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# HIGHER LAW SECULARISM: RELIGIOUS SYMBOLS, CONTESTED SECULARISMS, AND THE LIMITS OF THE ESTABLISHMENT CLAUSE

ZACHARY R. CALO\*

## INTRODUCTION

This paper considers whether religious symbols on public property might serve a permissible role within the secular polity, and whether there is a way to understand such symbols as compatible with secular commitments. While some attention will be given to constitutional issues, it is proposed that the jurisprudential incoherence in this area is less the result of legal interpretation and technique than with the way in which law has framed the concept of the secular. We are not facing a crisis in the Establishment Clause so much as a crisis in the secular.<sup>1</sup> The aim of the paper is thus to explore how achieving greater coherence in Establishment Clause jurisprudence, and thereby making law an agent of constructive political engagement rather than a funder of religious culture wars, will require a rethinking of the secular.

The central claim of this paper is that a binary approach to the secular has created a sharp and irresolute cleavage within legal discourse about religious symbols. There are two dominant traditions of understanding the secular, both with long genealogical resonance in western thought: Christian secularity and secularism. Constitutional debate has commonly framed, both implicitly and explicitly, the issue of religious symbols as demanding resolution in favor of one of these traditions. Rather than offering a way to overcome the divide and the culture war it encourages, the Court's jurisprudence has concretized the binary.

Whatever the relative intellectual merits of these two traditions—and the purpose of this paper is not to advance a normative position on the matter—neither has proven able to attract adequate cultural buy-in. One links the secular with a theological narrative that, to many, is narrow, exclusion-

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1. On the crisis in Establishment Clause jurisprudence, see generally BRUCE LEDEWITZ, *CHURCH, STATE, AND THE CRISIS IN AMERICAN SECULARISM* (2011).

ary and fundamentally incompatible with the basic precepts of an open liberal society. The other defines the secular as standing over and against religion in a manner that fails to resonate with historical practices and the religious convictions of many citizens. What is instead needed is a way of conceptualizing the secular that opens the Establishment Clause to new forms of meaning. The primary aim of this paper is to offer such an account, which will be described as higher law secularism.

In developing the idea of higher law secularism, the paper largely bypasses any sustained engagement with the technical jurisprudential questions implicated by the Establishment Clause debate. It is not that such questions are unimportant, but the concern of this paper is not with advancing a particular theory of constitutional interpretation in any formal sense. Rather, this paper aims to relocate the jurisprudential problematic within a more fundamental debate over the meaning of the secular. The paper is thus relatively modest in the constructive proposal its advances. Higher law secularism is not a set of principles so much as a way of conceptualizing the relationship of religion, and moral commitments more generally, to secular life and politics. It offers a methodology for framing the problematic more than a definitive resolution to it. While rethinking the secular on its own will not solve all of the contested issues involving religious symbols, it will go some way towards clarifying the framework of a resolution. Until there is greater agreement on the nature of the secular, the Establishment Clause will remain embedded within a divisive culture war.

In the end, this paper is therefore less about symbols than how accounts of the secular shape the Establishment Clause. There are a number of case studies that might be used to pursue this inquiry, but religious symbols provide an entry into the most elemental features of the debate over the nature and foundation of legal secularism. The subject of religious symbols, perhaps more than any other subject, precipitates a confrontation over the ontological character of the modern legal order and the secular space created out of the great separation of law and religion.

#### I. VARIETIES OF THE SECULAR: CHRISTIAN SECULARITY AND SECULARISM

The governing claim of this paper is that resolving the crisis in Establishment Clause jurisprudence must begin with rethinking legal secularism. However, this project demands that we begin by interrogating the meaning of the secular, itself a confused and contested concept. As Charles Taylor

observes, “[i]t is not entirely clear what is meant by secularism.”<sup>2</sup> Thus, simply discussing the secular is unhelpful because divergent accounts of the secular have emerged from within historically constructed and contingent social imaginaries. There are different secularisms competing to represent the authentic inheritance of modernity.<sup>3</sup> This contest within modernity stands as a necessary backdrop to the cultural and jurisprudential debate over religious symbols.

Within the United States, and the West more broadly, there have been two regnant traditions that have shaped debate within law, politics and culture about the meaning of the secular.<sup>4</sup> These two traditions are sometimes referred to as secularity and secularism.<sup>5</sup> Following this custom, Brett Scharffs describes the two concepts in this way:

Both secularity and secularism are linked to the general historical process of secularization, but as I use the terms, they have significantly different meanings and practical implications. By “secularity” I mean an approach to religion-state relations that avoids identification of the state with any particular religion or ideology (including secularism itself) and that endeavours to provide a neutral framework capable of accommodating a broad range of religions and beliefs. By “secularism,” in contrast, I mean an ideological position that is committed to promoting a secular order.<sup>6</sup>

Scharffs further illustrates this distinction by linking the United States with the tradition of secularity and French *laïcité* with the tradition of secularism.<sup>7</sup> I follow this distinction between secularity and secularism and find it to be a useful paradigm for interpreting different modes of relating law and religion. At the same time, I want to offer an even more elemental distinction within the secular that informs both its intellectual genealogy and its expression within legal systems. This distinction is ultimately theological in nature, for it concerns the relationship of law and political order to divine economy. In particular, what is ultimately at issue in this divide is whether or not secular politics derives its grounding and logic from religious warrant. The two sides of this debate discussed below are the traditions of Christian secularity and secularism.

2. Charles Taylor, *Modes of Secularism*, in *SECULARISM AND ITS CRITICS* 31 (Rajeev Bhargava ed., Oxford, 4th impr. 2005).

3. See Generally Brett G. Scharffs, *Four Views of the Citadel: The Consequential Distinction between Secularity and Secularism*, 6 *RELIGION AND HUMAN RIGHTS* (2011).

4. *Id.*

5. *Id.* at 110.

6. *Id.* at 109, 110–11.

7. *Id.* at 111.

### A. *The Idea of Christian Secularity*

The genealogy of the secular typically commences with reference to the rise of science and reason in the Enlightenment.<sup>8</sup> The underlying assumption is that the secular emerged out of modernity as it moved to replace the orders of Christendom. The secular, in this respect, is understood as being necessarily defined against religious politics. Along these lines, Ian Benson notes that, “[t]he secular as most people now understand it is a deeply anti-religious creation.”<sup>9</sup> Yet this account captures only one dimension of the history of the secular. In fact, Benson argues, “[t]he idea that ‘secular’ means ‘non-religious’ is a departure from its original meaning and challenges the idea that religion has a place in the public sphere.”<sup>10</sup> A full genealogy of the secular begins not with the Enlightenment, but with the Christianity’s engagement with the ancient world. As Robert Markus has argued, “The sacred and the profane were both familiar in antiquity; but until it was imported by Christianity, there was no notion of the ‘secular’ in the ancient world. The word and the concept are both alien to Greco-Roman religion.”<sup>11</sup> Against the Enlightenment-focused narrative, the first emergence of the secular in the West took place not against Christianity, but through it.

The idea of the secular as it emerged out of Christianity was, on one level, a political construct. With the rise of a Christian polity under Constantine, the link between politics and sacrifice that defined Rome, indeed all prior civilizations, was severed.<sup>12</sup> At the heart of Constantine’s political legacy, Peter Leithart argues, was the ending of pagan sacrifice and thus the loosening of political and civic identity from the sacrificial act.<sup>13</sup> This desacralization inaugurated a civilizational shift in which the state and its powers were deprived of eschatological significance and left radically relativized in light of Christian proclamation. The secular legal and political history of the West might be thus read as a footnote to this Constantinian legacy. It is, of course, a long road from desacralization to the modern liberal state, and the full logic of Christian insight would not be revealed until the dawning of modernity—a point that emphasizes the ineluctable link between Christian secularity and Enlightenment secularism—but the seeds

8. Ian T. Benson, *That False Struggle between Believers and Non-Believers*, OASIS, Dec. 12, 2010, at 24.

9. *Id.* at 22.

10. *Id.*

11. ROBERT A. MARKUS, *CHRISTIANITY AND THE SECULAR* 4 (2006).

12. See generally PETER J. LEIHART, *DEFENDING CONSTANTINE: THE TWILIGHT OF AN EMPIRE AND THE DAWN OF CHRISTENDOM* (2010).

13. *Id.*

of the modern secular political order were first established within Christianity.<sup>14</sup>

Another aspect of the Christian transformation was conceptual and theological. The secular, in this early understanding, referred not to a space defined against religion but merely that which was profane and ordinary, that is, spatially and jurisdictionally separate from the sphere of ecclesial activity. Along these lines, Pope Benedict recently noted that, “[i]n the Middle Ages, ‘secularity,’ a term coined to describe the condition of the ordinary lay Christian who belonged neither to the clerical nor to the religious state, inferred opposition between the civil powers and the ecclesiastical hierarchies.”<sup>15</sup> The secular, in other words, speaks merely to the fact there are spheres of society that properly possess jurisdictional autonomy from the Church.<sup>16</sup> As such, the emergent Christian idea of the secular did not rest upon a “radical opposition to the sacred.”<sup>17</sup> While the secular constituted a space apart from the church, it nevertheless found its meaning, foundation, and logic within a theological account of the world. Jurisdictional autonomy was not equated with ontological autonomy. It is in this respect that theologian Oliver O’Donovan can propose that the “secular community has no ground *of its own* on which it may simply exist apart. It is either opened up to its fulfillment in God’s love, or it is shut down.”<sup>18</sup> The sustenance of what Pope Benedict has recently referred to as a “healthy secularity” therefore finds its meaning within the bounds a Christian theological economy.<sup>19</sup>

14. Secularism might properly be viewed as a dependent tradition that is inexplicable apart from Christian secularity. One commentator has gone so far as to describe secularism as “the latest expression of the Christian religion.” See GRAEME SMITH, *A SHORT HISTORY OF SECULARISM 2* (Tauris, 2008).

15. Pope Benedict XVI, *Address to the Participants in the 56th National Study Congress Organized by the Union of Italian Catholic Jurists*, THE VATICAN, Dec. 9, 2006 [hereinafter Benedict Address], available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2006/december/documents/hf\\_ben\\_xvi\\_spe\\_20061209\\_giuristi-cattolici\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/december/documents/hf_ben_xvi_spe_20061209_giuristi-cattolici_en.html).

16. Following this tradition of thought, one commentator has recently argued that, “[g]iven a right understanding of secularism as the separation of religion from public life and the separation of church and state as nothing more than formal institutional independence of church and state, citizens should value church-state separation as the healthier and more justifiable state of affairs.” HUNTER BAKER, *THE END OF SECULARISM 20* (2009).

17. MARKUS, *supra* note 11, at 5.

18. OLIVER O’DONOVAN, *COMMON OBJECTS OF LOVE: MORAL REFLECTION AND THE SHAPING OF COMMUNITY: 2001 STOB LECTURES 24* (2002) (emphasis added).

19. Benedict Address, *supra* note 15.

### B. *The Idea of Secularism*

The West gave rise to another understanding of the secular that came to be defined largely over and against the tradition of Christian secularity. This alternative tradition that we will denominate secularism severed the elemental connection between theology and the secular that had been the hallmark of Christian secularity. This impulse found expression in the rise of the modern state following the Wars of Religion, with its aim of a political space largely autonomous from religion and theologically-inspired violence. The logic pregnant in this early secularism was given more complete expression in later Enlightenment thought. The first use of the term secularism was by George Holyoake in 1851 as a way to explicitly minimize the public and political influence of religion.<sup>20</sup> It was at this point that the term secularism acquired the meaning it holds in contemporary vernacular.

This intellectual lineage aside, there is no one uniform account of secularism. Even within the American context, Kent Greenawalt argues, “[s]ecularism can be a confusing and slippery term.”<sup>21</sup> Yet, what is common to the various expressions of secularism is that each represents “a way of thinking about the world and life which makes no reference to supernatural belief.”<sup>22</sup> While the secular as defined within Christian secularity is derived from a theological account of creation, the secular of secularism is increasingly freestanding and defined by its own logic. At its most basic, secularism thus describes “the world created by the intellectual rebellion against political theology in the West.”<sup>23</sup> Secularism is a revolt against the imaginative universe birthed by the tradition of Christian secularity and its representation of the secular as a space made sensible within a theological order.

This paper is concerned principally with secularism’s expression as a doctrine of the state that “strains the metaphysics out of politics.”<sup>24</sup> At the same time, it is artificial to separate political secularism from secularism as a more totalizing moral system.<sup>25</sup> Secularism, in this latter form, aims to advance a new form of moral order. Secularism is thus not a mere political settlement but the outworking of a broader strategy to effect the deeper

20. Benson, *supra* note 9, at 24.

21. Kent Greenawalt, *Secularism, Religion, and Liberal Democracy in the United States*, 30 CARDOZO L. REV. 2383, 2383 (2009).

22. SMITH, *supra* note 14, at 22.

23. MARK LILLA, *THE STILLBORN GOD: RELIGION, POLITICS, AND THE MODERN WEST* 6 (2007).

24. WILLIAM E. CONNOLLY, *WHY I AM NOT A SECULARIST* 22 (1999).

25. ELIZABETH S. HURD, *THE POLITICS OF SECULARISM IN INTERNATIONAL RELATIONS* 13–15 (2007).

ontological separation of the legal and religious. Within this order, law comes to possess its own logic unrelated to any supervening moral system, while religion is relegated to the private sphere. As Jürgen Habermas writes in describing the political consequences of this arrangement, “the constitution of the liberal state can satisfy its own need for legitimacy in a self-sufficient manner, that is, on the basis of the cognitive elements of a stock of arguments that are independent of religious and metaphysical traditions.”<sup>26</sup>

These two concepts of the secular—Christian secularity and secularism—continue to shape contemporary legal and political discourse. One tradition seeks to maintain a foundational link between the secular and the religious. The other advances a more totalizing rupture. While having distinct histories—one in Christianity’s encounter with the ancient word, the other in the Enlightenment break with Christendom—the echoes of these two broad traditions have established the lines of debate over the moral structure of modernity and its liberal political institutions. The debate is not a battle over the validity of the secular itself, but rather over the character of modernity. It is against this backdrop that the significance of legal contests over religious symbols becomes clearer, for at issue is the basic question of whether there exists some necessary point of contact between liberal separationism and a theological economy.

## II. THE FORMATION AND FRAGMENTATION OF THE AMERICAN TRADITION

The dueling history of Christian secularity and secularism has a distinctive American chapter that is important for understanding the problems afflicting contemporary Establishment Clause jurisprudence. It is argued that the current jurisprudential quagmire reflects the loss of common patterns of thought and practice that had previously created a stable environment within which to understand the relationship between law and religion. The particularly divisive character of the current legal debate, framed as a binary choice between Christian secularity and secularism, has emerged out of the void that resulted from the breakdown of a shared American cultural self-understanding.

A tradition emerged during the nineteenth century to govern the relationship between church and state in American law and public life.<sup>27</sup> This American tradition was deeply influenced by elements of Christian secular-

26. JÜRGEN HABERMAS, JOSEPH RATZINGER & FLORIAN SCHULLER, *THE DIALECTICS OF SECULARIZATION: ON REASON AND RELIGION* 29 (2005).

27. Thomas Berg, *Religious Displays and the Voluntary Approach to Church and State*, 63 OKLA. L. REV. 47, 49 (2010).



ity, but it also took this tradition in new and creative directions in response to the secularist tradition. This American tradition, which Thomas Berg defines as the “voluntarist tradition,” rested on two foundational principles.<sup>28</sup> First, the state maintained no jurisdiction over religious matters.<sup>29</sup> The state and the church existed as separate loci of social meaning and activity. In this respect, the tradition was thoroughly grounded in modern notions of the separation. Yet, at the same time, religion was of foundational importance to politics and public life, not only as the guarantor of morality and virtue but as an essential factor in preserving the principles by which law and religion operated in discrete social spheres.<sup>30</sup> While possessing its own authority and operating according to its own internal logic, law was nevertheless connected—symbolically and ultimately ontologically—to a supervening moral order.

This American tradition might be understood as the outworking of a long history of Christian insight concerning the scope of government authority and the character of the secular. Certainly in its recognition of the ineluctable importance of religion to the sustenance of democratic life and culture, the American tradition maintained links with foundational insights of Christian secularity. But the American tradition was not a mere parroting of Christian secularity, for its strong commitment to disestablishment marked a unique turning point in the western tradition. The American constitutional order was secular in a completely new way, for it broke with aspects of Christian political theology that extended to the early medieval church.<sup>31</sup> As Martin Marty writes,

[s]hortly before independence, the Americans were still living off a fourteen-hundred-year old charter. This charter went back to the emperor Constantine, in the fourth century; its theoretical base had been provided by St. Augustine. According to this reading, religion was established by law. Establishment meant official favor and status. The government encouraged one religion and discouraged or prosecuted all others.<sup>32</sup>

By denying any such competence or authority to the new federal government, the United States Constitution shattered a fundamental precept of Christendom. In brief, the achievement of the American tradition was

28. *Id.* at 56.

29. *Id.* at 51.

30. *Id.* at 53.

31. Steven Green notes that, “[i]n 1800, the United States represented the only secular government on earth, revolutionary France excepted. Formal, political disestablishment was the rule at the national level and all but complete among the states.” STEVEN GREEN, *THE SECOND DISESTABLISHMENT* 9 (2010).

32. MARTIN MARTY, *RIGHTEOUS EMPIRE: THE PROTESTANT EXPERIENCE IN AMERICA* 35–36 (1970).

based in a tension—a tension between acknowledging the state as having no jurisdiction over religion, even as this proposition rested on the cultural residue of Christian political insight. Aspects of both Christian secularity and Enlightenment secularism mingled in new and creative ways. Resting on a kind of circular logic in which strong religion was the foundation of a democratic order that made religious freedom possible, the inherent tension of this system served through the nineteenth century as a source of dynamic (if also sometimes violent and exclusionary) energy. It was this tension that shaped the American understanding of the relationship between law and religion within the bounds of a secular polity.

Christianity and liberty had of course been culturally, politically and intellectually linked from the beginnings of the United States.<sup>33</sup> Yet, the development of the American tradition of church-state relations in the nineteenth century brought about a settlement not entirely congruous with themes of the Founding Era. The American tradition was not a mode of understanding that flowed necessarily and ineluctably from the First Amendment, but rather a historically constructed model rooted in the particular impulses of a cultural moment. A shift occurred in the brief decades following 1789 that injected new meaning into the emergent constitutional order. “A *de facto* establishment grew,” Marty argues, “where the old legal one had fallen.”<sup>34</sup> Under this *de facto* establishment, the line between public religion and the non-confessional state was often porous,<sup>35</sup> and the promotion of Christianity was not widely deemed to be incompatible with a principled opposition to a state church.<sup>36</sup> It was not until the nineteenth century, for instance, that there emerged a strong account of America as a Christian nation.<sup>37</sup> It was the emergence of this Christian nationalism in law

33. Along these lines, Nathan Hatch observes, “American churches did not face the kind of external social and political pressures that in Great Britain often forced Christianity and liberty to march in opposite directions.” NATHAN O. HATCH, *THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY* 8 (1989).

34. MARTY, *supra* note 32, at 44.

35. See generally DONALD L. DRAKEMAN, *CHURCH, STATE AND ORIGINAL INTENT* 196–262 (2010).

36. As Marty observes,

“[e]ven within a single document the two interests relating to the one opinion coexisted. The Supreme Court of Maine in 1854 declared that the state ‘knows no religion’ and cited eight religions to prove that all possessed equal religion. . . but then went on to uphold the reading of the Protestant King James Version of the scriptures in public schools, even though Catholics were protesting the practice.

MARTY, *supra* note 32, at 44.

37. Jon Butler, *Why Revolutionary America Wasn't a Christian Nation*, in *RELIGION AND THE NEW REPUBLIC: FAITH IN THE FOUNDING OF AMERICA* (James H. Hutson ed.). Butler also observes that, “[a]s Christianization advanced in America, new and sometimes ugly demands for government guarantees of Christian hegemony emerged rather than receded.” JON BUTLER, *AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE* 284 (1990).

and culture that undergirded the American tradition, as the maturation of American self-identity went hand-in-hand with the construction of Christianity as the source and foundation of democratic life. The cause of American liberty was linked with the cause of Christianity.

As it first took shape in the nineteenth century, the American tradition advanced a distinctly and narrowly Protestant nationalism.<sup>38</sup> It was a robust Protestantism, expressed culturally and institutionally, that gave shape and support to the American tradition of secularity. In fact, the American tradition not only named Protestantism as the exclusive foundation of American democracy, but actively defined itself against other faiths, especially Catholicism. The noted Unitarian minister Theodore Parker summarized a common line or argument when writing in 1854 that, “[t]he Roman Catholic Church. . .denies spiritual freedom, liberty of mind or conscience, to its members. It is therefore the foe of all progress; it is deadly hostile to Democracy.”<sup>39</sup> Yet, while initially defined by an exclusionary impulse, the American tradition also possessed a certain elasticity. In fact, an important part of the drama of the American tradition was the effort of other faith traditions to draw themselves into the tapestry of American democratic life. Perhaps no challenge more defined American Catholic life in the nineteenth and early twentieth centuries than establishing the church’s basic synchronicity with the principles of the American tradition. The noted Catholic convert Orestes Brownson, in his 1865 book *The American Republic*, wrote that “the United States have a religious as well as a political destiny, for religion and politics go together. Church and state, as governments, are separate indeed, but the principles on which the state is founded have their origin and ground in the spiritual order—in the principles revealed or affirmed by religion—and are inseparable from them.”<sup>40</sup> He went on to affirm, against the practices of “the sectarian and schismatic states of the Old World,” that the American Catholic church “can deal with people as free men, and trust them as freemen.”<sup>41</sup> The moral theologian John Ryan advanced this line of argument in the opening decades of the twentieth century. In numerous publications, and most systematically in his book *The State and the Church*, Ryan not only argued for the basic compatibility of Catholicism and religious freedom but also for the church’s essential role in preserving the moral foundations of American liberal politics.<sup>42</sup> In fact,

38. See generally MARTY, *supra* note 32.

39. JOHN MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM 34 (2003) (internal quotations omitted).

40. ORESTES BROWNSON, THE AMERICAN REPUBLIC 257 (2003).

41. *Id.* at 263.

42. JOHN A. RYAN & MOORHOUSE F. X. MILLAR, THE STATE AND THE CHURCH (1922).

Ryan went so far as to claim that Catholicism had reached a point where it must seize from Protestantism the task of serving as public faith for American democracy.<sup>43</sup>

The Catholic experience was one episode in the expansion of the American tradition beyond Protestantism, and part of the larger reconstitution of American religion along the lines of Protestant-Catholic-Jew.<sup>44</sup> It reveals the native flexibility in the American tradition, as the uneasy blending of disestablishment and public religion expanded to encompass other theological traditions in the form of a new postwar consensus. This balance held, and was indeed sensible, so long as there existed a broadly religious culture to support it. Yet, this consensus no longer holds, pressured on different sides by the forces of pluralism, secularism, and resurgent religion. The result is that the underlying logic of the American tradition ceases to be compelling to some significant segments of the population. That which held together separationism and public religiosity has been lost, depriving American public life of a common basis by which to adjudicate the meaning of the secular.

The fragmentation of the American tradition has placed a revived Christian secularity and a radicalized secularism in fundamental conflict. Even more significantly, this fragmentation has pushed deliberation about the meaning of the secular ever more deeply into the realm of law and politics. As James Hunter observes, “a thinning consensus of substantive beliefs and dispositions in the larger culture” has produced “a turn towards politics as a foundation and structure for social solidarity.”<sup>45</sup> What cannot be achieved at the level of cultural self-understanding is now sought through the coercive agency of the state. “Each and every faction in society,” Hunter argues, “seeks the patronage of state power as a means of imposing its particular understanding of the good on the whole of society.”<sup>46</sup> No issue has maintained a more significant role in this political contest than the Establishment Clause, which has become the primary venue within which the meaning of the secular is deliberated. What the American tradition once accomplished through soft consensus now occurs through coercive politics. The jurisprudence involving religious symbols, in turn, has become a referendum on the two traditions that have shaped the meaning of the divorce of

43. Zachary R. Calo, *The Indispensable Basis of Democracy: American Catholicism, the Church State Debate, and the Soul of American Liberalism, 1920–1929*, 91 VA. L. REV. 1037 (2005).

44. See WILL HERBERG, *PROTESTANT, CATHOLIC, JEW: AN ESSAY IN AMERICAN SOCIOLOGY* (1983).

45. JAMES D. HUNTER, *TO CHANGE THE WORLD: THE IRONY, TRAGEDY & POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD* 103 (2010).

46. *Id.* at 104.

law and religion. On one side, religious symbols represent a way to link the logic of the secular state to a religious economy. On the other side, religious symbols represent an impingement upon an autonomous secular preserve that must stand apart from religion. On such binary terms, the debate has unsurprisingly been confused and irresolute.

### III. RELIGIOUS SYMBOLS, CONSTITUTIONAL LAW AND THEOPOLITICAL CULTURAL WARS

The fragmentation of the American tradition offers a starting point for assessing the current confused state of Establishment Clause jurisprudence. In particular, it is argued that one significant reason for the irresolute nature of debate over religious symbols is that the cases have often rested on a caricatured dichotomy between the religious and the secular. Even when the binary is not facially present, it nevertheless shapes the contours of the legal debate. The Establishment Clause has become the situs of a cultural debate about the fundamental orientation of American liberalism.<sup>47</sup> Is America to be a secular nation or a religious nation? Lacking a definition of the secular through which the culture wars might be blunted, the Supreme Court's jurisprudence has instead only fed this chaotic, irresolute, and often incoherent struggle.

Some of these dynamics might be seen in the recent Supreme Court cases addressing public displays of the Ten Commandments. The debate between the residue of Christian secularity and its secularist alternative is not invoked as such, but the opinions traffic in pathways established by these positions. In the 2005 case *Van Orden v. Perry*,<sup>48</sup> in which the Supreme Court upheld a Ten Commandments display on the grounds of the Texas State Capitol, the plurality opinion goes so far as to frame the overarching Establishment Clause issue in binary terms that echo the logic of Christian secularity and secularism. Justice Rehnquist writes that, "[o]ur cases Januslike, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation's history," while "[t]he other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom."<sup>49</sup> "One face," Rehnquist con-

47. As one commentator notes, "When Christians rail against the separation of church and state and heartily charge that those words do not appear in the Constitution, they are really reacting to secularism. The problem is that the language of the separation of church and state is often used to push for more secularistic understandings." HUNTER BAKER, *THE END OF SECULARISM* 20 (2009).

48. 545 U.S. 677 (2005).

49. *Id.* at 683.

tinues, “looks to the past in acknowledgement of our Nation’s heritage, while the other looks to the present in demanding a separation between church and state.”<sup>50</sup>

In a concurring opinion in *Van Orden*, Justice Scalia advances an argument that echoes the basic themes of Christian secularity. He argues, for instance, that “there is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.”<sup>51</sup> Scalia goes even further in *McCreary County v. American Civil Liberties Union*,<sup>52</sup> another Ten Commandments case decided the same day as *Van Orden* in which the Court found a courthouse display unconstitutional. Writing in dissent, Scalia argues that the Constitution permits the privileging of the monotheistic faiths of Judaism, Christianity and Islam.<sup>53</sup> At the heart of this argument is the claim that it is “demonstrably false. . . that the government cannot favor religion over irreligion” and “cannot favor one religion over another.”<sup>54</sup> Justice Thomas’s concurrence in *Van Orden* reveals similar impulses. Taking note of the “incoherence” of the Court’s Establishment Clause jurisprudence, Thomas argues for returning to a narrow notion of establishment as compulsion that would leave abundant space for such activities as the display of religious symbols. He is particularly critical of the Court’s tendency “to avoid declaring all religious symbols and words of longstanding tradition unconstitutional, by counterfactually declaring them of little religious significance.”<sup>55</sup>

On one level, this line of argument rests on a series of historical claims about the Founder’s understanding of establishment. But this is not merely a historical exercise, for this position also discloses a deeper set of assumptions about the relationship between religion and constitutional liberties. Particularly revealing is the statement that, “[o]ur institutions presuppose a Supreme Being.”<sup>56</sup> Not merely a historical claim, this statement is also pregnant with deeper moral and normative significance that draws constitutional jurisprudence into contact with the basic insights of Christian secularity. It is not Christian secularity in a narrow way, but it participates in the project of linking the logic of the liberal state to theological precepts, in this case those represented by the God of the Abrahamic

50. *Id.*

51. *Id.* at 692 (Scalia, J., concurring).

52. 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).

53. *Id.* at 894 (2005) (Scalia, J., dissenting).

54. *Id.* at 893 (Scalia, J., dissenting).

55. *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring).

56. *Id.* at 683.

faiths. The secular is by no means negated by religion, but it does find its grounding within the moral universe of monotheism.

The dissent in *Van Orden*, authored by Justice Stevens, is revealing in that it defines itself, at least in part, against a certain form of Christian or monotheistically-based secularity. The reading of the First Amendment presented in the plurality and concurring opinions, Stevens argues, “would replace Jefferson’s ‘wall of separation’ with a perverse wall of exclusion—Christians inside, non-Christians out.”<sup>57</sup> Rather than allowing the nation to assume a narrow theological identity, Stevens argues that the Establishment Clause should be interpreted in terms of the principle of neutrality.<sup>58</sup> A “resolute commitment to neutrality,” in turn, “is flatly inconsistent with the [*Van Orden*] plurality’s wholehearted validation of an official state endorsement of the message that there is one, and only one, God.”<sup>59</sup> Stevens’s opinion is not based in a deep secularist agenda, but the neutrality he offers necessarily demands a conception of the public denuded of religious meaning.

Similar implications arise from the majority opinion in *McCreary County v. American Civil Liberties Union*, in which the Court also endorses neutrality as the central interpretative guide for the Establishment Clause.<sup>60</sup> The Court is clear in stating that neutrality provides that “government may not favor one religion over another, or religion over irreligion.”<sup>61</sup> Against the dissent’s position that “the government should be free to approve the core beliefs of a favored religion over the tenets of others,”<sup>62</sup> Justice Souter presents neutrality as requiring a rather thoroughgoing removal of state involvement with sources of meaning that maintain any deep residual religious significance. Pluralism demands the negation of thick conceptions of the foundations of the liberal state. Yet, as has been pointed out, the most significant aspect of the decision in *McCreary* was its adoption of a revived and ultimately stricter form of the *Lemon* test. One commentator writes the following: “In Justice Souter’s hands, the [secular] purpose prong has been transformed. Where previously this prong was quite easy to satisfy—a secular purpose was deemed sufficient—the purpose prong now clearly

57. *Id.* at 730 (Stevens, J., dissenting).

58. *Id.* at 733.

59. *Id.* at 712.

60. *McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 874 (2005).

61. *Id.* at 875.

62. *Id.* at 880.

requires a *predominantly* secular purpose.”<sup>63</sup> Under this governing principle, political meaning is sealed from any point of contact with religion.

The lines of argument in *Van Orden* and *McCreary County* do not precisely map onto the conceptions of Christian secularity and secularism, but they have clearly been shaped by the imaginative universe these traditions birthed. Both jurisprudential positions draw from well-established lines of thought, but neither offers an adequate and sustainable intellectual model by which to untangle the current crisis in Establishment Clause Jurisprudence. Defenses of Ten Commandments displays fail to account for the cultural dynamics of pluralism and unbelief that have radically changed the landscape of American religion over recent decades. They link American law too intimately and narrowly with particularistic theological precepts. This approach fails to take account of law’s location within a post-Christian cultural milieu in which there has been a shift from an order “where belief in God is unchallenged and indeed, unproblematic, to one in which it is understood to be one option among others, and frequently not the easiest to embrace.”<sup>64</sup> At the same time, an account of law denuded of religious influence is not politically or culturally viable. It fails to grant adequate recognition to the deep role that religion holds for American identity and public life, and it fails in its attempt to impose a normative model of politics and ethics that is discordant with the pervasive religiosity of the American people. As such, this approach only further enhances the narrative that “the forces of secularity in contemporary America, within such institutions as higher education, public education, the news media, advertising, and popular entertainment, *are* very powerful and their agenda (deliberately or not) *is* fundamentally at odds with traditional Christian morality and spirituality.”<sup>65</sup> The legitimacy of the Court is undermined when it is understood to be yet another such elite secularist institution. What is thus needed is a way of rethinking the idea and content of law that moves beyond both the anti-religious impulses of secularism and the triumphalist and exclusionary impulses of theopolitical secularity. Only by cultivating a new understanding of legal secularism might there emerge an approach to Establishment Clause jurisprudence that overcomes the regnant binary.

63. Jay A. Sekulow & Francis J. Manion, *The Supreme Court and the Ten Commandments: Compounding the Establishment Clause Confusion*, 14 WM. & MARY BILL RTS. J. 38 (2005) (internal citations omitted).

64. CHARLES TAYLOR, *A SECULAR AGE* 3 (2007).

65. HUNTER, *supra* note 45, at 167.



#### IV. A PLURALISTIC POST-SECULAR HIGHER LAW JURISPRUDENCE

The third way this paper proposes is that of a higher law secularism. At its most basic, this concept aims to appropriate insights from the two regnant genealogies of the secular, while equally moving beyond both in order to advance a new foundation for conceptualizing the meaning of the Establishment Clause as applied to the issue of religious symbols. Higher law secularism aims, most basically, to reframe the debate about law and religion within the context of secular politics. In important respects, the via media embodied in higher law secularism does not lend itself to clear summation and line drawing. It rather invites a rethinking of the tone by which law and religion issues are formulated and deliberated. It is less a series of systematic principles than a mode of understanding the relationship between religion and politics that shifts the borders of cultural and legal imagination. In particular, rather than asking whether law should advance or delimit religious influence in public life, higher law secularism considers how law can direct religion to shape and support the architecture of a secular political order. In other words, higher law secularism is premised on the idea that the binary shaping Establishment Clause jurisprudence rests on the false premise that law must either defend the goods of religion or the goods of the secular state. What is rather needed is a jurisprudence that respects the fundamental independence and achievement of secular politics, but which nevertheless accounts for the ways in which religion might contribute to the structure of an open and plural secular order. The challenge is not to become more or less religious, or more or less secular, but to become differently secular.

Higher law secularism rests on two broad ideas. First, following the tradition of Judeo-Christian secularism, it proposes that the secular is not to be equated with the absence or negation of religion. To do so in sharp ideological terms ignores the essential role that theological concepts have had in shaping the legal and political inheritance of the West.<sup>66</sup> As discussed above, the desacralization of politics that birthed the idea of the secular was unimaginable apart from Christianity. Higher law secularism seeks to maintain and renew the idea that the secular might properly remain open to a theological logic. In fact, not only is the secular properly held open to religion, but closing it off feeds an ideologically rigid account of the secular. As such, higher law secularism rejects an account of the secular as representing a radical rupture within the West. The secular and the reli-

66. See generally NICHOLAS WOLTERSTORFF, *JUSTICE: RIGHTS AND WRONGS* (2007).

gious are historically and intellectually tethered, and higher law secularism seeks to reconstruct this genealogical point of contact in a new form.

At the same time, higher law secularism opens several important cleavages with Christian secularity by moving beyond a narrow theological genealogy of secular politics. Even as Christianity maintained a seminal role in birthing secular space, due recognition within a pluralistic society needs to be given to the ways in which the secular has developed a meaningful independence and autonomy that stands apart from and, in certain respects, in judgment of religion. Higher law secularism is thus distinguished from the tradition of Christian secularity in that it rejects the linkage between the secular and any particular theological worldview. In contrast to the tradition of Christian secularity, higher law secularism looks to the goods of religion more generally as a source of insight into the meaning of the secular. In fact, higher law secularism goes even further and opens the secular to the insights of non-religious forms of deep moral meaning.<sup>67</sup> In brief, higher law secularism resists an account of the secular as either a purely autonomous place of political meaning or as that which finds grounding solely within a religious economy.

On one level, the idea of higher law secularism can be properly viewed as a pragmatic and non-ideological approach to overcoming a deep and problematic cultural divide. Higher law secularism aims to advance a compromise between principles often deemed to be oppositional. It seeks, in particular, to diffuse the notion that the achievement of the secular state, including state neutrality, is incompatible with the state opening public space to the expression of particularistic religious and non-religious higher law claims. Such claims might be understood as an acknowledgment of the way in which secularism has and might continue to be shaped by higher commitments. Reaching such a rapprochement therefore does not demand a negation of the secular but a reimagining of its meaning.

In this respect, higher law secular shares certain features with what Tariq Modood terms “moderate/inclusive” secularism.”<sup>68</sup> It is a secularism shaped with the grain of religion. It equally means that higher law secularism should not be understood as advancing thick normative claims about the nature of the secular. It is not, in other words, an attempt to settle debates of long and deep consequence between Christian secularity or Enlightenment secularism. It might not be the case that these regnant positions

67. For such an account of the higher law, see LEDEWITZ, *supra* note 1, at chapter 5.

68. Tariq Modood, *Moderate Secularism: A European Conception*, OPEN DEMOCRACY, Apr. 7, 2011, available at <http://www.opendemocracy.net/tariq-modood/moderate-secularism-european-conception>.

represent a “false dualism,” only that the dualism to which they gave rise cannot serve as the basis for a constructive jurisprudence within a religiously pluralist and increasingly non-religious society.<sup>69</sup> Neither of the two positions has provided an adequate framework for resolving issues of religion and public life. Higher law secularism thus aims to open space within which there might emerge a prudential accord concerning the ways religious norms shape secular meaning.

By so doing, higher law secularism reimagines the secular as a site of dialogical engagement and constructive contestation between moral traditions. Higher law secularism presents an account of the secular as an ongoing and contested way of encountering and being in the world. It moves the legal and political conversation beyond the either/or proposition that often shapes debate and invites a dialectical engagement about the moral life of secular society. The Establishment Clause becomes a place of encounter, engagement, and contestation for which there need not be a settled univocal meaning. Thus higher law secularism, unlike Christian secularity and secularism, does not advance a totalizing conception of the public. It rather acknowledges the contingent and historically constructed nature of western secularity, thereby drawing the Establishment Clause into an ongoing dialogue about the nation’s self-understanding. Higher law secularism enters into the ambiguities and tensions that define the deeper sources of moral meaning within the late modern world and allows the secular to become the sight of a deep and authentic pluralism.

While these pragmatic considerations are at the center of higher law secularism, the concept is more than a mere *via media* that aims to diffuse cultural tension through strategic compromise. Viewed in another way, higher law secularism embodies a way of reimagining the moral structure of legal liberalism in relationship to religion. The idea of higher law secularism, in other words, offers a starting point for cultivating what Jeffrey Stout refers to as a democratic “common morality.”<sup>70</sup> There is perhaps no characteristic more emblematic of late modern culture than the pervasive lack of deep agreement. Yet, there must be constructive alternatives to a politics defined by either the dictatorship of relativism or the tyranny of univocity. Secularism’s project of privatizing religion and Christian secularity’s project of reinstantiating a theological politics have only enflamed the culture wars and politicized the Establishment Clause. A higher law secularism might therefore be understood as way to cultivate a post-metaphysical politics that preserves law’s openness to deep moral sources and aspirations. It

69. LEDEWITZ, *supra* note 1, at 143.

70. JEFFREY STOUT, *DEMOCRACY AND TRADITION* 225–45 (2004).

is a task at once pragmatic—undercutting what Stout has referred to as the standoff between secular liberals and new traditionalists—but also one that has the capacity to reframe the character of public discourse.<sup>71</sup> It is not so much a matter of elevating democracy-qua-democracy to the status of an independent tradition transcendent in its moral possibilities, but rather viewing democracy as constituted by—and in some measure dependent upon—the higher moral aspirations of the body politic (religious and non-religious alike).

Finally, higher law secularism offers resources for addressing the legitimacy problem within late modern liberalism. The battle over church and state is, at root, a battle about how to understand the nature and aims of secular politics. Yet, as Steven D. Smith has argued, Establishment Clause jurisprudence is defined by an incoherence that reflects “a difficulty in *justification*.”<sup>72</sup> This problem of justification is endemic to the secularist political project and is a problem that post-Christian modernity has failed to resolve. Christian secularity placed the ultimate meaning and completion of the secular within a theological narrative. Secular history, as such, maintained no final autonomy, even though it maintained its own jurisdictional space *in media res*. Secularism, by contrast, rests on the idea of the “Enlightenment as the end of history.”<sup>73</sup> The modern world is a “world without a story,” leaving secular political space with no inherent meaningfulness and no connection to a drama outside of its own logic.<sup>74</sup> If Christian secularity is problematic in that it gives the secular univocal meaning, secularism is problematic in that it leaves liberal values unwarranted—“vulnerable” in the words of one commentator.<sup>75</sup> Higher law secularism offers a way to draw legal liberalism into a new moral narrative by connecting it with deep and aspirational values that, in their plurality, shape communal identity. It opens a way for secular law to shape and be shaped by external moral norms rather than standing apart from any external order. At the same time, it does so in a way that moves beyond linking legal secularism to a foundationalist theopolitical order.

Within the imaginative possibilities this approach generates might be found a new way to address Establishment Clause jurisprudence. The issue of religious symbols is but one area where we might apply the methodolo-

71. *Id.* at 13.

72. STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* 109 (2010).

73. ADAM SELIGMAN, *MODERNITY'S WAGER* 131 (2000).

74. Robert Jenson, *How the World Lost its Story*, *FIRST THINGS*, Oct. 1993, <http://www.firstthings.com/article/2010/03/how-the-world-lost-its-story>.

75. Nigel Biggar, *What is the Good of Establishment*, *STANDPOINT*, Apr. 2010, available at <http://standpointmag.co.uk/node/3804/full>.

gy of higher law secularism, but it is a particularly useful one for reimagining the public role of religion with the liberal order. Of course, higher law secularism does not provide systematic answers to discrete legal questions such as whether any given display of religious symbols is or is not constitutionally permissible. At the same time, the methodology of higher law secularism provides a way to address the current quagmire by reframing the relationship between religious symbols and secular law. In particular, the underlying concern of higher law secularism is not with whether the secular finds it logic within a theological system or through the negation of religious logic. The concern is rather with how particular forms of higher law meaning contribute to the creation and sustentation of an open, dynamic, plural, and morally dense secular order. Moving beyond the binary between religion and the secular, higher law secularism looks to the ways in which religion can shape the goods of the secular state. As Bruce Ledewitz writes, in a statement that echoes the central theme here advanced, albeit with a different accent,

“[w]hen there is a dispute about the secular meaning of religious imagery in the public square, I suggest the standard by which public religious expression should be judged is whether it is plausible to view the government’s use of religious language, imagery, or symbols as endorsing the principle of higher law or other related, nonreligious themes.<sup>76</sup>”

Opening secular space to religious symbols, particularly if they advance plural forms of higher law meaning, need not involve the privileging of faith over the secular, but might rather represent a way of continuing the dialectal process through which the secular is given meaning. Viewed in this light, higher law secularism should be understood to at least potentially create space for public religious symbols. The principle that such symbols are fundamentally incompatible with the secular state rests on a view of the secular as negating religious meaning. Following the idea that religion and the secular are not basically incompatible, higher law secularism does not demand the negation of religious meaning for the sake of the secular. At the same time, higher law secularism resists, against the tradition of Christian secularity, an account of public religion that narrowly links one faith or one theological model such as monotheism, with the sustentation of political culture. Higher law secularism opens secular political space to religion but does not define it as the exclusive creation of religion. The secular instead is placed at the intersection of a tension between the secular and the religious, the different and the common, the given and the not yet. Whether any arrangement marshals these tensions for the creative development of

76. LEDEWITZ, *supra* note 1, at 124.

secular culture is a determination that must be shaped as much by prudence as principle.

The possibility that religious symbols might be reconciled with higher law secularism does not diminish the significant problems such an arrangement might generate. There are concerns, for instance, that using symbols in this manner instrumentalizes religion in the service of the state. There are also concerns with the way this project blurs jurisdictional lines between religion and the secular state. Finally, there remains the practical consideration of whether it is appropriate for courts to be engaged in line drawing exercises better left to the province of culture than law. There is therefore an understandable hesitancy in using the idea of higher law secularism to warrant certain public expressions of religion, especially symbols.

All the same, it is manifest that the current legal arrangement is unsustainable and that the crisis in Establishment Clause jurisprudence cannot be adequately addressed without engaging the underlying crisis in the secular. “The historical *modus vivendi* called secularism is coming apart at the seams,” writes William Connolly.<sup>77</sup> The “simple belief in the march of secularization” has faltered and forced a major reassessment of the history and meaning of the modern project.<sup>78</sup> But it is not clear to what this post-secular condition is giving rise. Certainly there has been a resurgence in various forms of religion throughout the world, but there has also been a rise in unbelief and non-traditional belief.<sup>79</sup> If it is indeed the case that modernity pluralizes rather than secularizes, then the current plural religious landscape, with its complex admixture of belief and unbelief, presents uncharted challenges for law that cannot be addressed by established categories and principles. Whether law can effect a new consensus that moves beyond the culture wars is the question with which we are now confronted. Higher law secularism offers one possible way to address this challenge. In the end, there remains a narrow and unstable line between a commitment to freedom from religion, on one hand, and an acknowledgment that religion ought also contribute to the secular order in non-supersessionist ways. How to strike and maintain this balance (and whether religious symbols have any role in doing so) is a task without easy resolution. Yet it is the foundational task confronting the Establishment Clause, and it can only be addressed by shifting constitutional adjudication towards an engagement with legal modernity’s deepest moral possibilities and limitations.

77. CONNOLLY, *supra* note 24, at 19.

78. SELIGMAN, *supra* note 73, at 130.

79. *See generally* JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *GOD IS BACK: HOW THE GLOBAL REVIVAL OF FAITH IS CHANGING THE WORLD* (2009).