes the use of coercion—and, sometimes, violence—against the group or individual whose normative interpretation has been quashed.¹⁹⁶

The point is this: in a democracy, the use of force against the citizenry demands justification. This concern with legitimacy is part of what distinguishes democratic government from a totalitarian state. If there is no agreement that it is possible for a religiously neutral sovereign to exist, it is not clear how agreement could ever be reached on a theory of justification for coercive state action against the individual. Religion poses a particularly acute danger to our ability to conceptualize such a neutral principle. God is, for believers, the ultimate authority in the realm that matters

DWORKIN, *LAW’S EMPIRE* 94–96 (1986). Dworkin imagines a Judge “Hercules” who makes balanced legal decisions using law as integrity as his guide; judicial precedent creates a sort of “chain novel” to which Hercules contributes by crafting a new chapter of case law that adheres as much to the past chapter’s story and style as it can (precedent) while still moving the plot along. *See id.* at 225–32, 239–40.

192. *See Cover, supra* note 31, at 203, 214 n.22 (“The violence of judges and officials of a posited constitutional order is generally understood to be implicit in the practice of law and government. Violence is so intrinsic to this activity, so taken for granted, that it need not be mentioned. For instance, read the Constitution. Nowhere does it state, as a general principle, the obvious—that the government thereby ordained and established has the power to practice violence over its people. That, as a general proposition, need not be stated, for it is understood in the very idea of government.”).

193. *See id.* at 95–96.

194. *See id.* at 99.

195. *See id.* at 214.

196. *See id.* at 203; *see also id.* at 139 (“[I]n myth and in history the origin of and justification for a court is rarely understood to be the need for law. Rather, it is understood to be the need to suppress law, to choose between two or more laws, to impose upon laws a hierarchy. . . .”). “Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence that has already occurred or which is about to occur.” *Id.* at 203.

most. Religion, too, is often a form of law backed by the threat of violence (punishment, purgatory, an eternity in hell, etc.). If a secular ideology—whether liberalism, conservatism, libertarianism, communism, or something else—can be termed a religion, then no religiously neutral authority is possible. The coercive power of the state becomes indelibly linked, at some level, to religious belief.

This is the true threat posed by the religious antiliberal claim that secular liberalism is a religion. This quest to define religion and secular liberalism, to differentiate the sacred from the profane, is ultimately a fight over the normative core of American democracy.

Maclure, Taylor, and Schwartzman are conscious of the importance this question has for democracy insofar as it pertains to the type of reasoning permitted in the public sphere and in legislative debates.¹⁹⁷ They refer to the need for popularly palatable rationale when discussing why and how the government makes decisions.¹⁹⁸ Legitimacy in public discourse is an important part of the problem, but these questions also present a more fundamental existential crisis. If there is no neutral secular principle that can underwrite liberalism's claim to religious neutrality, it no longer matters whether or how we deploy religious or moral arguments in the public sphere. In a religiously pluralistic society, it is inevitable that if the government has adopted a religion—however defined, so long as it is considered to be on the same playing field as other religions—then members of the non-dominant religion are always, at some level, implicitly required to opt into a religious framework that is not their own. If the government itself cannot be procedurally neutral, then questions of substantive neutrality become moot. This is the world created by the religious antiliberal definition of secular liberalism as religion. The goal for some religious antiliberals (for example,

197. See MACLURE & TAYLOR, *supra* note 156, at 20–21; *cf.* Micah Schwartzman, *Religion, Equality, and Public Reason*, 94 BOSTON UNIV. L. REV. 1321, 1327 (2014) (“A state that cannot rely on religious or secular convictions to justify its actions would be completely incapacitated, unable to legitimate any of its political or legal decisions, which is an absurd outcome for all but the most committed political or philosophical anarchists. How to avoid this result, while treating religious and secular commitments equally, remains perhaps the most difficult and underexplored problem in existing theories of religious freedom.”).

198. See MACLURE & TAYLOR, *supra* note 156, at 20–21; *see also* Schwartzman, *Religion, Equality, and Public Reason*, *supra* note 197, at 1327.

Vermeule) is a Catholic religious state.¹⁹⁹ They want to tear down Jefferson’s “wall of separation” for good, and redefining secular liberalism (as they have framed it) as a religion makes secularism itself an oxymoron.

Perhaps the Religion Clauses can be understood as designed to operate along these very lines. Imagine that the Religion Clauses were intended to establish a neutral wielder of state coercive power such that no one religion would ever be the legitimate source of authority tasked—or privileged—with dispensing state-sanctioned violence. Violent coercive action against religious dissidents was precisely what drove many people to leave England and continental Europe and come to North America in the seventeenth and eighteenth centuries.²⁰⁰ The English (and most Europeans at that time) still lived under governments where the sovereign’s coercive power was backed not just by a monarchical structure but by the will of God.²⁰¹ Henry VIII’s break with the Catholic Church

199. See Adrian Vermeule, *Liturgy of Liberalism*, FIRST THINGS (Jan. 2017), <https://www.firstthings.com/article/2017/01/liturgy-of-liberalism> [https://perma.cc/YW7P-NUMD]; Adrian Vermeule, *Integration from Within*, AM. AFF. (Feb. 20, 2018), <https://americanaffairsjournal.org/2018/02/integration-from-within/> [https://perma.cc/H6DP-79D3]; see also Micah Schwartzman & Jocelyn Wilson, *The Unreasonableness of Catholic Integralism*, 56 SAN DIEGO L. REV. 1039, 1041 (2019) (“Integralists argue that liberalism is a relentless and destructive ideology. They claim that the only way to remedy its many failures is to recognize the authority of the Church and to transform the administrative state into one that promotes the common good as understood within Catholic doctrine. They favor a confessional state, in which civic ends are subordinated to supernatural ones, as guided by an established Catholic Church—or, going even further, a social system in which church and state are so well integrated that it no longer makes sense to distinguish between them.”).

200. See, e.g., GREENAWALT, *supra* note 3 (“Only members of the Church of England were citizens, and Catholics and Protestant dissenters alike were persecuted. During the rule of Puritans, after Charles I was deposed, toleration was granted for all Protestants but not for Catholics and Jews. Restoration of royal rule brought back repression of dissenting Protestants. After James II was displaced in favor of William and Mary, however, the Toleration Act of 1689 guaranteed freedom of association to all Protestants. Not until the early nineteenth century were laws against the practice of Catholicism and Judaism actually repealed.”). War, too, drove migration; the brutal Thirty Years’ War in continental Europe ended in the Peace of Westphalia in 1648, which resolved the religious upheaval that caused the war by extending religious toleration, but only to Calvinists. See PETER H. WILSON, *EUROPE’S TRAGEDY: A HISTORY OF THE THIRTY YEARS WAR* 519 (2009) (ebook) (“Toleration was extended only to include Calvinists. Other dissenters, along with Orthodox Christians, Jews and Muslims, were denied similar constitutional rights.”).

201. The Holy Roman Empire—which encompassed all of modern-day Germany, Austria, Luxembourg, and the Czech Republic, as well as parts of modern-day France, Poland, Belgium, Italy, and the Netherlands—was such a place. The Holy Roman Empire “symbolized the late medieval universal ideal of a single Christendom.” See WILSON, *supra* note 200, at 28 (“[The Holy Roman Empire’s] ruler was the only Christian monarch with an imperial title, elevating him above all other crowned heads. His pretensions to be the secular head of Europe rested on the idea of the Empire as the direct continuation of that

merely replaced the old sovereign religious authority with one a little closer to home.²⁰²

Thinking about the problem in terms of violence helps ground the debate. Cover uses religious martyrs as ultimate examples of people willing to die for their normative worlds. The state's assertion of sovereignty has a history of playing out in the violent erasure of religious dissent. Thinking about the Religion Clauses in this way—as a safeguard, specifically, against the *religious* legitimation of state coercive violence—makes it difficult to imagine a functional constitutional jurisprudence in which secularism could ever be considered a religion. The invocation of religion as a justification for coercive state action is fraught with damaging and untenable implications for American democracy. Religion is a competing normative world, with its own interpretive commitments and its own theory of law.²⁰³ If secular liberalism can be characterized as a religion, religion can just as easily be characterized as a competing form of government, one with which we have not all signed a social contract, and which the Constitution explicitly attempts to prevent us from adopting. Following this argument to its logical conclusion invites both theocracy in the United States and state persecution of religions deemed to be in competition with the state. The First Amendment attempts to nullify the need for the state to eradicate religions by creating safe channels for their coexistence with government and with each other. It does this by subjecting them to the power and protection of a neutral—secular—state.

The liberal tenets that critics point to as articles of the secular liberal “faith” are not in and of themselves principles that legitimate governance. They are substantive ideas about how society should be and what the law should do to make such a society a reality. They serve, in Cover's reckoning, merely to maintain our pluralistic system; they do not, as religious narratives do, create meaning.²⁰⁴ Liberal ideas do not generate

of ancient Rome and so the last of the four great world monarchies prophesied in the Book of Daniel.”). See also GREENAWALT, *supra* note 3, at 18 (“With the Protestant Reformation and the rise of the nation-state, the tie between ruling governments and religious orthodoxy tightened, whether the territories remained Catholic or became Protestant. The Peace of Augsburg in 1555 settled that princes or city councils (in roughly 350 distinct polities) could choose the religion for their territory.”); see also SMITH, *supra* note 126, at 219–20.

202. See discussion of the English Reformation, *supra* at pp. 3–4.

203. See Cover, *supra* note 31, at 207–08.

204. See *id.* at 105.

new normative worlds; they merely establish the conditions for the religious (and, therefore, normative) pluralism envisioned by the Constitution.²⁰⁵ We pay a price for this pluralism in the form of “coercive constraints imposed on the autonomous realization of normative meanings”; the law must be neutral as to the normative substance of religion, and must sometimes limit the reach of some normative worlds in order to ensure the autonomy of all.²⁰⁶ Religion, on the other hand, does have its own legitimating principle of governance: God, or the divine, or however a given religion labels its concept of sanctity.

Henry VIII’s motives in breaking with the Catholic Church were surely selfish,²⁰⁷ but the example serves to illustrate the point that in a state subsumed to a religion there is always the risk that there will come a point where the worldly government and the spiritual authority diverge. In a state legitimated by religion, the state’s law is subsumed to a religious law, meted out by a sovereign wholly unconnected from the laws and people it governs. In a monarchy, this problem is not insurmountable. Henry VIII resolved it by creating a new church, one that would allow divorce, and one of which the English monarch would be the head. In a true democracy this problem is more than a problem—it is an existential crisis. Religious leaders are not accountable to the democratic process. The faithful cannot vote on whether to re-elect God.

CONCLUSION

Liberalism is not the adversary of religion, and it should not be contorted to appear that way. It should be understood to be—to again borrow framing from Chief Justice Roberts—the umpire.²⁰⁸ By trying to classify liberalism as a religion—and especially by trying to classify it as paganism, freighted as that term is with millennia of history and vitriol—religious antiliberals refuse to allow liberalism to occupy that mediating role. There is, it must be said, something attractively simple about the idea that liberalism could be a kind of religion. There are undeniable

205. *See id.* at 105, 106 n.36.

206. *Id.* at 106 n.36.

207. And his life and choices (e.g., beheading his wives, etc.) were certainly problematic.

208. *See* United States Courts, *Chief Justice Roberts Statement - Nomination Process*, <https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process> [<https://perma.cc/F8FD-J78D>].

similarities (as discussed in the preceding Parts) between secular liberalism and religion. This is, in historical context, unsurprising: religion is also a form of law, and it played a central role in governance in the European societies from whence the Founders' ideas about liberal democratic governance emerged. Those similarities, though, may break down to aesthetics in the end, vestigial structures of a common history. Sometimes aesthetic similarity is salient; in a democracy, the aesthetics of legitimacy are a vital part of politics. But if religion's core claim is that it touches something deeper—if, as George asserts, early Christianity distinguished itself from Roman paganism by reaching beyond the material world to locate meaning somewhere else, somewhere *transcendent*—then surely aesthetic similarity cannot be enough to transmute a political viewpoint into a religion.²⁰⁹ Religion must mean—and must understand itself to mean—much more than that.

Cover might have called this struggle over the religiosity of secular liberalism a battle over the “constitutive epics” with which we narrativize and make meaning from our system of government.²¹⁰ The narratives we use to frame law inform our understanding of its meaning, and the legitimacy of the force by which it is backed. In Cover's example, we can begin the story of the First Amendment “with ancient Egypt, with 1776, or with 1789.”²¹¹ We can frame the language of the Constitution as “part of a sacred history” between God and man, or as “a specific answer to a specific question raised about the national compromises struck” in the early years of the republic.²¹² The narrative we choose determines, too, how we understand the justification for the enforcement of its terms by the state. If our constitutive epic is a religious one, then the legitimacy of law and the state's authority to enforce it stem from God. And if we choose a constitutive epic in which there is no neutral religious principle—where secularism itself is a religion—then the state is not capable of acting as the arbiter Cover imagines it to be, or as the Constitution seems to intend.

What Cover describes here is not so different from the iconoclasm of the English Reformation. What iconoclasts seek to

209. See George, Remarks, *supra* note 126.

210. See Cover, *supra* note 31, at 96 n.4.

211. *Id.* at 111 n.47.

212. *Id.*

destroy is not the image or item itself, but its false representation of the divine.²¹³ Sixteenth-century English reformers used iconoclasm to erase one normative world and replace it with another.²¹⁴ The Catholic framework of meaning was burned, desecrated, demolished; the new, Protestant normative world asserted itself in the violent destruction of the old. Perhaps the most powerful, though, of the iconoclastic transformations is the one that does not destroy the object of iconoclasm, but repurposes it. The pyx that becomes a salt cellar, the church linen that becomes a tablecloth, the sepulcher that becomes a chicken coop: these items were transfigured from sacred objects into mundane, “secular” items, merely by being put to new use. These items receive a new meaning, a new constitutive epic, a new place in a new normative world.

The passions and convictions some critics label as evidence of secular liberal religiosity are not unlike the pyx on the kitchen table. An idea can emerge from religious tradition, morph into a philosophical concept, and become a secular principle, desanctified and repurposed for the needs of a religiously neutral society. We choose which narrative we will use to construct meaning around our laws. We can root the Constitution in revolution, in the Enlightenment, in the Protestant Reformation, or in the particular conversations and capitulations of the Constitutional

213. See ASTON, *supra* note 4, at 9. Following the Second Commandment’s prohibition of the creation or worship of graven images, it was deemed “transgressive to attempt any imaging of the Godhead.” *Id.* at 9.

214. This was self-consciously done. Margaret Aston breaks down the normative role of this ritual desanctification: “Throughout the record, it cannot escape notice that what was important to the authorities was to see the countless ‘monuments of superstition’ obliterated either by total destruction or by defacement and erasure so complete that they would become unrecognisable. All the implements of papal rites and superstitious practices were to undergo what amounted to a ritual reversal. They were to be cut off from all associations of holiness and traditional ceremonies, desacralised, by being desecrated in the eyes of old believers. If they survived they were to be handed over to the secular world, in precisely the way that was sacrilege in Catholic teaching. Secularisation and desecration went hand in hand. The very shock of so deliberate a reversal of earlier proprieties was to be a means of bonding parishioners to the new order. To be ‘putt to profane use’ was the insurance against future change. What monastic lands were to new gentry owners, converted copes and rood beams were to parishioners; their shareholding in a massive redistribution which (reformers hoped) torpedoed any possibility of another restoration. Ownership of converted items of once sacred service was to weld the wearers and users of old church goods into a new church. Walls and paths and bodies bearing or wearing objects wrenched from the church were to herald new inner certainties. The humiliation of the secularising process served the central spiritual end. And so the conjoining of religious reform with perennial human motives of greed and acquisition was an inherent part of the programme engineered and sponsored by the iconoclasts.” *Id.* at 177–78.

Convention.²¹⁵ We could even choose to root it in the spirit of iconoclasm itself: the desanctification and practical repurposing of ideas, stripped of their religious content.

Perhaps critics of liberalism will prevail, and the definition of secular liberalism as a religion will gain substantial legal traction. Perhaps the cattle gate can transform back into an altar stone. It may, however, turn out to be more useful where it is.

215. See Cover, *supra* note 31, at 111 n.47.